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WCL Clinic Files Landmark Asylum Case

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BRIEF

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Caballero Delgado and Santana: A Problematic Application of the American Convention on Human Rights

by *Claudia Martín and Diego Rodríguez**

On several recent occasions, the Inter-American Court on Human Rights (Court) has addressed the practice of forced disappearance in light of the standards established in the American Convention on Human Rights (Convention). In *Velásquez Rodríguez*, its most important decision to date, the Court stated, "The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obliged to respect and guarantee." Some of the rights affected by this multiple violation, according to the Court, are the rights to life, to humane treatment, to personal liberty, and to the necessary fair trial guarantees when brought before a judge. This list of rights reflects similar language in the UN Declaration on the Protection of Persons from Enforced Disappearances and the Inter-American Convention on Forced Disappearance of Persons.

On December 8, 1995, the Court issued a decision in *Caballero Delgado and Santana*, the first case ever decided by that body against Colombia. The case involved the disappearance on February 7, 1989, of Isidro Caballero Delgado and María del Carmen Santana at the hands of

the Colombian military and a paramilitary group. Both victims were linked to the M-19 guerrilla group. Several witnesses were able to learn about their detention by the military and their subsequent mistreatment. Judicial efforts to determine their whereabouts, establish the criminal responsibility of the perpetrators, and seek compensation were ineffective.

During the late 1980s and early 1990s, human rights abuses ravaged Colombian society. According to a 1992 report issued by Human Rights Watch/Americas, forced disappearances, torture, extrajudicial executions, and arbitrary detentions were common in many regions of the country, and were particularly related to the repression of suspected guerrilla members, political dissidents, union leaders, human rights activists and civilians caught in conflict zones. During 1989, official Colombian figures recorded 312 forced disappearances.

In its discussion of the merits of the case, the Court established that the perpetrators of the disappearance were State agents (members of the military exercising their official powers), as well as civilian members of paramilitary groups tolerated by and collaborating with Colombian authorities. The violations thus were imputable to Colombia in accordance with Article 1.1 of the Convention, which imposes on States parties the generic obligation to respect the rights of persons under its jurisdiction.

The Court further found that Colombia was responsible for violating Articles continued on page 10

WCL Clinic Files Landmark Asylum Case

by *Sidney Lebowitz*

The International Human Rights Clinic at the Washington College of Law (WCL) recently filed an appeal before the United States Board of Immigration Appeals (BIA) on behalf of a young Togolese woman fleeing forced

The case may establish a precedent in U.S. asylum law, which heretofore has not recognized fear of infliction of FGM as grounds for a grant of asylum.

polygamous marriage and imminent infliction of female genital mutilation (FGM). The case may establish a precedent in U.S. asylum law, which heretofore has not

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recognized fear of infliction of FGM as grounds for a grant of asylum.

Fauziya Kasinga fled Togo at the age of 17 to escape certain infliction of FGM as the result of her forced polygamous marriage to a man nearly 20 years her senior. She came to the U.S. to seek protection and, upon entering this country, immediately applied for asylum. Since her arrival in the U.S., however, Fauziya has been held in various detention centers in New Jersey and Pennsylvania, often enduring horrible and humiliating conditions. Her case will be heard by the BIA on May 2, 1996.

Togo

Fauziya enjoyed a privileged childhood. Her father was educated and wealthy. Due to his wealth, he was able to defy tribal norms. Fauziya was sent to boarding school to be educated, which was very unusual for women in her tribe. Mr. Kasinga opposed the tribal customs of polygamous marriage and FGM. He looked outside of his tribe in order to marry a woman who had not been mutilated. Because of Mr. Kasinga's beliefs and standing in his community, Fauziya's four older sisters were able to enter into monogamous marriages and avoid mutilation.

Fauziya's life changed when her father suddenly died of an asthma attack when Fauziya was only 16. As is common within the Tchamba-Kunsuntu tribe, Mr. Kasinga's sister, Haja-Mammud, took over the family finances and moved into the family home. She banished Fauziya's mother from the home and pulled Fauziya out of boarding school.

The next year, Fauziya's aunt explained that she had arranged for Fauziya to marry a 45-year-old man who already had three wives. Fauziya was horrified. On October 17, 1994, Fauziya's aunt called her into a room. Lying on the bed were the customary marriage clothes. Fauziya's aunt

Under Togolese law, her marriage is legal even without her signature.

explained to her that this would be Fauziya's wedding day. Fauziya was married that day, even though she refused to sign the marriage certificate. Under Togolese law, her marriage is legal even without this signature.

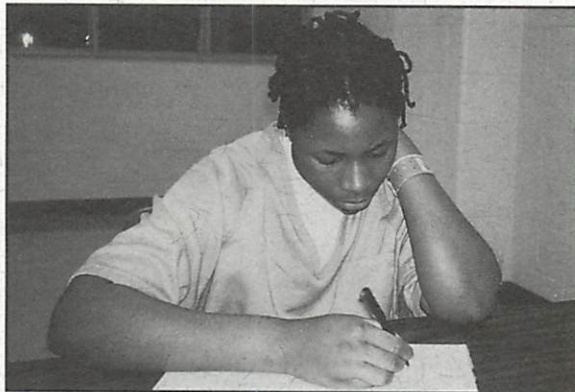
A few days after the marriage, a tribal elder was to come to the home to per-

form the mutilation. Fauziya would be held down by four men while the elder woman would remove her clitoris and labia minora with a knife that is normally used to cut hair. No anesthesia would be used. After the mutilation, Fauziya would be bound for 40 days to ensure that the wound would heal. After the 40 day respite, the marriage would be consummated. Luckily, Fauziya was able to escape and did not have to endure this painful and sometimes deadly practice.

One day after the marriage, Fauziya's oldest sister, Ayisha, helped Fauziya escape from the house and drove her to the airport in neighboring Ghana. Ayisha gave Fauziya \$3,000 and put Fauziya on the first plane out of the country, which happened to go to Germany.

Upon arrival in Germany, Fauziya wandered around the airport trying to figure out what to do. She struck up a conversation with a woman at the airport named Rudina Gergs. After hearing Fauziya's story, Rudina suggested that Fauziya stay with her until she decided what to do.

In exchange for accommodations, Fauziya cooked and cleaned for Ms. Gergs. Fauziya was very uncomfortable in Germany. She had no family there and did not



Ms. Kasinga writes letters from Lehigh County Prison requesting her release (January 1996).

know anyone. She did not speak any German. Fortunately, Fauziya met a man on a bus who, after hearing Fauziya's story, gave her his sister's passport so that she could come to the United States where she had family and where she believed she could gain protection by applying for asylum.

Incarceration

Upon arrival in Newark, New Jersey, Fauziya turned over her false passport and explained that she wanted to apply for asylum. To Fauziya's surprise, she was sent to the Esmor Immigration Detention Center in Elizabeth, New Jersey. At Esmor, Fauziya was put in a cold dark cell where

she was told to strip naked. She was menstruating and asked if she could keep her underwear. The guard refused and Fauziya sat over the toilet, waiting for whatever was to happen next. Later that evening, a guard gave Fauziya some clothes, including two sandals to wear, both of which were for the right foot, and underwear which were stained and so big for her that she had to tuck them into her belt to keep them from falling down. Once while at Esmor, Fauziya was kept in

The Immigration and Naturalization Service (INS) admitted abuses of the immigrants.

isolation for five days because she washed her hands and face before sunrise in a ritual before her morning prayers. She was told she was breaking a rule prohibiting detainees from using the showers before 6 am. Fauziya was still incarcerated at Esmor in June 1995, when prisoners rioted due to the intolerable living conditions at the prison. The Immigration and Naturalization Service (INS) admitted abuses of the immigrants, and Fauziya has stated that she was beaten by guards during the riots.

Photo courtesy of Jessica Neuwirth/Equality Now

Since the riots, Fauziya has been shifted to various prisons. At each prison, she has endured horrible conditions. At Lehigh County Prison in Pennsylvania, Fauziya was kept in isolation for almost three weeks without ever being told why. While in isolation, she was not permitted to shower, and guards slid her food under the door to her cell.

Fauziya has never committed any crime. She came to the U.S. to seek protection, but instead, has passed her 17th and 18th birthdays in jail.

Fauziya's Asylum Case

On August 25, Fauziya's case was heard by Donald V. Ferlise, an immigration judge in Philadelphia. Judge Ferlise denied Fauziya's asylum claim based on his assumptions about the cultural norms and practices in Togo. The judge found it "beyond belief" and "incredible" that Fauziya had met both Rudina Gergs and the man who gave Fauziya the passport by chance. In addition, Judge Ferlise found it "inconsistent" that FGM is the norm in her tribe, yet she and her sisters had man-

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FGM Asylum, continued from previous page

aged to escape it. The judge's finding came in spite of testimony by Professor Posnansky, an expert on Togo who testified for Ms. Kasinga, which verified the

On May 2, the BIA, the highest administrative court in the U.S. immigration system, will hear Fauziya's asylum claim.

pervasiveness of the practice. Professor Posnansky stated under oath that it was "very probable . . . that [Fauziya] was able to avoid FGM while her father was still alive."

On May 2, the BIA, the highest administrative court in the U.S. immigration system, will hear Fauziya's asylum claim. The BIA's decision will likely set important precedent that would be binding on the nation's 179 immigration judges.

Professor Karen Musalo, Supervising

Attorney at WCL's International Human Rights Clinic, which is currently representing Ms. Kasinga, believes that Fauziya qualifies for asylum because she has a well-founded fear of persecution on account of her membership in the social group of young women of her tribe who are opposed to the tribal practices of both FGM and forced polygamous marriages but have no protection against it. Profes-

The INS has stated in its brief to the BIA that FGM *can* be a basis for asylum..

sor Musalo also points out that there are no adverse discretionary factors which would justify a denial of relief. The INS has stated in its brief to the BIA that FGM *can* be a basis for asylum, and it is not directly contesting Fauziya's credibility.

While her asylum case is pending, Fauziya remains in detention. A request for Fauziya's release on humanitarian

grounds was denied in November. The International Human Rights Clinic currently is challenging detention and prison

Twenty-five members of Congress have written a letter to the Attorney General requesting Fauziya's release and expressing their belief that FGM should be a basis for asylum.

conditions through a petition for writ of habeas corpus in U.S. District Court. Twenty-five members of Congress have written a letter to the Attorney General requesting Fauziya's release and expressing their belief that FGM should be a basis for asylum. A press conference is scheduled for April 26 in support of Fauziya's release from detention. ☺

We are pleased to report that Ms. Kasinga was released on April 24. Her request for asylum is still pending.—Ed.

NEWS FROM THE INTER-AMERICAN SYSTEM

by Angela Collier

The Inter-American Commission on Human Rights

In its 91st session, held February 26 – March 8, 1996, the Inter-American Commission on Human Rights heard from government representatives, NGOs, and individuals regarding the observance and protection of human rights. Testimony was presented on individual cases currently before the Commission and on the general human rights situation in various countries in the hemisphere. The Commission issued reports in the following cases:

- *Giménez v. Argentina*
- *Feldman v. Colombia*
- *Bolaños Quiñonez v. Ecuador*
- *COMADRES v. El Salvador*
- *Richmond Hill v. USA*
- *Clark v. Grenada*
- *Mack v. Guatemala*
- *Chumbivilcas v. Peru*
- *de Mejía v. Peru*

The Commission also appointed new officers and welcomed new members. Professor Claudio Grossman accepted the position of Chairman and expressed the Commission's appreciation for the invaluable service rendered by his predecessor,

Dr. Alvaro Tirado Mejía. The Commission also recognized the work of Dr. Leo Valladares Lanza, Professor Michael Reisman, and Dr. Patrick Robinson, whose terms ended on December 31, 1995. New members Dr. Carlos Ayala Corao, Dr. Jean Joseph Exume, and Professor Robert Goldman, were sworn in.

The Commission scheduled a Meeting of Experts on the Future of the Inter-American Human Rights System to consider proposals for strengthening the system and improving its procedures. During the meeting, Commission members discussed the future of the Commission itself with OAS Secretary-General Dr. César Gaviria. The Commission recognized the spread of democracy in the Western hemisphere and examined how to further advance this process. As a case in point, the meeting discussed the Commission's recent cooperation with the Haitian National Committee for Truth and Justice, to whom the Commission provided legal advice and assistance in gathering information from complainants.

The Commission will present its Annual Report to the General Assembly in June 1996. The report will include a study of the conditions of detention in the Americas. The Commission decided to continue observation of penal institutions in the hemisphere.

Government, NGO and expert reports regarding the future Inter-American Declaration on the Human Rights of Indigenous Peoples are due in June 1996, and the Commission expects to send the draft to the General Assembly in 1997. The Commission expressed its satisfaction that Argentina and Panama ratified the Inter-American Convention on the Forced Disappearance of Persons in February 1996 and noted that the Convention is therefore now in force.

The Commission also coordinated with UN Special Representative Mr. Francis Deng regarding Internally Displaced Persons and appointed Commissioner Goldman as Rapporteur on the matter.

Finally, the Commission scheduled its 92nd special session from April 29 – May 3, 1996, and its 93rd regular session from September 30 – October 20, 1996.

The Inter-American Court on Human Rights

The XXXIII Session of the Inter-American Court of Human Rights was held in San José, Costa Rica, from January 22 to February 3, 1996. During this session the Court considered, *inter alia*, the following matters:

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