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Vienna, 21 March 2002

RULING

By way of its member Mag. Stefan HUBER, based on Section 66, subsection (4) of AVG [General State Administration Proceedings Act] and, in conjunction therewith, Section 38, subsection (1) of the 1997 Asylum Act, which was published in Issue No. 82/2001 of BGBl. [Federal Gazette] as AsylG [Asylum Act], the Independent Federal Refugee Council [of Appeal] has adopted the following decision:

<identical French text on the merits - remark of the Translation Agency>

VERDICT

The court hereby grants the appeal of [...] submitted on 11 December 2000 under No. 00 10.204-BAS [Federal Refugee Council] against the Ruling of 23 November 2000 of the Federal Refugee Department, and pursuant to Section 7 of AsylG [Asylum Act], hereby grants asylum to [...].According to Section 12 of the Act cited above, it is hereby established that [...] qualifies as a refugee by virtue of the said Act.

<identical French text on the merits - remark of the Translation Agency>

REASONING

The woman seeking asylum is a Cameroonian citizen who entered the territory of the Federal State on 3 August 2000. On the same day, she submitted an application for asylum, in response to which she was heard on 20 September 2000 in the presence of an adequately qualified French interpreter, and minutes were taken of the interview.

In the course of the interview, she said that, following her father's death, her mother had married her father's brother who had prohibited the asylum seeker from engaging in university studies in 1997. In 1999, the uncle agreed with an old Muslim man that he would marry the

asylum seeker as another wife. Prior to this, however, she should first have been subjected to female gender mutilation and sewn up. Following this, the Muslim man would have given her uncle wine, rice, meat, dried fish and a car as a wedding present. The wedding was scheduled for August 2000 and the mutilation should have taken place before the wedding. Consequently, upon her mother's advice, the asylum seeker left the country. She could not turn to the authorities since mutilation in her country is a tradition that everyone follows.

On 20 November 2000, the Federal Refugee Department received a collection of documents compiled by ACCORD, obviously on request, on the basis of which it was established that there was little and contradictory material regarding Female Genital Mutilation (FGM) in Cameroon. FGM was an accepted practice in the Far North and in the south-western provinces. This affects some 20% of women in Cameroon. There is no law yet against FGM. There is no information regarding the application of the general punitive provisions relating to bodily harm in connection with the execution of FGM. The country has for years been involved in the information campaign concerned with the negative consequences of FGM. The response of ACCORD is based on materials collected during a limited period of time and does not constitute a final and definitive opinion regarding the genuine nature of an asylum application.

Based on Section of 7 AsylG [Asylum Act], in its Ruling No. 00 10.204 BAS of 23 November 2000, the Federal Refugee Department refused the application for asylum, and declared that the asylum seeker may be deported or deported back to Cameroon. In the reasoning of its decision, the Department pointed out that although the data relating to the route of escape were not relevant to its decision pursuant to the Geneva Convention on Refugees, it had succeeded in presenting an indictment regarding the person's credibility. It may be established in respect of the asylum seeker's travel route that the asylum seeker concealed her route obviously consciously to an extent that it was impossible to establish the actual route beyond any doubt. The general state of human rights in Cameroon is obviously not comparable with the European or Anglo-American human rights norms. However, this issue may be disregarded in the present case since it did not transpire in the course of the interview that the asylum seeker had been exposed to persecution of any kind under the asylum regulations currently in force. It clearly transpired in the course of the interview that she had not engaged in political activities of any kind, and neither did our enquiry into her family environment result in references to such persecution-related motivation. It is hard to believe that a 23-year-old woman would be mutilated. In addition, based on the uncle's announcement whereby the asylum seeker is no longer a virgin, the main reason for mutilation, too, has ceased to exist. A further reference to the lack of credibility is that the prospective husband gave the asylum seeker's family wine as a wedding present. It appears to be highly unlikely for a Muslim man to give a drink containing alcohol as a gift. In addition, the Federal Refugee Department has the impression that the asylum seeker attempted to enhance the effect of her story and continuously presented new facts. The Federal Refugee Department has doubts concerning the authenticity of the documents presented, in particular, the document entitled "Publication de Mariage", in the case of which, even if inspected by a layperson, it may be established that it is a mere photocopy of a regular form. To this, we may add certain parts of the ACCORD research, without the hearing of the parties, which support the incredibility of the mutilation of a 23-year-old woman.

The asylum seeker appealed against this ruling within the statutory deadline and stated that she wished to repeat all her statements presented in the course of the proceedings at first instance. She stated that she had escaped from her country due to the mutilation (genital mutilation), which she had been threatened to be subjected to. In her country, she finds no protection against genital mutilation, and in the event of her return, she would have to face mutilation. The authority at first instance rejected her statements, for several reasons she did not understand, as not credible. For instance, the authority claims that at her age (23 years), she need not reckon with mutilation, and the possibility of mutilation is rejected as “unlikely in general”. It remains obscure where the authority proceeding at first instance derives this information from. Although the authority established that the data relating to the route of escape were irrelevant to its decision, her credibility was questioned on the basis of these very data. The authority at first instance never attempted to deal with the problems she had presented but only sought ostensible reasons for hindering her lawful asylum case, and stated, among other things, that what she had said, that is, that wine had been offered to her family as a wedding gift, was unlikely since she was to marry a Muslim man. The authority evaluated all her statements as evidence in a negative manner, to the asylum seeker’s detriment, attempted to see every probable fact she had stated in a negative light, and did not deal with the role of women in Cameroon, in particular, the problem of mutilation, at all. The authority at first instance does not state why and on what grounds she is not exposed to the threat of inhumane treatment as stated in Article 3 of the European Human Rights Convention but attempts to deny it in general without presenting an actual background to support its ruling.

Together with the documents of the case of 28 February 2001, an original Cameroonian driving license, a certificate issued by the town of [...] and a letter from the asylum seeker’s mother were presented, among others.

In response to an enquiry, on 17 September 2001, the Federal Refugee Department stated that, after photocopying, the asylum seeker’s documents presented in the proceedings at first instance had been returned to the asylum seeker. As it transpired in similar cases, due to a lack of comparative materials, a criminal-technical investigation would have been, most probably, unsuccessful. There were no obvious signs referring to forgery in the documents, however, there was a factor of uncertainty.

The Independent Federal Refugee Council conducted a verbal hearing on 17 September 2001. The Salzburg office of the Federal Refugee Department did not wish to attend, as stated in its letter of 24 August 2001, and requested the refusal of the appeal. As part of this hearing, evidence was taken through the hearing of the asylum seeker as a party to the proceedings and the viewing and discussion of the following documents:

Country Information and Policy of the UK Home Office, April 2001 (Appendix No. 1)

Country Report on Human Rights Practices, a material of the US Department of State of February 2001 (Appendix No. 2)

A report of Amnesty International in Germany regarding female genital mutilation (Appendix No. 3)

Report of the Ministry of Foreign Affairs of 24 September 1998 (Appendix No. 4)

Report of the Ministry of Foreign Affairs of 26 February 2001 (Appendix No. 5)

Report of the Institut für Afrikakunde [Institute of African Studies] of 26 February 2001 (Appendix No. 6)

Upon her hearing before the Independent Federal Refugee Council, the asylum seeker stated that the documents specified in the ruling at first instance were at the Federal Refugee Department. Her first names were [...] and her surname was [...], not as stated in the file of the proceedings at first instance where [...] was stated erroneously as her surname. In 1999, her uncle announced as part of a village festivity that the asylum seeker was no longer a virgin. Since he had agreed with a Muslim that he would marry the asylum seeker, she should have been mutilated in order to give the appearance that she was still untouched. Evidence of this statement is the marriage notice translated and featured among the documents of the case at first instance as a photocopy. She does not know her prospective husband; all she knows is that he is more than 50 years old.

In the course of the hearing, her mother's letter was translated which was effectively to the effect that her prospective husband still insisted on the marriage and that the asylum seeker's uncle was still looking for her.

Based on the investigation conducted, the Independent Federal Refugee Council establishes and takes account of the following in its resolution:

The asylum seeker's name is [...], was born on [...] and is a Cameroonian citizen. She last resided in a village called [...] in Province [...], in the south western part of Cameroon. In 1999, her uncle, who married her mother after her father's death, promised to a Muslim man called [...] living in the northern part of Cameroon, without her knowledge, that she would marry him. Since the gynecologist established that the asylum seeker was no longer a virgin, which was a condition of the marriage, the uncle planned to have the asylum seeker mutilated and sewn up (Female Genital Mutilation, FGM), in order to give the prospective husband the appearance that she was still untouched. Since the asylum seeker did not wish to submit herself to FGM, on her mother's advice, she ran away from Cameroon. The prospective husband still insists on the marriage promise, and consequently, the uncle continues to be looking for the asylum seeker who is therefore still threatened by the prospect of genital mutilation.

Findings in connection with female genital mutilation, FGM:

The concept of Female Genital Mutilation represents the full or partial removal of the female genitals.

Various forms of mutilation:

Clitoridectomy: removal of the skin covering the clitoris, the bulb of the clitoris or the entire clitoris;

Excision: in addition to clitoridectomy, the nymphae are also removed and skin and tissues are scraped off the vagina (introcision);

Infibulation: in the course of this, the labia are also cut off and the remaining skin is sewn up or clipped together with thorns, in such a way that only a tiny orifice is left which urine and the menstrual blood may pass through. In rarer cases, fewer tissues are removed and a bigger orifice is left.

The worst form of genital mutilation is infibulation, which is known as pharaoh circumcision. In the African region, infibulation accounts for some 15 per cent of all mutilations. The most frequent form of genital mutilation (85%) is clitoridectomy and excision in the African region.

The form of mutilation used, the age at which it is carried out and the way in which it is done depend on a number of factors: which ethnic group the girls and women belong to, which country they live in, whether they live in a village or in a town area and what type of social and economic environment they come from.

The age at which mutilation is carried out also varies. In some cases, it takes place shortly after birth, sometimes during the first pregnancy, however, in most cases, between the ages of four and eight years. According to the data of the World Health Organization (WHO), the average age decreases since, particularly in city areas, genital mutilation is regarded less and less as a ritual of initiation.

During the act, the little girl is unable to move, is held down usually by older women. Her legs are stretched apart. They use pieces of glass, tin lids, scissors and razors for cutting. In the case of infibulation, the two sides of the labia are held together with thorns. The legs are tied together for as long as 40 days. They sometimes put antiseptic powder on the wound, however, more frequently, they use pulped substances, which contain plants, milk, eggs, ashes or manure. These are supposed to accelerate healing. The girls are sometimes taken to a place where they are able to relax, to be then instructed in the traditions, if the mutilation was carried out as part of an initiation ritual. In the case of the rich, mutilation is carried out by a qualified physician in a hospital under full or local anesthetic.

FGM may, at times, have fatal consequences. A state of shock may occur or the organs around the clitoris and the labia may start bleeding and become damaged. It may retain the passing of urine, which may result in serious infections. Due to use of the same tool or instrument on several girls without any prior sterilization, there is a high risk of HIV infection.

More frequently, however, the consequences of clitoridectomy and excision are chronic infections, recurring bleeding, abscesses and smaller benign nerve tumors. The girls exposed to these interventions often feel unwell and are in serious pain on a long-term basis.

Infibulation may have even more serious permanent consequences: chronic infection of the urinal tracts, stones in the bladder and the urethra, damage to the kidneys, infections of the reproduction organs prompted by stagnant menstrual blood that is unable to pass, infections in the pelvis area, infertility, scar tissues produced in superfluous quantities (irregular shaped, spreading scarring) and dermoid cysts.

The first sexual intercourse may only take place after the slow and highly painful widening of the orifice left open after mutilation. Furthermore, in some cases, it may be necessary to cut the orifice open once again prior to sexual intercourse. An investigation conducted in Sudan

showed that 15% of the women had to be cut open repeatedly. Freshly married women are often seriously wounded by their husbands' awkward, untrained cuts. In the case of every victim of genital mutilation, there is an increased risk of HIV infection contracted in the course of sexual intercourse.

In giving birth, there is a risk that the scarred tissues of excised women may snap. Infibulated women whose genitals had been closely sealed have to be cut open so that they can give birth. If there is no one to assist, the perineum may break or the child may be born dead.

(Amnesty International: "What Does Female Genital Mutilation Mean?", 7.7.2000; Terre de Femmes: "Information on Genital Mutilation", 30.5.2000.)

Situation of women in Cameroon:

In large number of cases women are victims of violence. There are no reliable statistics regarding acts of violence, however, the large number of newspaper reports allow us to conclude that it is wide-spread. Activists fighting for women's rights report that the law stipulates no effective punishment for men who commit acts of domestic violence. There are no gender-specific laws regarding assault and battery and bodily harm in spite of the fact that women are, in the vast majority, the victims of domestic violence. Assault on the spouse does not constitute a statutory cause of divorce. In the case of sexual abuse, the family or village of the victim often imposes direct and considerable punishment on the perpetrator, which may extend from the confiscation of his property to beating.

Although the rights of women are recognized in the provisions of the Constitution, women do not enjoy the same rights and privileges as men. Discrimination has no legal definition and some of the stipulations of civil law discriminate women. The 1981 Civil Code allows the husband to deny the right to his wife to have an occupation of her own if he deems it is contrary to the interests of the household and the family. Partially for this reason, some employers request the husband's consent prior to hiring a woman.

Civil law provides a higher degree of equality and equal treatment than common law, which discriminates far more against women since, in many regions, the woman, is regarded as her husband's property according to common law. The laws, which protect women, are not observed due to the importance attributed to customs and traditions. In spite of the law, which determines the minimum age of 15 years for a girl to get married, many girls are wed by their families before they turn 12. Although the law and tradition allow a man to have several wives, women are not allowed to have several husbands. While a man can only be convicted of adultery if the act takes place in his own home, a woman may be convicted regardless of the scene of the intercourse. In the common law of some ethnic groups, not only do the men have full disposal of the family property but may even divorce their wives before a conventional court without any verifiable explanation or the payment of maintenance. The extent to which a woman may take over her husband's inheritance is, in the absence of his will, regulated by the law of convention, in the course of which customs vary from group to group. In many traditional societies, based on customs and traditions, the male heirs have stronger rights and enjoy priority over the female heirs. A further problem for women is forced marriage; in some regions, parents may and do wed their daughters without their consent. The husband often pays the bride's family a "bride price", and is often much older than the little girl he is to marry. If a married man dies, his widow often has no access to her late husband's inheritance because she herself forms part of the deceased husband's property. The widow is often forced

to marry one of the brothers of the deceased. Refusal to do so means that the price paid for the bride must be repaid in full and the woman must leave the family property. As a consequence of the lack of national statutory regulations regarding family relations, women are often unable to enforce their rights due to the customs, which favor men.

Women are also discriminated against as regards their access to education. A comparison of school frequentation data shows that there is a 9% difference between boys and girls nationwide and a 14% difference in the northern provinces. As a result of this problem, which is particularly great in the village areas, illiteracy among women is more wide-spread than among men. According to a 1995 study of the UN authority, the ratio of literate men is 75%, while only 52% of the women in the country are able to read and write. In addition, there are fewer girls in senior education as well.

(UK Home Office, Cameroon Assessment, April 2001)

Traditions and customs of the [...] Tribe and Muslims in Cameroon

Cameroon has 14.7 million citizens, 34.7% of whom are Catholics, 21.8% Muslims and 17.5% Protestants. The Muslims live in the north, while the Christians live in the south. One of the studies of Philip Burnham (1996) analyses the value system of the Fulbe ethnic group and the importance of endogamy and exogamy that, is marriage within and outside the ethnic group. Endogamy is exercised for the purpose of the preservation of the clan and Islamic traditions; exogamy may result in disadvantages, for instance, in inheritance, and it therefore occurs less frequently. In the case of an exogamous marriage with a third, fourth, fifth or sixth wife (Islam permits polygamy up to four wives, however, this limit is effectively ignored in Cameroon), the husband's personal motivation, the increase of his personal authority or the dowry may be of decisive importance.

"Freedom of religion" is stipulated in the Cameroonian Constitution. However, religious groups must be licensed and registered at the regional ministry of administration.

[...] and [...] and in Cameroon in the region between the towns [...] and [...] are inhabited by people having converted to Christianity (approximately 180,000). They have no ethnic or cultural community with the Muslims living in [...]. (In the course of her flight from a prospective marriage between a Catholic and [...] a Muslim man and her impending mutilation, the asylum seeker would be exposed to the risk that the man might find her and might force her to marry him on the basis of the dowry already paid since the woman, as a market trader, is engaged in a highly exposed activity.)

(Institute of African Studies, expert opinion of 26.02.2001 for the Aachen State Administration Court.)

FGM in Cameroon

Although Cameroon signed the international Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") as one of 163 nations on 6 June 1983, in particular, in the far north [...] territory and in the south-western part of the country, genital mutilation is still practiced on girls and women of different ages. It is carried out in infancy, childhood, upon marriage or during the first pregnancy. In contrast with this, mutilation as an initiation ritual is on the decline. In May 1998, an international workshop was organized in Yaoundé for the elimination of mutilation. As a consequence of the report drawn up there, the Cameroonian Government has intensified its efforts to terminate this custom. However, in

practice, there is no law, which explicitly prohibits discrimination on the basis of a person's race, language or social status. Although the Constitution prohibits discrimination against women, there is still very little practical, statutory protection for women against mutilation.

Due to the unsuitable implements used and sepsis, mutilations may result in life threatening or even fatal inflammations, and the risk of transfer of the HIV virus, too, increases considerably. According to the report of the AIDSCAP Program in Cameroon (October 1992 - September 1996), in Cameroon the first case of AIDS became known in 1985; in 1995, the number of HIV-infected persons increased to 8,141, while the number of unknown cases is also very high.

(Institute of African Studies, expert opinion of 26.02.2001 for the Aachen State Administration Court.)

According to the information of the Ministry of Foreign Affairs, in the [...] region (south-western province) and in the [...] region in the tribe of the [...], female genital mutilation is carried out on women against their will. It is usually the older women of the village that carry out the mutilations in the so-called "Fattening House". Mutilation is customarily performed on the occasion of a wedding or upon the birth of the first child of the woman concerned. As long as a woman is at an age when she is capable of giving birth to children, she is exposed to the threat of forced mutilation in the areas mentioned above.

Women who rebel against being mutilated are barred socially. They are under strong pressure from the family and the village community.

The Cameroonian Government disapproves of forced mutilation, which comes under the criminal category of general bodily harm. It is, however, not known to the Ministry of Foreign Affairs whether criminal proceedings have ever taken place in connection with these acts.

(Ministry of Foreign Affairs, report of 24.09.1998; similar to the UK Home Office Cameroon Assessment, April 2000 and the US Department of State Country Report 2000.)

In Cameroon there is no law, which prohibits mutilation. Instead, the law of Cameroon tends to tolerate the cultural practices of the various ethnic groups. Reference to the "sanctity of the person's physical condition" could be a legal means against mutilation. However, no court decisions adopted on the above grounds are known in connection with mutilation.

A woman of the asylum seeker's age does not realistically have a chance to escape to another part of the country. The ethnic and family ties are so tight in Cameroonian society that she would not be able to create an existence in another locality.

(Ministry of Foreign Affairs, expert opinion of 26.02.2001 for the Aachen State Administration Court.)

Moving to other parts of the country only provides a hypothetical chance for avoiding mutilation since

- it is often possible to track someone down through the existing extensive ethnic or family networks; and
- without support from the family, moving to other areas or to a city represents an adventure with an uncertain outcome.

(Institute of African Studies, expert opinion of 12.08.1998 for the Gera State Administration Court.)

These findings are based on the following pieces of evidence:

The asylum seeker's personal details and citizenship may be established on the basis of a photocopy of her birth certificate and an original copy of a Cameroonian driving license which also state the correct order of the surname and first names. The correct order of names also transpires from the application for asylum submitted in writing. It is therefore hardly a surprise that the asylum seeker's surname is [...], and consequently, the authority proceeding at first instance must have made a mistake.

The findings related to her reasons for escaping from her country are based on the details supplied by the asylum seeker during the first interview and the data provided on the occasion of the verbal appeal hearing, which are in agreement with one another. These are also supported by the photocopy of the "marriage notice" filed in the course of the state administration proceedings conducted at first instance. The original copy was no longer available in the appeal proceedings since both parties to the proceedings claimed that the other party had the original copies of the birth certificate, the "marriage notice" and the document called "certificate of good conduct" in the proceedings at first instance. However, upon being asked, the authority at first instance was of the opinion that no obvious signs of forgery were detected in the documents.

The appeal court was unable to accept the contradictions established by the authority at first instance in its decision. As regards the statement whereby the mutilation of a 23-year-old woman is hardly likely, we wish to draw attention to the above findings relating to instances of mutilation before the wedding, during the first pregnancy, and, furthermore, following the birth of the first child. In connection with the statement which questions the asylum seeker's account whereby the uncle announced to the village community that the asylum seeker was no longer a virgin and which claims that the main reason for mutilation would thereby have been eliminated quite obviously in the eyes of everyone, the appeal authority establishes that the asylum seeker's prospective husband is not from the same village community but is a Cameroonian Muslim from the northern part of the country who would therefore not be aware of this circumstance. The account that a Muslim gives wine as a wedding present cannot be disregarded as not believable since the prohibition of the consumption of alcohol by Muslims does not effectively preclude the consumption of alcohol in practice, not even mentioning the fact that the family of the asylum seeker, the uncle apart, is Christian. The appeal authority did not share the impression of the authority at first instance whereby the story had been presented in an exaggerated manner. The authority at first instance saw an indictment referring to a lack of credibility in how the asylum seeker described her route of escape. The appeal authority, too, is of the opinion that the route of escape was not presented in a satisfactory manner, however, this is not relevant to our decision based on the full context of the presentation of the story, which was otherwise found credible. (The true presentation of the route of escape is usually very rare.)

The findings of the appeal authority regarding the situation in Cameroon are based on the documents mentioned above which were at the disposal of the appeal authority for viewing and discussion in the course of the hearing. With regard to the professional quality of the sources named herein and the fact that they are in full agreement with one another as regards material findings, the appeal authority has no reason not to accept them on any grounds. The

parties were given the opportunity to present their respective positions in the course of a verbal hearing conducted before the authority judging the case, however, the authority at first instance did not contest these findings.

We must also point out that the story presented by the asylum seeker is in harmony with the reports and the documented findings therein.

From a legal point of view, it follows from the above that:

Pursuant to Section 7 of the 1997 Asylum Act [AsylG], the authority is obliged to grant an asylum seeker asylum on his/her application in a ruling if it may be presumed that he/she is subject to persecution in the country of origin (Geneva Refugee Convention, Article 1, Section A, paragraph 2), and none of the terminating or disqualifying circumstances specified in Article 1 and Sections C and F of the Geneva Refugee Convention prevails.

For the purposes of the 1997 Asylum Act, a refugee is a person who, as a result of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The central element of the concept of refugee is “well-founded fear of persecution”. A well-founded fear of persecution prevails if an asylum seeker, with regard to his/her individual situation, has objective reasons for being afraid of potential persecution. The criterion is “threat of persecution”, in respect of which persecution should be construed as an intervention in the individual’s sphere to be protected by the state of such intensity which is capable of justifying the fact that he/she cannot be expected to avail himself/herself of the protection afforded by the state regarded as his/her native country or that he/she cannot be expected to return to his/her previous country of residence. The reason for the threat of persecution must be one of the reasons stated in the Geneva Refugee Convention as reasons for seeking asylum, and it must give rise to the residence of the person concerned outside his/her native country or previous country of residence. The threat of persecution must come from the state regarded as the person’s native country or last country of residence. Imputability in this respect means not only giving rise to the threat of persecution but also liability for the prevailing threat of persecution. The threat of persecution must prevail, that is, it must prevail at the date of the issuance of the ruling. In the evidence proceedings, acts of persecution committed in the past qualify as a material indictment in respect of a prevailing or anticipated *pro futuro* threat of persecution.

The concept of “particular social group”:

The 1979 Handbook of UNHCR [UN High Commission for Refugees] says the following about the procedure of and criteria for the establishment of the refugee status:

„77. A “particular social group” normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook,

antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.”

In the case of “membership of a particular social group” mentioned in Article 1, Section A, paragraph 2 of the Geneva Refugee Convention, what we have is a broad collective concept which overlaps in wide areas with causes such as “race, religion, ethnic group”, however, it is interpreted in a broader context than these. (Grahl-Madsen, *The Status of Refugees in International Law* 1, 1966, page 219; Rohrböck, *Das Bundesgesetz über die Gewährung von Asyl / Federal Law Regarding Asylum / [1999]*, page 406.)

By “membership of a particular social group”, Kalin (*Grundriss des Asylverfahrens / An Outline for Asylum Proceedings /*, 1990. Page 96) means such repression not justified objectively which only afflicts persons who satisfy a common social criterion, that is, who would not be persecuted if they did not share that common criterion.

In the 4 March 1996 “Common Position” of the Council of the European Union, the following is stated in connection with the concept of “social group” as regards the harmonized application of the definition of the concept “refugee” stated in Article 1 of the 28 July 1951 Geneva Convention regarding the legal status of refugees (published by Rohrböck in the publication cited above, page 407): “A particular social group usually includes persons with similar backgrounds and customs or in a similar social status.”

In the decisions presented in the book by Goodwin-Gill entitled *The Refugee in International Law* 2, 1996, from page 359, the Canadian Supreme Court regarded Chinese women who already had one child (or more than one) and must therefore reckon with forced sterilization as a social group. This court defined this concept in such a way that, under the Geneva Refugee Convention, a social group includes persons falling into the following three categories: persons who have such characteristics that they are born with or into or are unalterable, such as gender, linguistic affiliation or sexual orientation; persons who are affiliated to one another on a voluntary basis for reasons which are so crucial to their human dignity that they should not be forced to give up that affiliation; and finally, persons who are affiliated on the basis of a condition formerly undertaken on a voluntary basis which, based on its historical duration, cannot be altered (Goodwin-Gill, *The Refugee in International Law*, 1996, see the cases presented from page 359 on, in particular, the *Canada v. Ward* case).

The Austrian Constitutional Court recently declared in its 19 December 2001 Verdict No. 98/20/0312: “In the cases of the “liability of relatives”, the legal grounds for disregarding the criterion of political conviction that the asylum seeker himself/herself is at least assumed to share must be seen in recognition of the family organization as a “social group” pursuant to Article 1, Section A, paragraph 2 of the Refugee Convention and Section 7 of the 1997 Asylum Act [AsylG]”.

As a result, the concept of “particular social group” is not only subjected to various interpretations but the concept itself undergoes obvious changes. If, according to the UNHCR Handbook and the related verdict of the state administration court, this required the addition of a further criterion to “membership of a particular social group” for its relevance to asylum law (other than in exceptional cases not detailed specifically), the concept of “particular social group” has been extended considerably as a result of the instruction and verdict of the Canadian court, and consequently, the “family organization” (without a precise definition), too, is regarded as a “particular social group” pursuant to the verdict of the state administration court, and any further criteria which may be relevant for the purposes of asylum law may be obviously dispensed with.

“Particular social group” in respect of gender and women:

According to unambiguous materials related to the 1991 Asylum Act which may also be transferred to the new legal situation since there has been no change in the circumstances relevant for the purposes of asylum law by virtue of the 1997 Asylum Act, persecution on the grounds of a person’s gender may come under persecution on the grounds of “membership of a particular social group”. In this respect, reference must be made to the materials related to the 1991 Asylum Act (Government Proposal No. 270, Appendix No. Legislation Period 18; Answer to Question No. 328, Appendix No. Legislation Period 18) and to the materials attached to Section 1 of the 1991 Asylum Act, which, with reference to the 13 April 1984 (Gazette No. C 127 of 14 May 1984, page 137) and 12 March 1987 (EU Law Gazette [EUGRZ], 1987, page 1986) Resolutions of the European Parliament, required in expert review proceedings the extension of the concept of refugee as defined by international law to the cases of persecution on the grounds of a person’s “gender” and “sexual orientation”. After due consideration and consultation with the UN High Commission for Refugees, these criteria were accepted. The governing considerations are that, on the one hand, it is not desirable to unilaterally deviate from an internationally defined concept, and, on the other hand, this deviation is not necessary because these persons are protected also at present as belonging to “a particular social group”.

(Resolution No. 203.430 of 28 September 1998 of the Independent Federal Refugee Council regarding homosexuality, /0-IX/26/98)

The state administration court is of the opinion (VwGH [State Administration Court] E 31.01.2002, No. 99/20/0497) that one cannot disregard the fact that the reason why the concept of refugee was not extended to persecution on the grounds of a person’s “gender” as a reason in the 1991 Asylum Act is, among others, that persons persecuted on the above grounds are “protected already at present as belonging to a ‘particular social group’” (Appendix No. 270, Legislation Period 18, 11).

A social group is usually created on the basis of criteria that the individuals concerned have no control over, such as, for instance, their gender. Women, for instance, constitute a “special social group” under the Geneva Refugee Convention (Resolution No. 215.604/7-X/28/01 of 07 September 2001 of the Independent Refugee Council, with reference to the book by Köfner/Nicolaus entitled Grundlagen des Asylrechts in der Bundesrepublik Deutschland II [The Foundations of Asylum Law in the Federal Republic of Germany II], page 456).

In its Resolution No. 39 (XXXVI) of 1985 of the “Executive Committee Concerned with the Programme of UNHCR” (refugee women and international protection), it is recognized that states have the right in exercising their sovereignty to adopt the interpretation whereby women seeking asylum who may have to reckon with harsh or inhumane treatment because they had violated the social moral code in the society which they live in constitute a “special social group” pursuant to Article 1, Section A, paragraph 2 of the 1951 UN Refugee Convention.

In Clause 3 of the document entitled “Resolution No. B5-0686/2000/REV of the European Parliament Regarding Female Genital Mutilation”, the European Parliament requests the Council, the Commission and the member states to recognize that the threat of a person becoming the victim of genital mutilation constitutes sufficient grounds for granting asylum and extending humanitarian protection.

According to the above criteria, the woman seeking asylum must be granted asylum:

In the case of persecution in Cameroon claimed by the asylum seeker to prevail on the grounds of female genital mutilation, according to all the above definitions, the person in question is subject to persecution due to her “membership of a particular social group”, namely (at least), her affiliation with the group of “Cameroonian women subject to mutilation”.

As it transpires from the above findings, should the asylum seeker return to Cameroon, she would most probably be exposed to the threat of genital mutilation.

In the specific case in question, the mutilation of genital organs would be a forced and unauthorized intervention which is of significant intensity since genital mutilation constitutes one of the most extreme forms of violence against women world-wide due to its grave health consequences, which could even, be fatal. It is an expression of multiple discrimination against and the oppression of the female gender.

Although persecution is not direct persecution by the state in the present case, in contrast with other African states and in spite of signature of the international convention against discrimination against women, Cameroon is not prepared to impose criminal sanctions against FGM in Cameroon. Not even charges brought on the grounds of bodily harm or damning court decisions are known to us.

In the specific case in question, the alternative of escape within the native country is not a realistic solution since the asylum seeker is unable to create a new, undisturbed existence in the other parts of *Cameroon* without her family members and/or tribe members, and her family members could even track her down. Verdict No. A 2 K 10475/00 of 05.02.2001 of the Freiburg State Administration Court is also to the same effect.

In the case of female genital mutilation, Verdict No. M 21 K 00.50622 of 27.06.2000 of the Munich State Administration Court and Verdict No. 4 K 1157/98 Tr. of the Trier State Administration Court approve of the existing alternative of escape within the native country in *Nigeria*.

By virtue of the foregoing, the appeal had to be granted and the asylum seeker had to be recognized in the status of refugee.

INSTRUCTION IN LEGAL REMEDY

No regular appeal lies against the present verdict.

NOTE

A complaint may be submitted against the present verdict to the State Administration Court and/or the Constitutional Court within six weeks of delivery. It must be signed by an attorney-at-law. In the case of the submission of such a complaint, duty of the amount of EUR 181.6821, that is, ATS 2,500, is payable.

<identical French text on the merits - remark of the Translation Agency>

On behalf of the Independent Federal Refugee Council
Magistrate Stefan HUBER