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January 28, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

We are extremely concerned over a recent decision by the Board of Immigration Appeals (BIA) that appears to reverse U.S. policy regarding the protection of women subjected to severe human rights abuses such as female genital mutilation (FGM) and forced marriage. In a recent decision, *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007), the BIA denied asylum and withholding of removal to a woman who had experienced FGM as a child in Mali and feared the further abuse of forced marriage. We strongly question the Board's reasoning in that decision, and we urge you to certify the case for further review.

As a preliminary matter, it should be noted that FGM is a reprehensible act and a gross violation of a woman's fundamental human rights. The procedure is intended to oppress and subjugate women through mutilation and sexual repression. *See Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (citing evidence that FGM is "a form of sexual oppression that is based on the manipulation of women's sexuality in order to assure male dominance and exploitation"). Moreover, the procedure often results in severe physical and psychological damage, including hemorrhage, shock, chronic urinary or pelvic infection, sterility, painful scars and obstructed labor, sexual dysfunction, depression, and various other gynecological and obstetric problems. Congress has criminalized the practice of FGM in this country, and the House of Representatives recently denounced FGM as a "barbaric practice" in H. Res. 32, which passed the House unanimously.

Due to the heinousness of FGM and the "risk of serious, potentially life-threatening complications" to women and girls, the BIA has previously held that FGM can support a grant of asylum. *Kasinga*, 21 I. & N. Dec. at 361. The *Kasinga* Board recognized FGM as a form of persecution and determined that women who fear being subjected to FGM may be members of a "particular social group" under our refugee laws.

Id. at 365-66. The Board thus approved the grant of asylum to the applicant in the case, a woman who feared she would be subjected to FGM if returned to Togo.

In *Matter of A-T-*, the BIA was presented with a woman from Mali who had already been subject to female genital mutilation. The Board recognized that once an applicant has shown past persecution, she is presumed to have a well-founded fear of future persecution. *A-T-*, 24 I. & N. Dec. at 297. But it determined in this case that the FGM procedure itself constituted a *changed circumstance* that rebutted the presumption. The Board concluded that the procedure represented a “fundamental change” in the applicant’s situation such that she no longer had a well-founded fear of persecution. *Id.* at 299-301.

This conclusion appears to conflict with the reasoning in *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003), a BIA decision concerning forced sterilization in the People’s Republic of China. In that case, the Board held that the act of forced sterilization did not constitute a “fundamental change in circumstances” that would preclude the granting of asylum to a sterilized woman, even if such persecution could not be repeated. *Y-T-L-*, 23 I. & N. Dec. at 606. The Board noted that it would be “anomalous” for the act of persecution itself to “constitute the change in circumstances that would result in the denial of asylum.” *Id.* at 605.

In the *A-T-* decision, the BIA appears to have backed away from its reasoning in *Y-T-L-* by distinguishing forced FGM from forced sterilization. The Board referred to the “refugee” definition in section 101(a)(42) of the Immigration and Nationality Act (INA), noting that Congress had specifically referred to forced sterilization and abortion in the definition. *A-T-*, 24 I. & N. Dec. at 300. The Board then concluded that “persons who suffered such harm [were] singled out by Congress as having a basis for asylum in the ‘refugee’ definition . . . on the strength of the past harm alone.” *Id.* Because Congress had not referred to FGM, the Board reasoned, Congress had not intended for FGM to serve as a basis for asylum on past harm alone. *Id.* at 300-01.

The Board’s reasoning in this regard is highly questionable, as Congress never intended to create a distinction between FGM and forced sterilization or abortion through the “refugee” definition. To the contrary, in referring to forced sterilization and abortion in the definition, Congress actually meant to *equate* such forms of persecution with FGM. The references to forced sterilization and abortion were meant to ensure that such acts were understood as persecution, a determination that the BIA had already made with respect to FGM in *Kasinga* and which obviated the need for further clarification by Congress. *See* INA § 101(a)(42); *Kasinga*, 21 I. & N. Dec. at 365-66. The *A-T-* Board appears to err when it concludes that Congress had meant to create an exception to general refugee law with respect to forced sterilization and abortion.

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Nowhere does the refugee definition state that victims of these procedures are automatically eligible for asylum. The definition is simply meant to ensure that those procedures are understood as persecution, which, as noted above, had already been determined by the BIA with respect to FGM. The BIA's attempt to differentiate FGM from forced sterilization appears unsupported by the INA.

We believe that the reasoning in *Y-T-L-* with respect to forced sterilization should be applied in *A-T-* with respect to forced FGM. In *Y-T-L-*, the Board reasoned that:

forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.

Y-T-L-, 23 I. & N. Dec. at 607. Such reasoning appears to be applicable in the *A-T-* case, as the continuing effects of FGM appear to be similar to those of forced sterilization:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

Kasinga, 21 I. & N. Dec. at 361.

We are also concerned that the BIA's treatment of forced marriage in *A-T-* further undermines human rights protections for women in the United States. The Board failed to see the threat of forced marriage in Mali as a form of persecution, particularly in light of her experience with FGM in Mali. It is our understanding that women subjected to forced marriage in Mali are vulnerable to severe abuse and deprivation of freedom. As such, forced marriage may be related to FGM in that it subjugates and oppresses women by controlling sexuality. It appears the Board failed to consider cumulatively all of the circumstances in the applicant's case.

We believe that the BIA's decision in *A-T-* is deeply flawed and serves as an inadequate vehicle for such a significant reversal in U.S. policy with regard to the fundamental human rights of women. The Board has failed to recognize that harms

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unique to women - such as FGM and forced marriage - may constitute persecution entitling a woman to protection. We urge you to address this decision and its devastating consequences for the protection of women fleeing severe human rights abuses.

Sincerely,



John Conyers, Jr.
Chairman

Committee on the Judiciary



Zoe Lofgren
Chairwoman

Subcommittee on Immigration,
Citizenship, Refugees, Border Security,
and International Law

cc: The Honorable Lamar S. Smith
The Honorable Steve King