

### Extending Asylum Eligibility to Include Gender-Related Persecution

by Natasha Parassram Concepcion\*

On June 13, 1996, the Board of Immigration Appeals (BIA), the appeals court overseeing the immigration courts of the United States, overruled an immigration judge's decision and held that the practice of female genital mutilation (FGM) could justify a grant of asylum under the Immigration and Nationality Act (INA). The case, *In re Fauziya Kasinga*, involved a female member of the Tchamba-Kunsuntu Tribe of Togo who fled to the United States when she learned that she would be forced to undergo the tribe's customary ritual of FGM. When the BIA made the decision to grant her asylum, it seemed to open the door for women seeking asylum based on sex and gender-related persecution, especially since the INS also had issued "Gender Guidelines for Asylum Officers in the Adjudication of Asylum Claims of Women," in May 1995, recognizing that gender-related violence was a legitimate basis for asylum.

Since that landmark decision, however, the BIA has granted asylum to only one other woman based on the fear of FGM. This second case, *Abankwah v. Immigration and Naturalization Service*, decided in July 1999, received widespread attention in the press and served to increase awareness of FGM.

To qualify for asylum under the INA §208, applicants must prove that they cannot return home because they will suffer persecution under any of the following five categories: race, religion, nationality, membership in a particular social group, or political opinion. Despite the fact that the BIA ruled that gender is included in the meaning of "social group," inconsistent immigration court rulings in recent cases of sex and gender-related persecution demonstrate that women seeking asylum based on these grounds must fight a new battle with each case.

#### Legislative Background and Substance of H.R. 1849

Even though the United States government outlawed the practice of FGM and recognized the practice as a form of persecution for those seeking asylum, immigration and human rights activists, as well as legislators like Representative Carolyn B. Maloney (D-NY), continue to criticize the Immigration and Naturalization Service (INS). They argue that the INS, which implements U.S. immigration law, is not following the BIA decision in the *Kasinga* case because it has failed to protect numerous asylum seekers who are fleeing sex based and gender-related persecution.

This criticism is not unfounded. Since the *Kasinga* decision, the United States has denied asylum to women such as Rodi Alvarado Peña, who escaped domestic brutality and apathetic authorities in her home country of Guatemala. Although the BIA recognized the extent of the abuse and the unresponsiveness of the Guatemalan government and courts to Alvarado Peña's situation, it reversed a prior ruling in her favor. In so ruling, the BIA held that Alvarado Peña did not adequately prove that she suffered persecution as a member of a particular social group, or any

of the other five categories through which one may claim asylum.

Representative Maloney has been at the forefront of the national movement to make gender-related persecution a basis for asylum. She was personally involved in both the *Kasinga* and the *Abankwah* cases, advocating that the women be granted asylum. Moreover, she has been working to publicize the dangers associated with FGM and arguing that it is a form of gender persecution. "Female genital mutilation," she states, "is mostly done in unsanitary conditions [and] has long term physiological, sexual and psychological effects. For many women, delivery, sexual intercourse, and even menstruation and urination can be painful and dangerous, even to death."

Accordingly, on May 18, 1999, Representative Maloney sponsored a bill (H.R. 1849) in the 106th Congress to require the Attorney General to promulgate regulations relating to gender-related persecution that will be binding on the INS, including FGM, for use in determining an alien's eligibility for asylum or withholding of deportation. According to Representative

Maloney, "[t]his change is needed because the Guidelines for Gender-Related Persecution issued by the INS are helpful but do not go far enough. The Guidelines have no binding effect on the Office of Immigration Litigation, administrative law judges, and courts. Additionally, the Guidelines have not been widely disseminated and many of the immigration judges have never seen them [and] thus are not following [them]."

Specifically, the bill states that U.S. immigration judges should

interpret the term "persecution" as used in INA §101(a)(42)(A) to include gender-related persecution. Gender-related persecution is defined in H.R. 1849 as a harm that (1) is specific to or disproportionately affects women on the ground of their gender, and (2) otherwise would be considered persecution for purposes of §101(a)(42)(A) of the INA.

Upon being introduced on May 18, 1999, the bill H.R. 1849 immediately was referred to the House Committee on the Judiciary and then to the House Subcommittee on Immigration and Claims on May 25, 1999. It has been languishing in the subcommittee, waiting for the chairman, Lamar Smith (R-TX), to schedule the bill for consideration.

#### Implications of H.R. 1849

H.R. 1849, if enacted, would reinforce the BIA holding that gender persecution constitutes a separate basis for asylum and would ensure a more consistent application of the law by giving judges hard law to rely upon. Enactment would also send a message that the United States is committed to protecting women seeking asylum for gender-related persecution. ☉

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