

NEW YORK
CITY BAR

BARRY M. KAMINS
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
bkamins@nycbar.org

January 4, 2008

Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Mukasey:

I am writing on behalf of the Association of the Bar of the City of New York. The Association is an independent non-governmental organization with more than 22,000 members in over 50 countries. Founded in 1870, the Association has a long history of dedication to human rights, notably through its Committee on International Human Rights, which investigates and reports on human rights conditions around the world, including within the United States; its Committee on Immigration and Nationality Law, which is comprised of highly experienced immigration attorneys, many of whom have extensive experience in refugee and asylum law; and its Committee on African Affairs, which closely follows legal and social developments in Africa.

I write today to request that you certify for further review, pursuant to 8 C.F.R. § 1003.1(h)(1)(iii), the recent decision of the Board of Immigration Appeals in *Matter of A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), denying the claim for asylum and withholding of removal of a Malian woman, Alima Traore, whose claim was based on female genital mutilation and forced marriage. We do not write to address the facts of this case, but rather out of a concern that the BIA's decision contravenes its own precedent with regard to its treatment of female genital mutilation and constitutes a serious reversal of policy that, if allowed to stand, will have a substantial harmful effect on a large class of women subjected to this practice.

Over a decade ago, in *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996), the BIA held that "[t]he practice of female genital mutilation, which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution" and that women who

base asylum claims on a well-founded fear of being subjected to female genital mutilation can be “recognized as members of a ‘particular social group’ within the definition of the term ‘refugee’ under section 1101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A).” *Id.* at 357. Accordingly, in that case, the BIA granted asylum to Kasinga, a woman who feared that she would be subjected to the practice upon her return to Togo.

In *A-T-*, the BIA recognized that once an applicant for asylum or withholding of removal has established past persecution, she is presumed to have a well-founded fear of future persecution. The BIA acknowledged that Traore had experienced female genital mutilation in the past, which, under *Kasinga*, constituted persecution; nevertheless, it determined that withholding of removal should be denied because the procedure itself constituted a “fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” under 8 C.F.R. § 1208.13(b)(1)(i)(A). *A-T-*, 24 I. & N. Dec. at 297.

However, in the context of forced sterilizations, the BIA has held that “[w]here an alien has established past persecution based on the forced sterilization of his spouse pursuant to a policy of coercive family planning, the fact that, owing to such sterilization, the alien and his spouse face no further threat of forced sterilization or abortion does not constitute a ‘fundamental change’ in circumstances sufficient to meet the standards for a discretionary denial under 8 C.F.R. § 1208.13(b)(1)(i)(A).” *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003).

The BIA in *A-T-* distinguished the forced sterilization context, reasoning that Congress, though 8 U.S.C. § 1101(a)(42), intended to make victims of forced sterilization eligible for asylum. However, by passing 8 U.S.C. § 1101(a)(42), Congress only did with respect to victims of forced sterilization what the BIA had already done for victims of female genital mutilation: it stated that forced sterilization constituted persecution for purposes of asylum and withholding of removal. Where the BIA had determined that victims of female genital mutilation had been persecuted on account of their membership in a particular social group, Congress stated that victims of forced sterilization had been persecuted on account of their political opinion. Significantly, Congress did not state that victims of forced sterilization would automatically be eligible for asylum. Thus, the BIA’s attempt to distinguish the forced sterilization context from the female genital mutilation context falls flat.

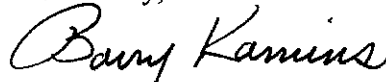
In deciding that the act of forced sterilization could not itself constitute a “fundamental change in circumstances” sufficient to deny asylum, the BIA in *Y-T-L-* reasoned, “[t]he act of forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident 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.” 23 I. & N. Dec. at 607. We submit that the BIA erred in failing to conduct a similar analysis in *A-T-*, particularly in light of the fact that many of the continuing effects of female genital mutilation are similar to those of forced sterilization. *See, e.g., Kasinga*, 21 I. & N. Dec. at 361 (“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.”).

In light of the above, we find disturbing the BIA’s decision in *A-T-* to treat female genital mutilation as analogous to the loss of a limb. The BIA failed to discuss the differences in the lasting impacts of the two forms of persecution, stating conclusorily, “[t]he loss of a limb also gives rise to enduring harm to the victim.”²⁴ I. & N. Dec. at 301. Moreover, the loss of a limb could never, in and of itself, be seen as a fundamental change in circumstances, so that an applicant who lost a limb on account of a statutorily protected ground would still be eligible for withholding of removal, while victims of female genital mutilation—under the BIA’s reasoning in *A-T*—would not.

Given the significant errors in reasoning in the *A-T-* decision, along with the devastating impact this decision will have on the lives of women seeking protection in the United States from grave human rights abuses abroad, we respectfully request that you grant counsel for Traore’s request that you certify the BIA’s decision for further review pursuant to 8 C.F.R. § 1003.1(h)(1)(iii).

Sincerely,

A handwritten signature in cursive script that reads "Barry Kamins".

Barry Kamins