NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 54
Issue 2 *Submissions Issue*

Article 11

January 2009

Bah v. Mukasey

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New York Law School Class of 2010

VOLUME 54 | 2009/10

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Bah v. Mukasey

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Female genital mutilation ("FGM") is a practice prevalent in African countries,[1] where it is widely considered a "social convention,"[2] and justified as "necessary to raise a girl properly and to prepare her for adulthood and marriage."[3] FGM is practiced not for medical, but for social and cultural reasons, "even when it is known to inflict harm upon girls because the perceived social benefits of the practice are deemed higher than its disadvantages."[4] The World Health Organization ("WHO") estimates that between 100 and 140 million girls and women worldwide have been subjected to FGM, with an additional estimated three million girls in Africa at risk every year.[5] Because of the wide range of physical and emotional harm FGM inflicts upon its victims,[6] the procedure is widely considered to violate human rights,[7] and it constitutes a criminal offense in the United States when the victim is under the age of eighteen.[8]

In *Bah v. Mukasey*, the Court of Appeals for the Second Circuit reviewed the denial of three applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"),[9] filed by women who had been subjected to

1. *See* World Health Organization (WHO), Eliminating Female Genital Mutilation: An Interagency Statement 29 (2008), *available at* http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf [hereinafter WHO Report]. Over 90% of women and girls are subjected to FGM in Somalia (97.9%), Egypt (95.8%), Guinea (95.6%), Sierra Leone (94.0%), Djibouti (93.1%), Mali (91.6%), and Northern Sudan (90.0%). *Id.* Outside Africa, FGM has also been found in the Middle East (Yemen, Israel, the United Arab Emirates, and Iraq) and Asia (India, Indonesia, and Malaysia). *Id.* at 29–30.

2. *Id.* at 3.

3. *Id.* at 5–6.

4. *Id.* at 5.

5. *Id.* at 4.

6. WHO lists the immediate effects of FGM as including pain, bleeding, and infections. *Id.* at 11. Long-term effects have been reported as including "chronic pain, infections, decreased sexual enjoyment, and psychological consequences." *Id.* A significantly higher incidence of complications at childbirth has also been reported in women who had been subjected to FGM to include caesarean sections and post-partum hemorrhage, as well as higher death rates for babies. *Id.* For a description of the various forms of FGM and their classification, see generally *id.* at 24–28.

7. *See generally id.* at 8–10; *Female Genital Mutilation from a Human Rights Perspective*, 6:2 Afr. Voices 1 (USAID Bureau for Africa, Office of Sustainable Development), 1997, at 4–5, *available at* http://www.usaid.gov/locations/sub-saharan_africa/newsletters/docs/av/avsum97.pdf ; Amnesty International USA, Female Genital Mutilation: A Fact Sheet, http://www.amnestyusa.org/violence-against-women/female-genital-mutilation--fgm/page.do?id=1108439 (last visited Nov. 17, 2009); FORWARD: Foundation for Women's Health, Research & Development, Female Genital Mutilation: Information Pack 11–15 (2002), http://www.forwarduk.org.uk/download/10; Center For Reproductive Rights, Female Genital Mutilation: A Matter of Human Rights, an Advocate's Guide to Action (2006), http://www.reproductiverights.org/pdf/FGM_final.pdf.

8. 18 U.S.C. § 116 (2006). States throughout the United States have also criminalized FGM. *See, e.g.*, N.Y. Penal Law § 130.85 (McKinney 2009); Del. Code Ann. tit. 11, § 780 (2009); Cal. Penal Code § 273.4 (West 2008); 720 Ill. Comp. Stat. 5/12-34 (2008).

9. *See* 8 C.F.R. § 208.13(b) (2009) (eligibility for asylum). Under current law, an applicant for asylum who is unlawfully present in the United States and has been placed in removal proceedings may request relief

FGM.[10] In immigration law, an asylum applicant may establish eligibility for relief by showing that she suffered past persecution because of, inter alia, membership in a particular social group.[11] If established, the demonstration of past persecution gives rise to the presumption "that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim."[12] The government may then rebut this presumption by demonstrating "a fundamental change in circumstances such that the applicant's life or freedom would not be threatened" if removed.[13] In *Bah*, the applicants argued that the Board of Immigration Appeals ("BIA") improperly assumed that FGM was a one-time act that could not be repeated and automatically rebutted the presumption of future harm.[14] While the appellate court acknowledged that FGM victims suffer long-lasting physical and psychological injuries and are routinely subject to other related acts of persecution after the initial procedure,[15] it declined to decide whether FGM is a form of "continuing persecution."[16] This case comment contends that the court should have ruled that FGM amounts to continuing persecution, based on existing BIA precedent, decisions in other jurisdictions, and congressional intent.

Salimatou Bah, Mariama Diallo, and Haby Diallo—three Guinean women of the Fulani ethnic group—applied for asylum in the United States, alleging that they had been victims of FGM as children and continued to suffer various long-term effects from the procedure.[17] Applicant Salimatou Bah claimed she was eleven years old when

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from removal while the asylum application is under review. *See* 8 C.F.R. § 208.16(a) (2009). To be eligible for withholding of removal, the applicant must establish that his "life or freedom would be threatened [in the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2006). For a description of the asylum process in the U.S., including withholding of removal, see Executive Office for Immigration Review, U.S. Dep't of Justice, Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections (2009) [hereinafter EOIR, Fact Sheet], http://www.usdoj.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf. An applicant for asylum in the U.S. may also request withholding of removal under Article 3 of the Convention Against Torture. 8 C.F.R. § 208.16(c). To be eligible, the applicant must show that "it is more likely than not that [he or she] would be tortured in the proposed country of removal." *Id.* § 208.16(c)(3); *see also* EOIR, Fact Sheet, *supra*, at 7–8.

10. Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008).

11. 8 C.F.R. § 208.13(b). A "particular social group" is defined by a "common characteristic that . . . members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

12. 8 C.F.R. § 208.16(b)(1)(i). Furthermore, "[a]n applicant who has been found to have established . . . past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim." 8 C.F.R. § 208.13(b)(1).

13. *Id.* § 208.16(b)(1).

14. *Bah*, 529 F.3d at 111. On appeal, the Second Circuit reversed this finding, holding that the BIA had improperly shifted the burden of proof from the government to the asylum applicant, in violation of the regulatory scheme of 8 C.F.R. § 208.13(b)(1). *Id.* at 117.

15. *Id.* at 112, 114–16.

16. *Id.* at 116.

17. *Id.* at 104–07.

five elderly women performed FGM on her, with her mother's consent.[18] The excision was done "without any anesthetic or sanitary precaution" and left her "bleeding heavily."[19] She claimed that she continued to suffer physical problems as an adult, including menstruation problems, lack of sexual pleasure during intercourse, and complications during the births of her children.[20] Applicant Mariama Diallo claimed she was eight years old when her relatives forced her "to undergo the mutilation without [her parents'] knowledge" and despite their opposition to the practice.[21] In the month following the procedure, she suffered from "constant pain, excessive bleeding, and loss of consciousness" and, as an adult, had two miscarriages and experienced "extremely difficult" childbirth.[22] If returned to Guinea, she was afraid her daughters would also be subjected to the procedure without her consent.[23] Applicant Haby Diallo claimed she was subjected to FGM at the age of eight, when "three old women" took her to "the bush" and mutilated her with a knife.[24] She alleged that despite her heavy bleeding, she was not taken to the hospital, but was instead treated with "traditional medicine."[25] She further stated that as a result of FGM, she could not feel pleasure during sexual intercourse, and did not want her "future daughters" to be subjected to the procedure.[26] On these facts, Salimatou Bah, Mariama Diallo, and Haby Diallo applied for asylum, withholding of removal, and relief under CAT.[27]

The immigration judges ("IJ") denied the three applications as untimely filed.[28] While one IJ found that Haby Diallo failed to establish that she had been subjected to FGM,[29] a different IJ held that applicants Salimatou Bah and Mariama Diallo had

18. *Id.* at 104.

19. *Id.* (internal quotation marks omitted).

20. *Id.*

21. *Id.* at 106.

22. *Id.*

23. *Id.*

24. *Id.* at 107.

25. *Id.* In rural areas where the procedure is not performed in a hospital, it is often performed without anesthetics or antiseptics using special knives, scissors, scalpels, pieces of glass, or razor blades. *See* WHO, Female Genital Mutilation: Information Kit (1996), http://whqlibdoc.who.int/hq/1999/WHO_CHS_WMH_99.11.pdf. Once completed, mixtures of herbs, porridge, and ashes are rubbed on the wound to stop the bleeding. *Id.*

26. *Bah*, 529 F.3d at 107.

27. *Id.* at 104–07.

28. *Id.* at 104, 106–07. Applicants for asylum in the United States must file their claims with the Citizenship and Immigration Services within one year after their arrival in the United States. 8 U.S.C. § 1158(a)(2)(B) (2006). Salimatou Bah entered the U.S. in June 2003 and applied for asylum in January 2005. *Bah*, 529 F.3d at 104. Mariama Diallo entered the U.S. in May 1992 and filed her application in September 2003. *Id.* at 105. The application was amended in February 2005 to include a claim based on FGM. *Id.* The *Bah* court does not provide Haby Diallo's exact date of entry in the U.S. or when she applied for asylum. *See id.* at 106–07.

29. *Bah*, 529 F.3d at 107.

submitted reliable evidence in that regard.[30] However, the IJs also denied the applications on the merits, finding that FGM is a one-time act, and therefore, neither applicant would be subjected to it again in the future.[31] The three applicants appealed the decisions with the BIA. In unpublished decisions,[32] however, the BIA upheld the denials, concurring with the IJs that because FGM is a one-time occurrence, the applicants failed to establish a well-founded fear of future persecution.[33] In the same decisions, the BIA rejected the claim that, like forced sterilization and related forms of coercive family planning practices, FGM constitutes a form of "continuing persecution."[34] Arguing that Congress had not specifically included FGM in the statutory definition of "refugee"—as it did with forced sterilization[35]—the BIA held that FGM was not entitled to the same status of continuing persecution as forced sterilization.[36]

The applicants requested judicial review of the BIA's denials pursuant to 8 U.S.C. § 1252.[37] The Second Circuit consolidated the three appeals and reversed the BIA's finding that FGM was a one-time act as "impermissible speculation."[38] In reaching this conclusion, the court acknowledged the potential "devastating, permanent effects" of FGM upon its victims, "including immediate and long-term physical problems such as infection, difficulty during urination and menstruation, incontinence, and sexual dysfunction; complications during childbirth such as fetal and maternal death, birth defects, and internal damage to the mother; and severe psychological problems."[39] However, despite prior BIA decisions regarding FGM

30. *Id.* at 104, 106.

31. *Id.*

32. *In re* Salimatou Bah, No. A98 648 305 (B.I.A. Mar. 26, 2007); *In re* Mariama Diallo, Amadou Sow, Nos. A97 849 373, A97 849 374 (B.I.A. Apr. 12, 2007); *In re* Haby Diallo, No. A97 924 445 (B.I.A. Apr. 20, 2007). Findings of fact throughout this case comment cite the Second Circuit opinion. Because the IJ and BIA decisions are not published, it is impossible to determine whether the IJ and BIA actually cited to or quoted studies, cases, or other materials to make their findings. Such findings of fact are relied upon on appeal to the Second Circuit. *See Bah*, 529 F.3d 99.

33. *See Bah*, 529 F.3d at 106–07.

34. *Id.* at 105–06, 108.

35. *See* 8 U.S.C. § 1101(a)(42) (2006).

36. *Bah*, 529 F.3d at 105.

37. *See id.* at 104–07. Under 8 U.S.C. § 1252, the asylum applicant who has been placed in removal proceedings (following the denial of the asylum application) may apply for judicial review of the removal order by the appropriate court of appeals in the jurisdiction. *See* 8 U.S.C. § 1252(a) (2006). The petition for review "shall be the sole and exclusive means for judicial review of an order of removal . . . ." *Id.* § 1252(a)(5). Review is based solely on the administrative record, and the findings of the Asylum Officer and Immigration Judge are conclusive, "unless any reasonable adjudicator would be compelled to conclude to the contrary . . . ." *See id.* § 1252(b)(4)(A)–(B).

38. *Bah,* 529 F.3d at 114–15.

39. *Id.* at 102. In its decision, the Second Circuit provided extensive background information on FGM and its short- and long-term effects, which include vaginal ruptures, extremely painful menstruation, severe pain during sexual intercourse, and possible sterility. *Id.* at 102–03 (citing Alexi Nicole Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12

and a Ninth Circuit decision supporting such findings, the majority in *Bah* failed to decide whether FGM constitutes a form of continuing persecution,[40] leaving the issue unresolved in the Second Circuit. In his concurring opinion, Judge Straub noted this deficiency, finding that FGM met the definition of continuing persecution as established in the similar context of forced sterilization.[41] Judge Straub also deemed it "prudent to decide the issue, as it provides petitioners with another potential avenue for relief" in applying for asylum and withholding of removal in the United States.[42]

This case comment contends that the Second Circuit should have held that FGM was entitled to the status of continuing persecution, as supported by prior BIA decisions, congressional intent, and a persuasive decision by the Ninth Circuit on this issue. By failing to do so, the *Bah* decision has created inconsistency in the manner in which two substantially similar forms of persecution are treated, and effectively promotes forum shopping for asylum applicants.

FGM has been recognized as an act of persecution based on membership in a particular social group under 8 U.S.C. § 1101(a)(42) since the 1996 decision, *In re Kasinga*.[43] Notably, in *Kasinga*, the BIA found that the procedure "permanently disfigure[d] the female genitalia . . . expos[ing] the girl or woman to the risk of serious, potentially life-threatening complications."[44] The doctrine of "continuing persecution," however, was first established in *In re Y-T-L-* in the context of coercive

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Hastings Women's L.J. 347, 363–67 (2001)); *see also* Office of the Senior Coordinator for Int'l Women's Issues, Office of the Under Sec'y for Global Affairs, U.S. Dep't of State, Report on Female Genital Mutilation as Required by Conference Report (H. Rept. 106-997) to Public Law 106-429 (2001), *available at* http://www.state.gov/documents/organization/9424.pdf; WHO Report *supra* note 1, at 24–28. For further background information on FGM and its long-term effects, see generally American Academy of Pediatrics, Committee on Bioethics, *Female Genital Mutilation*, 102 Pediatrics 153 (1998), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;102/1/153.pdf.

40. *Bah*, 529 F.3d at 116 ("Because we find that the case must be remanded based on the errors identified above, we do not reach the issue of whether the agency also erred in declining to apply its 'continuing persecution' reasoning to claims based on female genital mutilation.").

41. *See id.* at 117–25 (Straub, J., concurring).

42. *Id.* at 117.

43. *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996). In *Kasinga*, the BIA reviewed the denial of an FGM-based application for asylum in the U.S. *Id.* The applicant was a member of the Tchamba-Kunsuntu Tribe (in Northern Togo), who feared she would be subjected to FGM if she were to return to Togo. *Id.* at 358–59. She had evaded the procedure as a child, while she was under the protection of her father. *Id.* at 358. After his death, however, she was promised into a polygamous marriage by her relatives, who planned for her to undergo FGM before the wedding. *Id.* She fled Togo and applied for asylum upon her entry into the United States. *Id.* at 358–59. Relying on the nature of the procedure and the resulting "permanent damage" to its victims, *id.* at 361–62, the BIA held that FGM "can constitute 'persecution,'" defined as "the infliction of harm or suffering by . . . persons a government is unwilling or unable to control, to overcome a characteristic of the victim." *Id.* at 365. For cases following *Kasinga*, see, e.g., Niang v. Gonzales, 422 F.3d 1187, 1197 (10th Cir. 2005); Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004); Balogun v. Ashcroft, 374 F.3d 492, 499 (7th Cir. 2004); Abankwah v. I.N.S., 185 F.3d 18, 23 (2d Cir. 1999).

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

family planning in China.[45] In *Y-T-L-*, the BIA reviewed the denial of an application for asylum and withholding of removal filed by a Chinese couple on the basis of forced sterilization.[46] After the birth of her second child, the applicant's wife had a contraceptive intrauterine device ("IUD") forcibly implanted,[47] pursuant to the Chinese government's One-Child Policy.[48] She had the IUD removed in secret,[49]

45. *In re* Y-T-L-, 23 I. & N. Dec. 601 (B.I.A. 2003).

46. *Id.* at 601–02.

47. An IUD is a device implanted in a woman's uterus that is designed to prevent pregnancy. *See* Planned Parenthood, IUD, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Nov. 23, 2009). In *Y-T-L-* the BIA does not provide details on what type of IUD was implanted, and the IJ decision is unpublished. *See Y-T-L-*, 23 I. & N. Dec. at 601–03. A joint report made in 2002 by the WHO, United Nations Development Program (UNDP), United Nations Populations Fund (UNFPA), and the World Bank, mentions several types of IUDs used in China, including stainless steel rings and, since the early 1990s, copper-bearing rings. *The Intrauterine Device (IUD)—Worth Singing About*, Progress in Reproductive Health Research, 2002, at 4–6, *available at* http://www.who.int/hrp/publications/progress60.pdf.

48. *Y-T-L-*, 23 I. & N. Dec. at 601–02. The One-Child Policy was implemented in 1979, when the Chinese government advocated a one-child limit in both rural and urban areas, with a few exceptions for minority nationalities and ethnic groups with very small populations. *See* Country Studies, *China, Population Control Programs*, http://www.country-studies.com/china/population-control-programs.html (last visited Jan. 10, 2010). The purpose of the policy was to support economic development by population control and to keep the population under 1.2 billion through the year 2000. *Id.* The policy has been implemented by propaganda, social pressure, and, in some cases, coercion, as in *Y-T-L-*. *Id.* The policy has been implemented nationwide since 1981. *See* Population Research Institute, Full Report on UNFPA's Involvement in China, Testimony of Steve Mosher (2001), http://www.pop.org/full-report-on-unfpas-involvement-in-china#mosher (last visited Jan. 10, 2010). A report distributed by the Department of Justice in 2001 describes the standard policy as follows:

> After having her first child, within three to six months a woman is required to have an intra-uterine device (IUD) inserted. Many women will get an IUD and a One-Child Certificate on their own initiative because they know it is expected. If not, a birth planning worker will come to visit, inquire about how the woman's first child is doing, and remind her about the IUD. After IUD insertion, the woman's contraceptive practice is monitored by both her work unit and her residential unit.

Susan Greenhalgh & Edwin A. Winckler, Perspective Series: Chinese State Birth Planning in the 1990s and Beyond 5 (2001), *available at* http://www.uscis.gov/files/nativedocuments/pschn01001.pdf. For further background information, see Country Studies, *China, Population Control Programs*, http://www.country-studies.com/china/population-control-programs.html (last visited Sept. 25, 2009); Population Research Institute, *supra*. The *Y-T-L-* applicant requested asylum in the U.S. as a victim of this policy. *Y-T-L-*, 23 I. & N. Dec. at 601. Based on the *Y-T-L-* decision citing the applicant's testimony to the Immigration Judge, his wife was "forced to have an [IUD] inserted after the birth of [her] second child," and was "simultaneously informed that she soon would have to undergo sterilization." *Id.* at 602. After evading sterilization and giving birth to a third child, she "was taken for sterilization in March 1986, and a substantial fine was imposed in April 1986." *Id.* As further punishment under the One-Child Policy, the couple was required to attend "study class[es]" on birth control, where they were presented "as a 'bad example' to educate other people," and the government confiscated land assigned to their family, depriving them of their livelihood. *Id.* The IJ found the testimonies credible, and ruled that the applicant's wife "was subjected to involuntary sterilization pursuant to a coercive population control program." *Id.*

49. *Y-T-L-*, 23 I. & N. Dec. at 602. Because the lower IJ's decision is unpublished and the BIA does not specify how the IUD was removed, it is not possible to ascertain how exactly the removal was performed. *See id.*

only to have it re-implanted after the birth of her third child ten months later.[50] The IJ denied the asylum application, finding the IUD implantation was a one-time event which, in and of itself, constituted a "fundamental change in circumstances such that the respondent no longer ha[d] a well-founded fear of persecution."[51] The BIA reversed on appeal, holding that because of the "profound and permanent nature" of the harm caused by forced sterilization, the practice amounted to 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."[52] To reach this conclusion, the BIA had to reconcile its own precedent—which denied asylum to victims of forced sterilization on the basis that such policies were not persecutory in nature[53]—with the 1996 amendment to the Immigration & Nationality Act, which explicitly recognized forced sterilization as a form of political persecution.[54] In *Y-T-L-*, the BIA relied on "the special nature of the persecution at issue" to hold that "forced sterilization should not be viewed as a discrete, one-time act, comparable to a term in prison, or an incident of severe beating or even torture."[55] The *Y-T-L-* holding was subsequently upheld on the basis that forced sterilization victims suffer "drastic and emotionally painful consequences that are unending," including the deprivation of "a procreative life."[56]

Based on this rationale, the determinative factor of a continuing persecution is the ongoing nature of the persecutory act, which "continues . . . into the future" and "permanently deprives [its victims] of certain aspects of [their] sexuality."[57] Because of the particular nature of the persecution, forced sterilization has obtained a "special result under the asylum regulations, namely that the applicants who have suffered forced . . . sterilization necessarily have an inherent well-founded fear of future persecution . . . ."[58]

Despite the factual similarities between forced sterilization and FGM, the *Bah* court refused to apply the *Y-T-L-* ruling to hold that FGM, like forced sterilization, is a form of continuing persecution.[59] The *Bah* court's description of FGM is similar to the *Y-T-L-* court's description of forced sterilization. Specifically, the *Bah* court described FGM as a "series of surgical operations,"[60] with the potential of having

50. *See id.* at 602.

51. *Id.* at 603.

52. *Id.* at 607.

53. *See, e.g.*, Matter of G-, 20 I. & N. Dec. 764, 775 (B.I.A. 1993); Matter of Chang, 20 I. & N. Dec. 38, 45 (B.I.A. 1989).

54. 8 U.S.C. § 1101(a)(42).

55. *Y-T-L-*, 23 I. & N. Dec. at 606–07.

56. Qu v. Gonzales, 399 F.3d 1195, 1202 (9th Cir. 2005).

57. *Bah*, 529 F.3d at 119–20 (Straub, J., concurring).

58. *Qu*, 399 F.3d at 1202.

59. *Bah*, 529 F.3d at 116.

60. *Id.* at 101 (quoting *Abankwah*, 185 F.3d at 23) (internal quotation marks omitted).

"devastating, permanent effects on its victims, including immediate and long-term physical problems such as . . . sexual dysfunction; complications during child birth[;] . . . and severe psychological problems."[61] The court's acknowledgement of the "long-lasting and severe consequences"[62] of FGM was consistent with the language of prior BIA decisions, which held that "[f]orced female genital mutilation is better viewed as a *permanent and continuing* act of persecution,"[63] and "[t]he persecution resulting from FGM is . . . continuing and permanent."[64] FGM thus meets the *Y-T-L-* definition of "continuing persecution,"[65] and should be granted the same status under asylum law.

Holding that FGM is a form of continuing persecution would have been consistent not only with *Y-T-L-*, but also with existing case law in another jurisdiction. In *Mohammed v. Gonzales*, the Ninth Circuit relied on *Kasinga* and *Y-T-L-* to reverse the BIA's denial of an FGM-based asylum application, holding that FGM amounts to continuing persecution, and its victims are entitled to the same treatment under asylum law as victims of forced sterilization.[66] Mohammed, a Somali national and member of the Benadiri ethnic group, applied for asylum in the United States on the basis that she had been subjected to FGM as a child and feared further persecution if she returned to Somalia.[67] In an unpublished decision, the BIA denied her asylum claim, finding, inter alia, that she had failed to present evidence "that establishes that [female genital mutilation] would likely be performed . . . in the future."[68] On review, the Ninth Circuit reversed and found that FGM is a continuing act of persecution, based on precedent and the nature of the procedure.[69] Specifically, the court analogized the nature and effects of FGM, as described by the World Health Organization and BIA precedent,[70] with those of forced sterilization, and concluded that FGM "is, like forced sterilization, a 'permanent and continuing' act of persecution"[71] because both procedures "permanently disfigure[] a woman, cause[]

61. *Id.* at 102.

62. *Id.* at 103.

63. *Id.* at 120 (Straub, J., concurring) (emphasis added) (quoting *In re* Bosede Olawumi, No. A70 651 629 (B.I.A. May 23, 2003) (per curiam)) (internal quotation marks omitted).

64. *Id.* (quoting *In re* Mariama Dalanda Bah, No. A97 166 217 (B.I.A. Sept. 1, 2005) (per curiam)) (internal quotation marks omitted).

65. *See supra* text accompanying notes 45–61.

66. Mohammed v. Gonzales, 400 F.3d 785, 801 (9th Cir. 2005).

67. *Id.* at 789–90. The applicant first submitted an application for asylum for political persecution, claiming that her family had been subjected to persecution during the civil war in Somalia. *Id.* at 789. She claimed her brother and father had disappeared, her sister had been raped, and attempts had been made to imprison her family. *Id.* However, the IJ and the BIA found her claim was not credible and denied the application. *Id.* Mohammed then retained new counsel and filed a motion to re-open her application for asylum as a victim of FGM. *Id.* at 789–90.

68. *Id.* at 790 (alteration in original).

69. *See id.* at 800.

70. *See id.* at 799–800 (citing *Kasinga*, 21 I. & N. Dec. at 361; *Abay*, 368 F.3d at 638).

71. *Id.* at 801.

long term health problems, and deprive[] her of a normal and fulfilling sexual life."[72] The *Mohammed* court thus ruled that FGM "must be considered a continuing harm that renders a petitioner eligible for asylum, without more,"[73] and the presumption of a well-founded fear of future persecution "cannot be rebutted."[74] The rationale of the *Mohammed* court applies equally in *Bah*, where the applicants had been forcibly subjected to FGM and feared further persecution if returned.[75] Both courts acknowledged the permanent effects of the procedure and used similar language in describing such effects. Further, the *Bah* court adopted the *Mohammed* decision, in part, to support its finding that FGM can constitute persecution and may expose its victims to future related persecution.[76] Yet the *Bah* court failed to reach the *Mohammed* court's logical conclusion that FGM amounts to continuing persecution.[77]

In 1996, Congress amended the statutory definition of "refugee" to explicitly classify forced sterilization as a form of imputed political persecution and to grant its victims a form of relief under U.S. asylum law.[78] In denying FGM the status of continuing persecution, the BIA and other courts have unduly focused on the amended definition of "refugee," often citing Congress's failure to specify FGM as it did forced sterilization.[79] This rationale, however, is unsupported by the amendment's legislative history.

When amending the Act in 1996, Congress specifically intended "to overturn several decisions of the Board of Immigration Appeals" that denied asylum to victims of forced sterilization on the ground that laws of coercive population control were of "general application" and not persecutory in nature.[80] By contrast, when the Act was amended in 1996, case law had clearly established that, unlike forced sterilization, FGM was already considered a form of persecution under the statute.[81] Therefore,

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72. *Id.* at 799.

73. *Id.*

74. *Id.* at 801.

75. *See Bah*, 529 F.3d at 104, 106–07.

76. *Id.* at 112–14. *Bah* also adopts *Mohammed*'s holding that the applicants' gender and membership in an ethnic group met the statutory requirement of membership in a particular social group, and that the government bears the burden of proof to rebut the presumption of a well-founded fear of future persecution, once past FGM was established. *Id.* at 112–13.

77. *See id.* at 117–25 (Straub, J., concurring).

78. 8 U.S.C. § 1101(a)(42).

79. *See, e.g.*, Diallo v. Mukasey, 268 F. App'x 373, 380 (6th Cir. 2008); *In re* A-T-, 24 I. & N. Dec. 296, 300 (B.I.A. 2007). In *In re A-T-*, the BIA reviewed the denial of an application for asylum filed on the basis of FGM. *Id.* at 296–97. The applicant, a native of Mali, was subjected to FGM as a child. *Id.* at 296. While the BIA recognized the similarities between forced sterilization and FGM, it rejected *Mohammed* and denied FGM the status of continuing persecution on the ground that "Congress has not seen fit to recognize FGM (or any other specific kind of persecution) in [a] similar fashion [as forced sterilization] with special statutory provisions." *Id.* at 300.

80. H.R. Rep. No. 104-469(I), at 173–74 (1996).

81. *Kasinga*, 21 I. & N. Dec. at 365.

there was no need for Congress to explicitly include FGM in the amended definition of "refugee." Further, by using this argument to deny FGM the status of continuing persecution, the BIA effectively reversed its own precedent, which had established that "[t]he persecution resulting from FGM is . . . continuing and permanent,"[82] effectively narrowing the definition of refugee. The BIA's rationale for denying FGM the status of continuing persecution is thus unsupported by the amendment's legislative history and violates congressional intent.[83] By contrast, had it followed *Mohammed*, the *Bah* court would have furthered congressional intent to expand the scope of "refugee" in asylum law.

In *Bah*, the court had the opportunity to decide that FGM is a form of continuing persecution, thereby resolving the issue in the Second Circuit. The decision would not have been precluded by congressional intent, but instead would have been supported by BIA precedent that FGM is "a permanent and continuing act of persecution"[84] and by the Ninth Circuit's holding in *Mohammed*—a persuasive, albeit non-binding, decision, which the *Bah* court adopted in part.[85] As Judge Straub stated in his concurring opinion, the court's failure to hold that FGM is a form of continuing persecution deprives asylum applicants of "another potential avenue for relief."[86] The decision also sustains unequal treatment of victims of forced sterilization and FGM, a hotly debated immigration law issue. Congress had to amend the statutory definition of "refugee" to include forced sterilization as a form of persecution. Similarly, resolution of the FGM issue may now require Congress to further amend the definition so that victims of forced sterilization and of FGM are treated equally under asylum law.

82. *Bah*, 529 F.3d at 120 (Straub, J., concurring) (quoting *In re* Mariama Dalanda Bah, No. A97 166 217 (B.I.A. Sept. 1, 2005) (per curiam)) (internal quotation marks omitted).

83. *See* H.R. Rep. No. 104-469(I), at 173–74. Under binding precedent, BIA decisions are granted deference and the agency's interpretation of an ambiguous statutory provision of the Immigration & Nationality Act is binding unless it is clearly erroneous and impermissible. *See* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984). Here, however, the Second Circuit is not bound by the BIA's decision in *A-T-*. The BIA's rationale to deny FGM the status of continuing persecution in effect narrows the scope of the statute. The BIA's statutory interpretation thus violates congressional intent to expand the scope of "refugee," as ascertained from the amendment's legislative history. *See supra* note 80 and text accompanying notes 80–81. The BIA's interpretation is thus not a "permissible construction of the statute," and under *Chevron*, the Second Circuit is not bound by it. *See Chevron*, 467 U.S. at 843.

84. *In re* Bosede Olawumi, No. A70 651 629 (B.I.A. May 23, 2003) (per curiam), *cited in Bah*, 529 F.3d at 120 (Straub, J., concurring).

85. *See supra* notes 66–77 and accompanying text.

86. *Bah*, 529 F.3d at 117 (Straub, J., concurring).