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ABAY V. ASHCROFT: THE SIXTH CIRCUIT'S BASELESS EXPANSION OF INA § 101(a)(42)(A) REVEALED A GAP IN ASYLUM LAW

Wes Henricksen

Abstract: In *Abay v. Ashcroft*, the United States Court of Appeals for the Sixth Circuit held that a noncitizen mother qualified for asylum based on her fear that her daughter, who qualified as a refugee, would undergo female genital mutilation if her daughter were to return to the family's home country. The Immigration and Nationality Act (INA) provides derivative asylum for spouses and children, but not parents, of refugees granted asylum. Parents of asylees must therefore independently qualify for asylum under INA § 101(a)(42)(A), which requires that the applicant show a well-founded fear of persecution if returned to the applicant's home country. The circuit courts of appeals have generally denied refugee status to mothers in situations similar to that of the petitioner in *Abay*. Nevertheless, the *Abay* court concluded that there is a "governing principle" in favor of granting asylum to mothers when their daughters would face genital mutilation upon return to the family's home country. This Note argues that the *Abay* court erred in granting asylum to the petitioner mother because no such "governing principle" exists. Further, this Note argues that the mother in *Abay* lacked a well-founded fear of persecution, making her ineligible for asylum, for two reasons. First, harm to her daughter did not amount to persecution of the mother. Second, because her daughter is a refugee, the petitioner cannot reasonably fear the genital mutilation of her daughter in the family's home country. When the law is correctly applied in cases such as *Abay*, a mother of an asylee must choose between abandoning her child in the United States or taking the child back to her home country where the child may be persecuted. Congress did not contemplate this appalling predicament when it drafted the current asylum laws. Accordingly, this Note concludes that Congress should amend the INA to grant derivative asylum to parents of asylees.

United States immigration law is ill-equipped to handle situations where children are the targets of persecution in their home countries but their parents are not. The Immigration and Nationality Act (INA) provides derivative asylum to spouses and children of asylees.¹ However, parents of asylees are not included in the derivative asylum provision.² To gain asylum, parents must therefore independently satisfy the requirements for refugee status under INA § 101(a)(42)(A).³

1. Immigration and Nationality Act § 208(b)(3)(A) (codified at 8 U.S.C. § 1158(b)(3)(A) (2000)). The INA generally defines "child" as an unmarried person under twenty-one years of age. INA § 101(b)(1) (codified at 8 U.S.C. § 1101(b)(1) (2000)).

2. 8 U.S.C. § 1158(b)(3)(A).

3. 8 U.S.C. § 1101(a)(42)(A). The lack of a derivative asylum provision for parents of asylees can be attributed to the historic context in which the asylum provisions of the INA were passed. When Congress initially added the refugee provisions to the INA through the Refugee Act, Pub. L. No. 96-

Specifically, such parents must be outside of their country of nationality and unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴

Courts recognize several types of child persecution,⁵ and will grant asylum directly to children who face such persecution.⁶ This Note addresses one type of child persecution that is increasingly generating litigation: female genital mutilation.⁷ This heinous procedure is performed on an estimated two million young women and girls each year in Africa, Asia, and the Middle East.⁸ In many female genital

212, 94 Stat. 102 (1980), the major humanitarian concerns that prompted the United States to extend asylum to foreign citizens were political conflicts from the Cold War era, whose victims fled oppression in their home countries to seek freedom in the United States. See Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. REV. 223, 234 n.63 (2000). As such, laws passed at this time that granted asylum to refugees politically persecuted abroad were primarily concerned with adult applicants, whose families would be included in their claim. See 8 U.S.C. § 1158(b)(3)(A) (stating that derivative asylum is available to spouses and children, but not parents, of asylees).

4. 8 U.S.C. § 1101(a)(42)(A).

5. Annette Lopez, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 603, 609 (2004) (“[C]ircumstances that amount to child persecution [include] infanticide, child abuse, incest, female genital mutilation, and child sale.”). There are two statutory grounds for child persecution that allow parents that accompany or follow to join the asylee child to be granted the same status as the child. One of them, the “T” visa, allows human trafficking victims under the age of twenty-one to immigrate their parents where the children were victims of severe human trafficking and assisted a government investigation and prosecution of the offenders, or because the children were under eighteen years of age when trafficked. 8 U.S.C. § 1101(a)(15)(T) (2000). The other, the “U” visa, allows parents to immigrate with their minor children if the children were victims of certain violent crimes. 8 U.S.C. § 1101(a)(15)(U) (2000).

6. See *In re Kasinga*, 21 I. & N. Dec. 357, 358, 368 (B.I.A. 1996) (en banc) (holding that female genital mutilation victim qualified for asylum based on persecution).

7. See *id.* at 358 (holding that female genital mutilation may constitute “persecution” for purposes of U.S. asylum law). The procedure is referred to by many courts and the Board of Immigration Appeals (BIA) as “FGM.” However, this Note will follow the lead of the United States Court of Appeals for the Ninth Circuit and use the full three-word phrase “female genital mutilation” or substitute the shortened phrase “genital mutilation” in lieu of using the initialism “FGM.” See *Mohammed v. Gonzales*, No. 03-70803, slip op. 3063, 3068 n.2 (9th Cir. Mar. 10, 2005). As noted by the Ninth Circuit, “[t]he use of the initials, if it has any effect, serves only to dull the senses and minimize the barbaric nature of the practice.” *Id.*

8. World Health Organization, *Fact Sheet No. 241: Female Genital Mutilation* (June 2000), at <http://www.who.int/mediacentre/factsheets/fs241/en> [hereinafter *Female Genital Mutilation*]. The permanent consequences of the procedure, which involves removal of part or all of the external female genitalia, ensures it will normally be undertaken no more than once per victim. One of the seminal cases addressing the procedure found that female genital mutilation “‘has been used to control wom[e]n’s sexuality’ . . . [and] is characterized as a form of ‘sexual oppression’ that is

mutilation cases, the female child who is potentially subject to genital mutilation upon return to her family's home country has a legal right to remain in the United States through citizenship,⁹ legal permanent resident status,¹⁰ or asylum based on persecution that is particular to her.¹¹ However, the child's parents often do not have independent grounds upon which to file an asylum claim.¹²

In *Abay v. Ashcroft*,¹³ a court held for the first time that a mother may qualify for asylum under INA § 101(a)(42)(A) if she fears that her daughter would undergo genital mutilation were her daughter to return to the family's home country.¹⁴ In its opinion, the United States Court of Appeals for the Sixth Circuit relied on a handful of administrative decisions to conclude that there is a "governing principle" in favor of granting refugee status to mothers like the petitioner, Yayeshwork Abay.¹⁵ Following this governing principle, the court held that Abay qualified as a refugee.¹⁶

This Note argues that the Sixth Circuit erred in holding that Abay's fear that her daughter would undergo genital mutilation in their home country qualified her as a refugee. The administrative decisions cited by the *Abay* court do not amount to a "governing principle" in favor of granting asylum to mothers like Abay.¹⁷ Absent this governing principle, Abay did not qualify for asylum because the fear that her daughter would be subjected to the persecution of genital mutilation did not amount to persecution of Abay. Moreover, any fear Abay initially possessed could no longer be well-founded once her daughter qualified

'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'" *Kasinga*, 21 I. & N. Dec. at 366.

9. See, e.g., *Oforji v. Ashcroft*, 354 F.3d 609, 611 (7th Cir. 2003) (noting that daughters were U.S. citizens).

10. See, e.g., *Olowo v. Ashcroft*, 368 F.3d 692, 698 (7th Cir. 2004) (noting that daughters were legal permanent residents).

11. See, e.g., *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (holding that daughter was refugee and therefore eligible for asylum).

12. See *Olowo*, 368 F.3d at 698, 704–05 (holding that, although legal permanent resident daughters feared female genital mutilation if returned to mother's native country, mother was ineligible for asylum); *Oforji*, 354 F.3d at 618 (holding that, although U.S. citizen daughters feared genital mutilation if returned to mother's native country, mother did not qualify for asylum).

13. 368 F.3d 634 (6th Cir. 2004).

14. *Id.* at 642.

15. *Id.*

16. *Id.*

17. *Id.*

as a refugee.¹⁸

Part I of this Note reviews the law of asylum. Part II discusses asylum based on harm to an applicant's family member. Part III analyzes the facts, procedural history, holding, and reasoning of *Abay v. Ashcroft*. Part IV argues that the *Abay* court erroneously concluded that a mother may qualify for asylum under INA § 101(a)(42)(A) based exclusively on her fear that her daughter may be subject to genital mutilation upon her return to their home country. This Note concludes that the Sixth Circuit's approach is unfortunate because such a change in the law would be better effectuated through an amendment to the INA that confers derivative asylum on parents of asylee children.

I. A NONCITIZEN MAY BE GRANTED ASYLUM IF HE OR SHE QUALIFIES AS A REFUGEE UNDER THE INA

To qualify for asylum, a noncitizen applicant has the burden of establishing that he or she is a refugee as defined in § 101(a)(42)(A) of the INA.¹⁹ This section defines a refugee as a person who is outside of his or her country of nationality and is unable or unwilling to return to that country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁰ The "persecution" element imposes a high standard that the applicant must meet, and requires more than a showing of

18. *Abay's* daughter, Amare, was granted refugee status by the *Abay* court, *id.* at 640, which rendered her eligible for, but did not guarantee, asylum. *See id.* at 636 (noting that U.S. Attorney General, who is represented by immigration courts, has discretion to grant asylum). On remand, an immigration judge has discretion as to whether to grant asylum. *See id.* However, because the case was remanded to the immigration judge "for proceedings not inconsistent with [the Sixth Circuit's] opinion," *id.* at 643, the immigration judge would be unlikely to deny Amare asylum. For the purposes of this Note, it will be assumed that Amare acquired a legal right to remain in the United States upon gaining refugee status.

19. 8 U.S.C. § 1101(a)(42)(A) (2000). The U.S. Attorney General, normally represented by asylum officers, may grant asylum to any applicant who qualifies as a refugee and is not barred by any of the grounds for inadmissibility. *Id.* § 1158(b)(1)–(2). Unsuccessful applicants can appeal the asylum officer's decision to an immigration court, 8 C.F.R. § 208.31(g) (2004); then to the BIA, *id.* § 1003.1(b); and then to the United States Court of Appeals in the circuit where the original application was filed. *See* United States Department of Justice, Executive Office for Immigration Review, *Board of Immigration Appeals*, ¶ 3, at <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Mar. 21, 2005) ("All Board decisions are subject to judicial review in the Federal courts."). Throughout this process, the applicant bears the burden of establishing asylum eligibility under INA § 101(a)(42)(A). 8 C.F.R. § 208.13(a).

20. 8 U.S.C. § 1101(a)(42)(A).

offensive treatment.²¹ In addition, the applicant must show that his or her fear of persecution is “well-founded.”²² An applicant may show a well-founded fear of persecution by demonstrating that there is a reasonable possibility that the applicant would suffer persecution upon returning to the applicant’s home country.²³

A. To Be Eligible for Asylum, an Applicant Must Show Harm that Rises to the Level of Persecution

To demonstrate persecution under INA § 101(a)(42)(A), an applicant must show extreme harm²⁴ that either occurred in the past or may occur in the future.²⁵ This extremity requirement does not limit persecution to severe physical harm²⁶ or threats to life or freedom,²⁷ such as severe beatings,²⁸ torture,²⁹ or fear of death.³⁰ Rather, courts have held that persecution also includes lesser forms of physical harm.³¹ In addition, courts may consider mental harm as an element—but not as the exclusive basis—of an applicant’s persecution.³²

21. *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993).

22. 8 U.S.C. § 1101(a)(42)(A).

23. 8 C.F.R. § 208.13(b)(2)(i)(B).

24. See *Fatin*, 12 F.3d at 1243 (“[P]ersecution’ is an extreme concept that does not include every sort of treatment our society regards as offensive.”); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (“[P]ersecution’ is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience.”).

25. See INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A)).

26. See *Zhao v. Gonzalez*, 2005 WL 590829, at *8 (5th Cir. Mar. 15, 2005) (“The harm or suffering need not be physical, but may take other forms”); accord *In re Laipenieks*, 18 I. & N. Dec. 433, 456–57 (B.I.A. 1983) (“The harm or suffering need not [only] be physical”), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985).

27. See *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985) (“[T]he statutory term ‘persecution’ includes more than just restrictions on life and liberty”).

28. See, e.g., *Vladimirova v. Ashcroft*, 377 F.3d 690, 696 (7th Cir. 2004) (“The physical violence suffered by petitioner—a beating so severe that it caused a miscarriage—certainly . . . qualifies as proof of past persecution.”).

29. See, e.g., *In re S—P—*, 21 I. & N. Dec. 486, 495–96 (B.I.A. 1996) (finding persecution in case of detention, interrogation, and torture); *In re Acosta*, 19 I. & N. Dec. 211, 222 n.9 (B.I.A. 1985) (discussing meaning of persecution; noting that “[t]he harm or suffering inflicted could consist of confinement or torture”), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

30. See, e.g., *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 35 (2d Cir. 1994) (holding that death threats by Shining Path guerrillas in Peru constituted persecution).

31. See, e.g., *Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991) (holding that “non-life-threatening violence and physical abuse” may constitute persecution).

32. See *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (concluding that “mental or

Courts have held that female genital mutilation is extreme physical harm and that the future threat of it constitutes persecution of the applicant.³³ In *In re Kasinga*,³⁴ the Board of Immigration Appeals (BIA) granted asylum to a nineteen-year-old applicant who feared that she would be forced to undergo genital mutilation if removed to her home country of Togo.³⁵ In determining that the fear of female genital mutilation qualifies as persecution, the BIA reasoned that a “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”³⁶ No court has abrogated the BIA’s holding in *Kasinga*; the few courts of appeals that have considered the same question have favorably cited the *Kasinga* board’s holding.³⁷

Mental suffering may also contribute to a finding of persecution,³⁸ but only where it is accompanied by physical harm or a threat of physical harm.³⁹ Where the BIA has relied on mental suffering in its persecution determination, it has found mental harm to be a critical, but not conclusive, aspect of the persecution.⁴⁰ The mental harm must be severe in order to contribute to an asylum claim,⁴¹ and it must be accompanied

emotional injury may *in part* constitute persecution”) (emphasis added); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 215 (3d ed. 1999) (stating that mental harm can be “main element” of finding of persecution for asylum purposes) (emphasis added).

33. See *Mohammed v. Gonzales*, No. 03-70803, slip op. 3063, 3068 n.2 (9th Cir. Mar. 10, 2005); *Toure v. Ashcroft*, No. 03-1706, 2005 WL 247942, at *6 n.4 (1st Cir. Feb. 3, 2005); *In re Kasinga*, 21 I. & N. Dec. 357, 368 (B.I.A. 1996).

34. 21 I. & N. Dec. 357 (B.I.A. 1996).

35. *Id.* at 358.

36. *Id.* at 365.

37. See *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1018–19 (9th Cir. 2004); *Nwaokolo v. INS*, 314 F.3d 303, 309 (7th Cir. 2002).

38. See *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (finding that “mental or emotional injury may *in part* constitute persecution”) (emphasis added); ANKER, *supra* note 32, at 215 (stating that mental harm can be “main element” of finding of persecution for asylum purposes).

39. See *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (determining that, where people of opposing political viewpoint forced entry into applicant’s home, beat his father, and threatened—but did not physically harm—applicant if he refused to join their cause, applicant was persecuted, but upholding denial of asylum because of lack of nexus to statutory ground); *In re S—P—*, 21 I. & N. Dec. 486, 488 n.1 (B.I.A. 1996) (holding that mental abuses, six-month detention, beatings, and other physical harm constituted persecution). Certain mental harm may, alone, allow an applicant to apply for relief under the Convention Against Torture (CAT). See 8 C.F.R. § 208.18 (2004). However, the CAT is inapposite to this Note’s analysis.

40. See, e.g., *S—P—*, 21 I. & N. Dec. at 488 n.1 (noting mental abuses, along with six-month detention, beatings, and other physical harm, constituted persecution); *In re B—*, 21 I. & N. Dec. 66, 72 (B.I.A. 1995) (holding that combination of psychological and physical abuse, including torture and food deprivation, established persecution).

41. ANKER, *supra* note 32, at 214.

by actual or threatened physical harm.⁴² For example, in *Lopez-Galarza v. INS*,⁴³ the United States Court of Appeals for the Ninth Circuit found that the petitioner, who was raped by Nicaraguan Sandinistas while imprisoned, had been persecuted.⁴⁴ In its holding, the court emphasized the “severe and long-lasting psychological” harms associated with rape.⁴⁵ Although the court considered mental suffering to be central to the persecution determination,⁴⁶ the underlying harm was a physical one: rape. Similarly, in *In re O—Z— & I—Z—*,⁴⁷ the BIA considered the mental suffering caused by beatings and humiliations of the applicant’s son as an element of the applicant’s persecution.⁴⁸ However, the applicant also suffered repeated beatings,⁴⁹ which provided the underlying physical harm normally required in cases where the applicant’s persecution is based, in part, on mental suffering.⁵⁰ In contrast, the applicant persecuted in *Sangha v. INS*⁵¹ was not physically harmed by his persecutors.⁵² However, he was threatened with physical harm if he refused to join the persecutors’ political movement.⁵³

B. According to INA § 101(a)(42)(A), an Applicant’s Fear of Persecution Must Be Well-Founded

To establish eligibility for asylum based on a well-founded fear of

42. See, e.g., *Sangha*, 103 F.3d at 1487 (determining that, where people of opposing political viewpoint forced entry into applicant’s home, beat his father, and threatened applicant if he refused to join their cause, applicant was persecuted); *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (finding past persecution because of “severe and long-lasting” psychological harms associated with applicant’s treatment while imprisoned, including rape); *In re O—Z— & I—Z—*, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998) (considering mental suffering caused by beatings and humiliations of applicant’s son as element of applicant father’s persecution, where father also suffered repeated beatings and received multiple handwritten threats).

43. 99 F.3d 954 (9th Cir. 1996).

44. *Id.* at 962.

45. *Id.*

46. See *id.* at 962–63.

47. 22 I. & N. Dec. 23 (B.I.A. 1998).

48. *Id.* at 25–26.

49. *Id.*

50. See *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (finding that “mental or emotional injury may *in part* constitute persecution”) (emphasis added); ANKER, *supra* note 32, at 215 (stating that mental harm can be “main element” of finding of persecution for asylum purposes).

51. 103 F.3d 1482 (9th Cir. 1997).

52. *Id.* at 1487.

53. *Id.*

persecution, an applicant must show that there is a reasonable possibility of suffering persecution upon returning to the applicant's home country.⁵⁴ In *In re Mogharrabi*,⁵⁵ the BIA noted that an applicant for asylum has a well-founded fear of persecution if a reasonable person in the applicant's circumstances would fear persecution.⁵⁶ Furthermore, circuit courts have held that an applicant's fear "must be both subjectively genuine and objectively reasonable."⁵⁷ An applicant can show a subjectively genuine fear by demonstrating an unfeigned fear of persecution⁵⁸ that serves as the primary motivation for requesting refuge in the United States.⁵⁹ In order to be objectively reasonable, an applicant's fear must have some basis in reality; apprehension grounded in fantasy will not suffice.⁶⁰ However, persecution does not have to be a certainty; at least one court has found that an applicant who faces as little as a one-in-ten chance of persecution can establish an objectively reasonable, well-founded fear of persecution.⁶¹

In addition, the well-founded fear standard is future-oriented,⁶² aimed at protecting noncitizens from future persecution. To establish a well-founded fear of persecution, an applicant must either make a showing of past persecution, as evidence that future persecution is likely, or satisfy one of three tests for applicants lacking past persecution.⁶³ These three tests require a showing that either: (1) the applicant has been targeted for

54. 8 C.F.R. § 208.13(b)(2)(i)(B) (2004).

55. 19 I. & N. Dec. 439 (B.I.A. 1987).

56. *Id.* at 445.

57. Ghaly v. INS, 58 F.3d 1425, 1428 (9th Cir. 1995); *accord* Zubeda v. Ashcroft, 333 F.3d 463, 469 (3d Cir. 2003) (stating that "the 'well-founded fear of persecution' that an alien must demonstrate involves both a *subjectively* genuine fear of persecution and an *objectively* reasonable possibility of persecution") (emphasis in original).

58. *See In re Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. at 446.

59. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL 29 (1994).

60. *See* Blanco-Comarribas v. INS, 830 F.2d 1039, 1042 (9th Cir. 1987).

61. *See* Montecino v. INS, 915 F.2d 518, 520 (9th Cir. 1990) (suggesting that fear is well-founded when applicant, "on the basis of objective circumstances personally known to him, believes that he has at least a one in ten chance of being killed by the guerrillas"); *see also* Martirosyan v. INS, 229 F.3d 903, 909 (9th Cir. 2000) (applying *Montecino* standard). The one-in-ten standard appears to be the most liberal well-founded fear standard put forth. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 976 (3d ed. 2002).

62. ANKER, *supra* note 32, at 32.

63. *Id.* at 33.

future persecution;⁶⁴ (2) persons similarly situated to the applicant have been or are being persecuted,⁶⁵ or (3) the applicant has a well-founded fear of future persecution under the “totality of the circumstances.”⁶⁶

In sum, applicants must establish that they meet the requirements of INA § 101(a)(42)(A) in order to be granted asylum. The “persecution” requirement imposes a heavy burden for an applicant to satisfy. Additionally, an applicant must demonstrate that there is a reasonable possibility that he or she will suffer the persecution feared upon returning to the applicant’s home country.

II. IN SOME CIRCUMSTANCES, APPLICANTS MAY BASE ASYLUM CLAIMS ON HARM TO FAMILY MEMBERS

Although the INA explicitly provides derivative asylum to spouses or children of persons granted asylum, it does not extend this privilege to parents or other family members of the person granted asylum.⁶⁷ In the absence of derivative asylum, an applicant, in certain circumstances, may nevertheless be able to satisfy the “well-founded fear of persecution” requirement through a showing of harm to a member of the applicant’s family.⁶⁸ In general, harm to a family member will not rise to the level of persecution of the applicant unless there is some indication that the harm to the family member will lead to future harm to the applicant.⁶⁹ However, courts have made an exception to this required

64. See, e.g., *Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994) (concluding that evidence that soldiers had been searching for Armenian Christian petitioner, along with State Department report stating that membership in Armenian Christian minority in Iran creates presumption of asylum eligibility, may be sufficient to establish well-founded fear); *Carcamo-Flores v. INS*, 805 F.2d 60, 62 (2d Cir. 1986) (concluding that participation in strike, murder of petitioner’s labor-organizing father by government, and warning by friend in labor ministry may suffice to establish well-founded fear).

65. 8 C.F.R. § 208.13(b)(2)(iii)(A) (2004).

66. ANKER, *supra* note 32, at 34.

67. See 8 U.S.C. § 1158(b)(3)(A) (2000).

68. See *Al Ayed v. INS*, No. 98-70142, 1999 WL 851452, at *2 (9th Cir. Oct. 8, 1999) (recognizing that “[e]vidence of harm to a family member may support a finding of persecution or a well-founded fear of persecution”).

69. See, e.g., *Shoaira v. Ashcroft*, 377 F.3d 837, 845 (8th Cir. 2004) (concluding that “[t]o succeed in [a] claim of derivative persecution, the [petitioner] must show a pattern of persecution closely tied to the petitioner”) (citations omitted); *Baballah v. Ashcroft*, 335 F.3d 981, 988 (9th Cir. 2003) (“Violence directed against an applicant’s family members provides support for a claim of persecution and in some instances is sufficient to establish persecution because such evidence ‘may well show that [an applicant’s] fear . . . of persecution is well founded.’”) (quoting OFFICE OF THE

showing when the applicant's spouse is harmed due to coercive family planning policies.⁷⁰ Only recently have courts begun to address whether asylum may be granted based on an applicant's fear of genital mutilation of the applicant's daughter. The circuit courts have generally disallowed asylum claims based on such a fear.⁷¹ The immigration courts, however, are in disagreement on the issue.⁷²

A. Harm to Family Members That Suggests Future Harm to the Applicant May Establish a Well-Founded Fear of Persecution

The circumstances under which asylum claims may be based on harm to an applicant's family member follow one general rule: the harm to the family member somehow indicates a probability that the applicant will become the victim of future persecution.⁷³ Various scenarios can establish this probability. For example, the applicant may establish persecution if a persecutor harmed the applicant's family member in order to persecute the applicant.⁷⁴ An applicant may also demonstrate a well-founded fear in circumstances where the persecutor mistakenly harmed the family member when intending to harm the applicant.⁷⁵ Moreover, where the applicant's family is itself the target of the

UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 43 (rev. 1992)); *Ciorba v. Ashcroft*, 323 F.3d 539, 545 (7th Cir. 2003) (stating that to show derivative persecution, applicant must "show that her family's political opinions have been imputed to her and that she has suffered or will suffer persecution as a result").

70. See *In re C—Y—Z—*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (en banc).

71. See *infra* Part II.B.

72. See *infra* Part II.B.

73. See, e.g., *Shoaira*, 377 F.3d at 845 (concluding that "[t]o succeed in [a] claim of derivative persecution, the [petitioner] must show a pattern of persecution closely tied to the petitioner") (citations omitted); *Baballah*, 335 F.3d at 988 ("Violence directed against an applicant's family members provides support for a claim of persecution and in some instances is sufficient to establish persecution because such evidence 'may well show that [applicant's] fear . . . of persecution is well founded.") (quoting HANDBOOK, *supra* note 69, at ¶ 43); *Ciorba*, 323 F.3d at 545 (stating that to show derivative persecution, applicant must "show that her family's political opinions have been imputed to her and that she has suffered or will suffer persecution as a result").

74. See, e.g., *Carrasco-Humanani v. INS*, 18 Fed. Appx. 607, 608–09 (9th Cir. 2001) (holding applicant was not refugee because he could not establish that he was intended target of murders of his uncle and cousin); *Meza-Manay v. INS*, 139 F.3d 759, 761–64 (9th Cir. 1998) (finding applicant was intended target of terrorist group Shining Path in Peru where group threatened applicant and her husband, bombed husband's car, shot at husband, attempted to kidnap her children, and bombed in-laws' home).

75. See, e.g., *Lopez-Carrillo v. INS*, No. 97-70463, 1998 WL 19630, at *1 (9th Cir. Jan. 12, 1998) (holding that applicant failed to establish he was refugee because he lacked direct and specific evidence that his brother's murderers had intended to kill applicant instead of applicant's brother).

persecution, an applicant may have a well-founded fear of such persecution.⁷⁶

Courts make one exception to the general rule when one spouse suffers harm under a government's coercive population control policies.⁷⁷ In *In re C—Y—Z—*,⁷⁸ the BIA held that a husband established a well-founded fear of persecution based on the forced sterilization of his wife.⁷⁹ The BIA pointed to an Immigration and Naturalization Service (INS)⁸⁰ memorandum, which conceded that “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”⁸¹ The BIA further noted that while the case was pending, Congress amended INA § 101(a)(42)(A) to codify coercive population control programs as a valid ground for asylum for couples.⁸² Relying on the amendment of INA § 101(a)(42)(A) and the government's concession, the BIA concluded that the applicant established past persecution.⁸³ Subsequent circuit court decisions have reinforced the notion that a spouse may establish persecution based on coercive population control procedures performed on the other spouse.⁸⁴ However, courts have not extended this exception beyond the context of

76. See *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (granting asylum petition and noting “it should now be clear that a pattern of persecution targeting a given family . . . supports a well-founded fear of persecution by its surviving members”).

77. See *In re C—Y—Z—*, 21 I. & N. Dec. 915, 918–19 (B.I.A. 1997) (en banc).

78. 21 I. & N. Dec. 915 (B.I.A. 1997) (en banc).

79. *Id.* at 918.

80. The former INS is now the United States Citizenship and Immigration Service.

81. *C—Y—Z—*, 21 I. & N. Dec. at 918 (internal quotation marks omitted).

82. *Id.* at 917. The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) amended INA § 101(a)(42)(A) by adding the following: “For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure . . . shall be deemed to have been persecuted on account of political opinion” IIRIRA, Pub. L. No. 104-208, § 601(a), 110 Stat. 3009, 3009–689; see also H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (“Couples with unauthorized children are subjected to excessive fines, and sometimes their homes and possessions are destroyed.”).

83. *C—Y—Z—*, 21 I. & N. Dec. at 919.

84. See, e.g., *Chen v. Ashcroft*, 381 F.3d 221, 226 (3d Cir. 2004) (“[P]erforming a forced abortion or sterilization procedure on one spouse constitutes persecution of the other spouse because of the impact on the latter's ability to reproduce and raise children.”); *Lin v. Ashcroft*, 356 F.3d 1027, 1041 (9th Cir. 2004) (holding that forced sterilization of wife could be “imputed” to her husband, “whose reproductive opportunities law considers to be bound up with those of wife”); *Qiu v. Ashcroft*, 329 F.3d 140, 144–45 (2d Cir. 2003) (recognizing that petitioner may assert claim of persecution on basis of wife's forced sterilization).

coercive population control policies imposed on couples.⁸⁵ Some courts have expressly declined to apply such a rule to parent-child relationships.⁸⁶

B. Most Courts Hold that a Parent's Asylum Claim May Not Be Based Exclusively on the Genital Mutilation of a Daughter

Little statutory support exists for parents applying for asylum based on harm to their children, even where such harm rises to the level of persecution of the children. The INA provides spouses and children of asylees with derivative asylum, which automatically qualifies them for asylum based on their relationship to the asylee.⁸⁷ However, no similar provision exists for parents of asylees.⁸⁸ Therefore, to qualify for asylum, parents of asylees must independently show a well-founded fear of persecution.⁸⁹

In recent years, federal courts of appeals have addressed the issue of whether a parent may qualify for asylum based on a fear that his or her daughter would undergo genital mutilation if she were to return with the mother to the parent's home country.⁹⁰ With the exception of the Sixth Circuit, the circuit courts of appeals have held that parents do not qualify for asylum based solely on a fear that their daughters will face genital mutilation upon return to their home country.⁹¹ In *Oforji v. Ashcroft*,⁹²

85. *Chen*, 381 F.3d at 222 (concluding that *C—Y—Z* holding applied to Chinese couples who were not legally married but were subject to that country's coercive population control policies); *Ma v. Ashcroft*, 361 F.3d 553, 554 (9th Cir. 2004) (same).

86. *See, e.g., Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (holding that a "parent . . . may not establish a . . . claim for asylum by pointing to potential hardship to the alien's United States citizen child"); *Argueta-Rodriguez v. INS*, No. 95-2367, 1997 WL 693064, at *1, *3, *6 (4th Cir. Oct. 29, 1997) (upholding, based on lack of well-founded fear of persecution, denial of asylum to child who witnessed burning of her village and her family during massacre).

87. *See* 8 U.S.C. § 1158(b)(3)(A) (2000).

88. *See id.*

89. *See id.* § 1101(a)(42)(A).

90. *See, e.g., Olowo v. Ashcroft*, 368 F.3d 692, 697–98 (7th Cir. 2004) (considering whether mother qualified for asylum because her two daughters might undergo female genital mutilation if they returned to mother's home country); *Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

91. *See Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (denying asylum to mother notwithstanding the risk that her daughters may undergo female genital mutilation if they were to return to mother's home country); *Abebe*, 379 F.3d at 759 (denying a petition for review by parents whose daughter was at risk of undergoing genital mutilation in the parents' home country); *Osigwe*, 77 Fed. Appx. at 235 (holding that noncitizen parents are not eligible for asylum based exclusively on daughter's risk of undergoing genital mutilation).

the United States Court of Appeals for the Seventh Circuit considered whether Doris C. Oforji, a Nigerian citizen, could qualify for asylum because her two U.S. citizen daughters might be forced to undergo genital mutilation if she returned to Nigeria with them.⁹³ The *Oforji* court acknowledged the difficult choice that Oforji would face if the court denied her asylum: either desert her daughters in the United States or bring them back to Nigeria, where they may face genital mutilation.⁹⁴ Nonetheless, the court affirmed the denial of Oforji's asylum application, and held that a parent may not establish a claim for asylum based on potential persecution of the applicant's U.S. citizen children.⁹⁵ In a case with similar facts, the Seventh Circuit denied asylum to a mother who feared that her legal permanent resident daughters would be subjected to genital mutilation if they returned with her to Nigeria.⁹⁶ The court noted that "current immigration laws do not allow an [immigration judge] to factor in potential hardship to a petitioner's lawful resident or citizen family members when considering an asylum claim."⁹⁷

Other circuit courts have followed the Seventh Circuit's lead and denied asylum to parents of children who face the possibility of female genital mutilation upon return to their home country.⁹⁸ In *Abebe v. Ashcroft*,⁹⁹ the Ninth Circuit denied a petition for review by parents whose eight-year-old daughter was in danger of undergoing genital mutilation in the parents' home country. The court noted that the threat of persecution was to the daughter, and not to the parents.¹⁰⁰ Likewise, in an unpublished opinion of a case with similar facts, the United States Court of Appeals for the Fifth Circuit held that noncitizen parents "are not eligible for asylum under the general asylum provisions based solely on their daughter's risk of being subject[ed] to [female genital mutilation] if she is returned to Nigeria."¹⁰¹

In contrast to the circuit courts, the BIA and the immigration courts

92. 354 F.3d 609 (7th Cir. 2003).

93. *Id.* at 612.

94. *Id.* at 617.

95. *Id.* at 618.

96. *Olowo*, 368 F.3d at 697–98, 704–05.

97. *Id.* at 701 n.2.

98. *See Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

99. 379 F.3d 755 (9th Cir. 2004).

100. *See id.* at 759.

101. *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

offer conflicting guidance about whether a mother may base her asylum claim on a fear that her daughter may undergo genital mutilation in the mother's home country. In *In re Anonymous*,¹⁰² a U.S. Immigration Court judge denied asylum to a mother who feared that her daughters—at least one of whom would be constructively removed along with her mother if she was not granted asylum¹⁰³—would be forced to undergo genital mutilation upon returning to her home country of Sierra Leone.¹⁰⁴ There, the immigration judge held that, even though “the [c]ourt empathizes with the fears and concerns expressed by respondent, the fear of [genital mutilation] to her daughters upon their return to Sierra Leone is not persecution under the [INA].”¹⁰⁵

On the other hand, three administrative decisions have reached results contrary to those in *Anonymous*.¹⁰⁶ However, unlike *Anonymous*, none of the decisions applied the standard established in INA § 101(a)(42)(A).¹⁰⁷ In *In re Oluloro*,¹⁰⁸ the immigration judge granted suspension of deportation to the applicant because the risk that her U.S.-born daughters would be subjected to genital mutilation posed an “extreme hardship” to the daughters.¹⁰⁹ The suspension of deportation standard used in *Oluloro*, unlike the standard applied in asylum cases, allowed the U.S. Attorney General to grant legal permanent resident status to removable noncitizens who met certain minimal criteria.¹¹⁰ In one case cited by the

102. *In re Matter of* [Apr. 28, 1995] (Dep't Justice), available at <http://sierra.uchastings.edu/cgrs/law/ij/40.pdf> [hereinafter *Anonymous*].

103. At the time of the immigration court hearing, the respondent mother had been in the United States for five years, and her eldest daughter was thirteen years old. *See id.* at 1–2. This indicates that the daughter could not have been born a U.S. citizen, and she would presumably face constructive removal alongside her mother.

104. *Id.* at 12.

105. *Id.*

106. Those decisions are: *In re Oluloro*, No. A72 147 491 (Dep't Justice Mar. 23, 1994); *In re Adeniji*, No. A41 542 131 (Dept. Justice Mar. 10, 1998) (cited in *Abay v. Ashcroft*, 368 F.3d 634, 641–42 (6th Cir. 2004)); and *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001).

107. *See Oluloro*, No. A72 147 491, at 17 (applying suspension of deportation); *Abay*, 368 F.3d at 641–42 (noting that court in *Adeniji*, No. A41 542 131, applied the withholding of removal standard); *Dibba*, No. A73 541 857, at 2 (applying the reopen standard).

108. No. A72 147 491 (Dep't Justice Mar. 23, 1994).

109. *Id.* at 17.

110. *See id.* These criteria are codified at 8 U.S.C. § 1229b(b)(1) (2000). To meet these criteria at the time of the *Oluloro* case, applicants must have: (1) been continually present in the United States for seven years; (2) been of good moral character; (3) not been convicted of certain offenses; and (4) established that removal would result in exceptional and extremely unusual hardship to the noncitizen's parent, child, or spouse who was a U.S. citizen or lawfully admitted for permanent residence. *Oluloro*, No. A72 147 491, at 14. Congress amended this statute in 1996 as part of

Abay court, *In re Adeniji*,¹¹¹ the immigration judge granted relief to a father under a different standard— withholding of removal¹¹²—because his U.S. citizen daughters would likely be subject to genital mutilation.¹¹³ The third administrative decision that reached a result contrary to that in *Anonymous* under a standard other than asylum was the BIA’s decision in *In re Dibba*.¹¹⁴ There, the BIA granted a motion to reopen an application for asylum¹¹⁵ to a mother who feared that her daughters would be subjected to genital mutilation if they returned with her to The Gambia.¹¹⁶

In sum, although applicants may show a well-founded fear of persecution based on harm to family members, the circumstances under which they may do so are very limited. Applying the requirements of INA § 101(a)(42)(A), circuit courts of appeals have generally held that parents are not eligible for asylum based exclusively on a fear of genital mutilation of a daughter. Despite this authority, immigration courts have reached varying conclusions.

IIRIRA, Pub. L. No. 104-208, sec. 304, § 240A, 110 Stat. 3009-594 (1996). Consequently, the form of relief formerly known as suspension of deportation is now called cancellation of removal. LEGOMSKY, *supra* note 61, at 579. Additionally, applicants must now reside in the United States continuously for ten years instead of seven. *Id.* at 581. Furthermore, under the former suspension of deportation, harm to the applicant gave rise to a colorable claim for relief. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214-16 (1952). In contrast, the new cancellation of removal only provides relief when the harm is to the applicant’s spouse, parent, or child. LEGOMSKY, *supra* note 61, at 584.

111. *Abay*, 368 F.3d at 641-42 (citing *Adeniji*, No. A41 542 131).

112. *Id.* Under the INA, “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion,” subject to certain exceptions enumerated in the statute. 8 U.S.C. § 1231(b)(3)(A)-(B) (2000). Unlike asylum applicants, applicants who meet the elements of withholding of removal are automatically granted relief. *Id.* The standard applied under withholding of removal is whether it is more likely than not the noncitizen would be persecuted upon return to the country. *See INS v. Stevic*, 467 U.S. 407, 424 (1984).

113. *Abay*, 368 F.3d at 641-24 (citing *Adeniji*, No. A41 542 131).

114. No. A73 541 857 (B.I.A. Nov. 23, 2001) (decision on motion to reopen).

115. In order to prevail on a motion to reopen to apply for asylum, the applicant must make a prima facie showing of eligibility for asylum. *See INS v. Abudu*, 485 U.S. 94, 97 (1988); *Guo v. Ashcroft*, 386 F.3d 556, 563 (3d Cir. 2004); *Reyes v. INS*, 673 F.2d 1087, 1089 (9th Cir. 1992); *see also Oforji v. Ashcroft*, 354 F.3d 609, 616 (7th Cir. 2004) (stating that, in order to prevail on a motion to reopen removal proceedings, “appellant needed to show to this court ‘some’ likelihood of success on the merits, part of a relatively low standard of review”).

116. *Dibba*, No. A73 541 857, at 2. Applying the prima facie standard, the BIA granted *Dibba*’s motion to reopen an asylum application, even though she “ha[d] not fully demonstrated that she would be forced to allow the mutilation of her daughter against her will.” *Id.*

III. THE SIXTH CIRCUIT GRANTED ASYLUM TO A MOTHER WHO FEARED HER DAUGHTER'S GENITAL MUTILATION

In *Abay v. Ashcroft*, the Sixth Circuit considered whether a mother and her daughter qualified for asylum based on their fear that the daughter would be subjected to genital mutilation if they returned to their native country.¹¹⁷ The court first granted the daughter refugee status because she possessed a well-founded fear of persecution based on her fear of undergoing genital mutilation.¹¹⁸ The court then held that the mother was independently eligible for asylum based on what it termed a “governing principle in favor of refugee status” for parents whose child may face grave harm if the child were to return to the parent’s home country.¹¹⁹

Yayeshwork Abay and her seventeen-year-old daughter, Burhan Amare, were citizens of Ethiopia.¹²⁰ They lawfully entered the United States on tourist visas and subsequently applied for asylum.¹²¹ Amare based her asylum application on her fear that she would be subjected to genital mutilation at the hands of her relatives and her future in-laws if she returned to Ethiopia.¹²² Her mother, Abay, based her asylum claim on, inter alia, her own fear that her daughter would be subjected to genital mutilation in Ethiopia.¹²³ Specifically, she argued that the genital mutilation of her daughter “and its consequences would cause [Abay] mental suffering sufficient to constitute persecution.”¹²⁴ The immigration judge denied both Abay’s and Amare’s claims for asylum,¹²⁵ and the BIA affirmed without opinion.¹²⁶ Abay and Amare appealed their claims to the Sixth Circuit,¹²⁷ which reversed the BIA’s

117. *Abay*, 368 F.3d at 635–36.

118. *Id.* at 640.

119. *Id.* at 642.

120. *Id.* at 635, 644.

121. *See id.* at 636.

122. *Id.* at 636.

123. *Id.* at 636, 640–41. Abay also claimed to have been persecuted in the past on account of her Amhara ethnicity, her Pentecostal Christian religious practice, and her membership in the All Amhara People’s Organization. *Id.* at 636. The Sixth Circuit made no findings as to whether these claims were sufficient to establish asylum eligibility for Abay. *See id.* at 640–42.

124. *Id.* at 642.

125. *See id.* at 639–41.

126. *Id.* at 635–36.

127. *See id.* at 636.

denial of both claims.¹²⁸

The Sixth Circuit based its reversal of Abay's denial on what it called a "governing principle" in favor of granting refugee status to mothers like Abay.¹²⁹ The court drew this governing principle from a handful of administrative decisions. First, the court turned to *In re C—Y—Z—*, in which the BIA granted asylum to a husband based on his wife's forced sterilization by the Chinese government.¹³⁰ Next, the court noted that immigration judges had twice granted relief other than asylum to parents who feared that their daughters would be subject to genital mutilation should they return to the parents' country of origin.¹³¹ In those cases, *In re Adeniji* and *In re Oluloro*, the immigration judges granted withholding of removal and suspension of deportation, respectively, to the parents in each case.¹³² The final decision on which the *Abay* court relied was *In re Dibba*, in which the BIA granted a motion to reopen an asylum application to a mother based on her fear that her U.S. citizen daughter would be subjected to genital mutilation upon returning to the family's home country.¹³³

Relying on these administrative decisions, the Sixth Circuit reversed the BIA's denial of Amare's and Abay's asylum claims.¹³⁴ The court held that Amare was a refugee because of her fear of undergoing genital mutilation in Ethiopia.¹³⁵ With respect to Abay, it held that "a rational factfinder would be *compelled* to find that Abay's fear of taking her daughter [to] . . . Ethiopia" and being forced to witness her daughter's pain and suffering from genital mutilation was well-founded, and that Abay was, therefore, a refugee.¹³⁶

128. *Id.* at 642–43.

129. *Id.* at 642.

130. *Id.* at 641 (citing *In re C—Y—Z—*, 21 I. & N. Dec. 915, 919–20 (B.I.A. 1997)); *supra* notes 77–83 and accompanying text (summarizing *C—Y—Z—* decision).

131. *Abay*, 368 F.3d at 641–42.

132. *See id.* (citing *In re Adeniji*, No. A41 542 131 (Dep't Justice Mar. 10, 1998)); *In re Oluloro*, No. A72 147 491 (Dep't Justice Mar. 23, 1994); *see also supra* notes 107–13 (summarizing *Adeniji* and *Oluloro* decisions).

133. *In re Dibba*, No. A73 541 857, at 1–3 (B.I.A. Nov. 23, 2001) (decision on motion to reopen).

134. *See Abay*, 368 F.3d at 642–43.

135. *Id.* at 640.

136. *Id.* at 642 (emphasis added).

IV. THE SIXTH CIRCUIT ERRED IN HOLDING THAT ABAY QUALIFIED AS A REFUGEE UNDER INA § 101(a)(42)(A)

The Sixth Circuit improperly expanded the scope of asylum when it held that a mother, Abay, was independently eligible for asylum based exclusively on her fear that her daughter, Amare, would be subjected to female genital mutilation. To support its decision, the court relied on a “governing principle” in favor of granting refugee status to applicants in Abay’s position.¹³⁷ However, the authorities cited by the court do not support the existence of such a “governing principle.”¹³⁸ The court instead should have applied the statutory definition of refugee found in INA § 101(a)(42)(A). Under this definition, harm to a daughter, even where such harm rises to the level of persecution to the daughter, would not, by itself, constitute persecution to the mother.¹³⁹ Yet, even if such harm did constitute persecution to Abay, her fear of persecution was not well-founded because her daughter was entitled to remain safely in the United States.¹⁴⁰

A. *There Is No “Governing Principle” in Favor of Granting Refugee Status to Mothers Like Abay*

The *Abay* court’s “governing principle” is not supported by case law. The assertion that there is a “governing principle” in favor of granting refugee status to mothers like Abay suggests some kind of consensus among authorities on the matter. However, the decisions cited by the court do not collectively create a “governing principle.” *In re C—Y—Z—* is distinguishable on its facts, and only one of the remaining administrative decisions cited by the *Abay* court involves a standard as stringent as that for asylum.¹⁴¹ Further, there is circuit court and immigration court authority contrary to the Sixth Circuit’s “governing principle.”¹⁴²

137. *Id.*

138. *See infra* Part IV.A (discussing lack of “governing principle” in favor of granting refugee status to mothers like Abay).

139. *See infra* Part IV.B (applying INA’s definition of asylum to Abay and concluding she did not fit statutory requirements).

140. *See Abay*, 368 F.3d at 640; *supra* note 18.

141. *Id.* (citing *In re Adeniji*, No. A41 542 131 (Dep’t Justice Mar. 10, 1998) (granting application for withholding of removal to noncitizen father because U.S. citizen daughters might be forced to undergo genital mutilation if they returned with father to family’s home country)).

142. *See Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (denying asylum to mother

The *Abay* court inappropriately relied on *C—Y—Z—* because that case merely created a very narrow exception to the requirement that the applicant be the victim of persecution where there has been forced sterilization of a spouse.¹⁴³ The difference between the facts of *C—Y—Z—* and those of *Abay* is material in two ways. First, precluding a wife from bearing and raising children similarly precludes her husband.¹⁴⁴ In contrast, performing genital mutilation on a daughter does not have the same sort of direct effect on her mother.¹⁴⁵ Because the mother does not similarly suffer mutilation with her daughter, the mother's situation is not analogous to the situation of the husband, who becomes a victim of persecution when his wife is subjected to coercive population control policies. Second, the *C—Y—Z—* board's holding is supported by Congress's goal in passing the amendments to the INA regarding coercive population control policies: to provide relief for persecuted "couples."¹⁴⁶ No analogous provision exists stating that one of the INA's purposes is to keep asylee children together with their noncitizen parents.¹⁴⁷

Of the three remaining administrative decisions cited by the *Abay*

notwithstanding the risk that her daughters may undergo female genital mutilation if they were to return to mother's home country); *Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004) (denying a petition for review by parents whose daughter was at risk of undergoing genital mutilation in the parents' home country); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003) (holding that noncitizen parents are not eligible for asylum based exclusively on daughter's risk of undergoing genital mutilation); *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001); *In re Oluloro*, No. A72 147 491 (Dep't Justice Mar. 23, 1994).

143. See *Abay*, 368 F.3d at 641; *In re C—Y—Z—*, 21 I. & N. Dec. 915, 917–18 (B.I.A. 1997) (en banc) (holding that applicant established eligibility for asylum by virtue of his wife's forced sterilization).

144. See *Chen v. Ashcroft*, 381 F.3d 221, 226 (3d Cir. 2004); *Lin v. Ashcroft*, 356 F.3d 1027, 1041 (9th Cir. 2004).

145. Compare *Chen*, 381 F.3d at 226 (“[P]erforming a forced abortion or sterilization procedure on one spouse constitutes persecution of the other spouse because of the impact on the latter's ability to reproduce and raise children.”), and *Lin*, 356 F.3d at 1041 (noting that forced sterilization of wife could be “imputed” to her husband, “whose reproductive opportunities the law considers to be bound up with those of his wife”), with *Abebe*, 379 F.3d at 759 (holding that mother may not apply for asylum based on potential genital mutilation of her daughter), and *Oforji*, 354 F.3d at 618 (holding that a “parent . . . may not establish a derivative claim for asylum by pointing to potential hardship to the alien's United States citizen child”).

146. See H.R. REP. NO. 104-469, pt. 1, at 174 (1996); see also *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (noting that reason for decision in *C—Y—Z—* was “to fulfill Congress's goal in passing the amendments—to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy”).

147. This stands in contrast to the INA's express provision for the reunification of asylee parents and their noncitizen children. See 8 U.S.C. § 1158(b)(3)(A) (2000).

court, two were decided under less stringent standards of review than the standard applied in asylum cases.¹⁴⁸ In *In re Oluloro*, the immigration judge granted suspension of deportation to a mother who feared the risk of genital mutilation to her U.S.-born daughters.¹⁴⁹ INA § 240A(b)(1) provides for this remedy, now called cancellation of removal, where certain basic criteria are met and removal would result in hardship to the noncitizen's U.S. citizen child.¹⁵⁰ Abay, on the other hand, applied for asylum under INA § 101(a)(42)(A), which does not allow derivative relief for parents based on potential harm to their children.¹⁵¹ *Oluloro* was, therefore, inapposite.

Similarly, the BIA's decision in *In re Dibba*, which allowed the applicant to reopen her case to apply for asylum,¹⁵² lends little support to the "governing principle" fabricated by the *Abay* court. A decision to reopen a case is not tantamount to granting the relief for which the case was reopened. To reopen a case, the moving party needs only to show "some likelihood of success on the merits, part of a relatively low standard of review."¹⁵³ Thus, the Sixth Circuit's reliance on *Dibba* is misplaced because it was decided under a lower standard.

The *Abay* court declined to mention, much less distinguish, administrative authority that conflicts with its "governing principle."¹⁵⁴ To support its principle, the court pointed out that, in *In re Adeniji*, the immigration court granted withholding of removal to a father because of his fear that, should he be removed, his U.S. citizen daughters would return with him to Nigeria and be forced to undergo genital mutilation.¹⁵⁵ However, in *In re Anonymous*, the immigration court denied the mother's asylum application under similar circumstances. There, the applicant mother claimed to have a well-founded fear that her daughter would be subjected to genital mutilation upon returning to their

148. See generally *In re Dibba*, No. A73 541 857 (B.I.A. Nov. 23, 2001) (applying application to reopen standard); *In re Oluloro*, No. A72 147 491 (Dep't Justice Mar. 23, 1994) (applying suspension of deportation standard).

149. *Oluloro*, No. A72 147 491, at 14–18.

150. See 8 U.S.C. § 1229b(b)(1).

151. See *id.* § 1158(b)(3)(A) (establishing derivative asylum only for spouses and children of asylees that qualify under INA § 101(a)(42)(A)).

152. *Dibba*, No. A73 541 857, at **2–3.

153. *Oforji v. Ashcroft*, 354 F.3d 609, 616 (7th Cir. 2003) (internal quotation marks omitted).

154. See *Anonymous*, at 2, 12 (Dep't Justice Apr. 28, 1995), available at <http://sierra.uchastings.edu/cgrs/law/ij/40.pdf>.

155. See *Abay v. Ashcroft*, 368 F.3d 634, 641–42 (6th Cir. 2004) (citing *In re Adeniji*, No. A41 542 131 (Dep't Justice Mar. 10, 1998)).

home country of Sierra Leone.¹⁵⁶ *Anonymous* is more analogous to *Abay* than any of the BIA or INS cases cited by the *Abay* court because it involved an application for asylum,¹⁵⁷ not suspension of deportation,¹⁵⁸ withholding of removal,¹⁵⁹ or a motion to reopen.¹⁶⁰

Additionally, no authority from the circuit courts of appeals supports the Sixth Circuit's "governing principle." The other circuits that have addressed the issue have uniformly denied asylum to mothers like *Abay*.¹⁶¹ The Seventh Circuit twice denied asylum to mothers whose U.S. citizen or legal permanent resident daughters were at risk of undergoing genital mutilation if they returned to their mother's home country.¹⁶² Likewise, in *Abebe v. Ashcroft*, the Ninth Circuit denied a petition for review by an applicant whose eight-year-old daughter was in danger of undergoing genital mutilation in the applicant's home country.¹⁶³ Additionally, the Fifth Circuit, under similar facts, held that noncitizen parents "are not eligible for asylum under the general asylum provisions based solely on their daughter's risk of being subject[ed] to [female genital mutilation] if she is returned to Nigeria."¹⁶⁴

Given the factual and legal dissimilarities among the cases relied on by the Sixth Circuit; the disagreement among the immigration courts on the issue; and the substantial circuit court holdings contrary to the *Abay* court's, the Sixth Circuit did not reasonably find a governing principle. Although the court granted *Abay*'s daughter, Amare, refugee status—presumably putting her on the road to being granted asylum¹⁶⁵—*Abay* did not qualify for derivative asylum.¹⁶⁶ Consequently, the Sixth Circuit

156. *Anonymous*, at 2, 12.

157. *Id.*

158. See *In re Oluloro*, No. A72 147 491, at 20 (Dep't Justice Mar. 23, 1994).

159. See *Abay*, 368 F.3d at 641–42 (citing *In re Adeniji*, No. A41 542 131 (Dep't Justice Mar. 10, 1998)).

160. See *In re Dibba*, No. A73 541 857, at 1–3 (B.I.A. Nov. 23, 2001).

161. See *Abebe v. Ashcroft*, 379 F.3d 755, 759–60 (9th Cir. 2004); *Olowo v. Ashcroft*, 368 F.3d 692, 697, 704–05 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

162. See *Olowo*, 368 F.3d at 697, 704–05 (denying asylum to mother despite risk of genital mutilation to legal permanent resident daughters); *Oforji*, 354 F.3d at 609, 618 (denying asylum to mother despite risk of genital mutilation to U.S. citizen daughters).

163. *Abebe*, 379 F.3d at 759–60.

164. *Osigwe*, 77 Fed. Appx. at 235.

165. See *supra* note 18.

166. See 8 U.S.C. § 1158(b)(3)(A) (2000) (providing derivative asylum for spouses and children, but not parents, of refugees granted asylum).

should have examined whether Abay satisfied the elements of INA § 101(a)(42)(A) to independently qualify for asylum.

B. Abay Fails to Qualify for Asylum Under the Statutory Definition of "Refugee"

Assuming that Abay relies exclusively on her fear of her daughter's genital mutilation; the ground upon which the Sixth Circuit based its finding,¹⁶⁷ Abay does not meet the definition of refugee¹⁶⁸ for three reasons. First, any mental harm Abay would suffer as a result of the genital mutilation of her daughter does not rise to the level of persecution.¹⁶⁹ Second, Abay lacked a well-founded fear of persecution because, even if her daughter were genitally mutilated, it would not indicate that Abay would likely be harmed in the future.¹⁷⁰ Finally, once her daughter became a refugee, Abay no longer possessed a well-founded fear of persecution because her daughter could remain in the United States without the risk of female genital mutilation.¹⁷¹

1. Persecution of Abay's Daughter Is Not "Persecution" of Abay

The mental injury Abay would suffer were her daughter to undergo genital mutilation could not rise to the level of persecution because there was no showing that Abay would be *physically* harmed in connection with her objection to the practice of female genital mutilation on her daughter.¹⁷² Unlike the applicants in *Lopez-Galarza* and *O—Z— & I—Z—*, where mental suffering was found to be just one element of the persecution of the applicants,¹⁷³ Abay did not claim she would be physically harmed in connection with her mental suffering.¹⁷⁴ Likewise,

167. See *Abay v. Ashcroft*, 368 F.3d 634, 640–42 (6th Cir. 2004).

168. INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A)).

169. See *infra* Part IV.B.1.

170. See *infra* Part IV.B.2.

171. See *infra* Part IV.B.3.

172. See *Abay*, 368 F.3d at 635–36.

173. See *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (finding past persecution because of "severe and long-lasting" psychological harms associated with petitioner's treatment while imprisoned, which included rape); *In re O—Z— & I—Z—*, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998) (considering mental suffering caused by beatings and humiliation of applicant's son as element of applicant father's persecution, where father also suffered repeated beatings and received multiple handwritten threats of physical harm).

174. See *Abay*, 368 F.3d at 635–36. Although Abay was subjected to genital mutilation as a child, *id.* at 639, this would not constitute past persecution sufficient to prevail on an asylum claim

Abay's mental injury is distinguishable from that of the petitioner in *Sangha*, where the applicant's mental suffering was accompanied by threats of physical harm.¹⁷⁵ Instead, Abay claimed that, by itself, the genital mutilation of her daughter constituted persecution.¹⁷⁶ However, case law does not support this position.¹⁷⁷ As the law currently exists, any mental suffering Abay may endure, though distressing, would not rise to the level of persecution.

2. *Abay Could Not Have a Well-Founded Fear of Persecution Because the Genital Mutilation of Her Daughter Would Not Indicate Any Probability of Future Harm to Abay*

Abay does not fit within any of the circumstances in which harm to a family member can serve as a basis of a well-founded fear of persecution. Outside of the coercive population control context, an applicant can base his or her well-founded fear on harm to family members only where such harm indicates that the applicant will be harmed in the future.¹⁷⁸ However, the genital mutilation of Abay's daughter would not indicate a likelihood of harm to Abay in the future. First, the possibility that her daughter, Amare, will be forced to undergo female genital mutilation does not indicate that Abay will undergo the procedure in the future. The procedure is normally carried out only once on its victims,¹⁷⁹ and Abay was already genitally mutilated as a young girl.¹⁸⁰ Second, the desire of Amare's relatives to subject her to genital mutilation, while perhaps malicious,¹⁸¹ is presumably not intended to

because a woman who has been subjected to genital mutilation is not likely to be subjected to the practice anew.

175. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).

176. *Abay*, 368 F.3d at 636, 641-42.

177. See *Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004); *Olowo v. Ashcroft*, 368 F.3d 692, 697-98 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

178. See *Shoaira v. Ashcroft*, 377 F.3d 837, 845 (8th Cir. 2004) (concluding that "[t]o succeed in [a] claim of derivative persecution, the [petitioner] must show a pattern of persecution closely tied to the petitioner") (internal citations omitted); *Baballah v. Ashcroft*, 335 F.3d 981, 988 (9th Cir. 2003); *Ciorba v. Ashcroft*, 323 F.3d 539, 545 (7th Cir. 2003) (stating that to show derivative persecution, an applicant must "show that her family's political opinions have been imputed to her and that she has suffered or will suffer persecution as a result").

179. See *Female Genital Mutilation*, *supra* note 8.

180. See *Abay*, 368 F.3d at 639.

181. See *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) ("[Female genital mutilation] 'has been used to control wom[e]n's sexuality' . . . [and] is characterized as a form of 'sexual

persecute her mother, Abay, but rather to effectuate a circumcision of Amare.¹⁸² Third, Amare's relatives' desire to perform genital mutilation on her is not due to mistaken identity.¹⁸³ Finally, the target of the genital mutilation is not Amare's family, but Amare herself.¹⁸⁴ In fact, it is Abay's family who wishes to inflict the procedure on Amare.¹⁸⁵

3. *Any Well-Founded Fear Abay Possessed Vanished When Her Daughter Was Granted Refugee Status*

Even if Abay possessed a well-founded fear of persecution, Abay could no longer reasonably hold this fear once her daughter became a refugee because her daughter would be eligible to remain in the United States.¹⁸⁶ Thus, the chance that Abay would be persecuted in Ethiopia became much lower than the chance contemplated by the most liberal well-founded fear standard: a one-in-ten chance of being persecuted.¹⁸⁷ Using the reasonable person standard articulated in *In re Mogharrabi*, a court should ask, "Would a reasonable mother fear persecution, based on the genital mutilation of her daughter, where her daughter can legally remain in the United States?"¹⁸⁸ With the exception of the Sixth Circuit in *Abay*, circuit courts that have addressed this question have answered

oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'").

182. See *Female Genital Mutilation*, *supra* note 8. The World Health Organization lists several reasons for different cultures' practice of female genital mutilation. *Id.* However, none relates directly to the mother of the girl on whom genital mutilation is to be practiced. Compare *Abay*, 368 F.3d at 640–41 (noting that Amare may be targeted by her family for genital mutilation), with *Meza-Manay v. INS*, 139 F.3d 759, 761–64 (9th Cir. 1998) (finding applicant was intended target of terrorist group Shining Path in Peru where group threatened applicant and her husband, bombed husband's car, shot at husband, attempted to kidnap her children, and bombed in-laws' home).

183. Compare *Abay*, 368 F.3d at 640 (noting that threat of genital mutilation to Amare comes from her relatives and future husband and his relatives—people who could not reasonably mistake her identity), with *Lopez-Carillo v. INS*, No. 97-70463, 1998 WL 19630, at *1 (9th Cir. Jan. 12, 1998) (holding that applicant failed to establish he was refugee because he lacked direct and specific evidence that his brother's murderers had intended to kill applicant instead of applicant's brother).

184. Compare *Abay*, 368 F.3d at 640–41 (noting that Abay fears genital mutilation of one family member: her daughter Amare), with *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (granting asylum petition where all members of asylee's family had been persecuted for their membership in political party).

185. *Abay*, 368 F.3d at 640.

186. *Id.*; *supra* note 18.

187. See *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

188. See *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

in the negative.¹⁸⁹

Abay's predicament was unenviable by any measure. Nonetheless, she lacked a well-founded fear of persecution required under the current immigration laws.¹⁹⁰ Once Abay's daughter, Amare, became a refugee, the alleged agent of persecution—Amare's relatives, her future husband, and his relatives in Ethiopia¹⁹¹—could no longer persecute Abay, unless she chose to take Amare to Ethiopia. In *Oforji v. Ashcroft*, the Seventh Circuit acknowledged the difficult choice left to a mother in such a circumstance: she can either abandon her daughter in the United States or take her daughter back to Ethiopia and risk her subjection to genital mutilation.¹⁹² Nevertheless, the INA currently allows such mothers the possibility of remaining in the United States only where they have been present in the United States for at least ten years and are eligible for cancellation of removal.¹⁹³ Asylum, as several circuit courts of appeals have pointed out,¹⁹⁴ is not a remedy available for such mothers because they lack the required well-founded fear of persecution.

In sum, because Abay did not meet the statutory definition of a refugee, the Sixth Circuit erred in finding her eligible for asylum. The court's reliance on a few administrative decisions as a "governing principle" was inappropriate because there are more analogous administrative decisions to the contrary and the weight of circuit court authority pulls in the opposite direction of this governing principle. Under INA § 101(a)(42)(A), Abay did not meet the definition of refugee for two reasons. First, the persecution she alleged did not amount to persecution to Abay. Second, once her daughter gained refugee status, Abay lost any well-founded fear of persecution she may have originally had.

189. See *Abebe v. Ashcroft* 379 F.3d 755, 759 (9th Cir. 2004); *Olowo v. Ashcroft*, 368 F.3d 692, 697–98 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003).

190. See *Oforji*, 354 F.3d at 617–18 (“[T]he question before us is whether th[e] potential hardship to citizen children arising from the mother’s deportation should allow an otherwise unqualified mother to append to the children’s right to remain in the United States. The answer is no.”); Anonymous, at 12 (Dep’t Justice Apr. 28, 1995), available at <http://sierra.uchastings.edu/cgrs/law/ij/40.pdf> (holding that fear of genital mutilation to applicant’s daughters “upon their return to Sierra Leone is not persecution under the Refugee Act”).

191. *Abay*, 368 F.3d at 640.

192. *Oforji*, 354 F.3d at 617.

193. See 8 U.S.C. § 1229b(b)(1)(A) (2000).

194. See *Abebe*, 379 F.3d at 759; *Olowo*, 368 F.3d at 697–98, 704–05; *Oforji*, 354 F.3d at 618; *Osigwe*, 77 Fed. Appx. at 235.

V. CONCLUSION

Because courts now recognize forms of persecution aimed particularly at children—which were not acknowledged by Congress at the time of the asylum provisions' addition to the INA¹⁹⁵—as valid grounds for asylum, a gap in the law has developed that Congress must fill. Parents of victims of persecution such as female genital mutilation are required to show separate persecution to themselves in order to join their children in the United States. In order to remedy this problem, Congress should grant all parents accompanying or following to join their child the same status as their child—a remedy already afforded to spouses and children of asylees under INA § 208(b)(3)(A). The legislature has already done this with two of the more recent amendments to the INA. One amendment created “T” visas, which allow human trafficking victims under the age of twenty-one to immigrate their parents, either because the children were the victims of severe human trafficking and assisted the government in the investigation and prosecution of the offenders, or because the children were under the age of eighteen when trafficked.¹⁹⁶ A similar provision allows parents to immigrate if their minor children were victims of certain violent crimes.¹⁹⁷

By providing asylum applicants' parents with the opportunity to immigrate with their children to the United States—and therefore to keep families together—these provisions reflect the newly recognized reality that children are more vulnerable than adults to certain forms of persecution, such as human trafficking, sexual abuse, and female genital mutilation. As a result of this vulnerability, they are often the principal applicants for relief from such persecution. Unfortunately, however, the derivative asylum provisions have yet to incorporate parents of asylees as asylum beneficiaries. Consequently, mothers in *Abay*'s position are faced with a “choice no mother wants to make”:¹⁹⁸ abandon their daughters in the United States or expose their daughters to persecution. However, the goal of expanding asylum law to grant relief to such mothers is not furthered by decisions such as *Abay v. Ashcroft*, which purport to expand the law but provide no solid basis on which to do so.

195. See *supra* note 3.

196. See INA § 101(a)(15)(T) (codified at 8 U.S.C. § 1101(a)(15)(T) (2000)) (establishing “T” visas).

197. See *id.* § 101(a)(15)(U) (codified at 8 U.S.C. § 1101(a)(15)(U)) (establishing “U” visas).

198. *Oforji*, 354 F.3d at 617.

Asylum for Parents of Female Genital Mutilation Victims

A more desirable alternative would be for Congress to amend INA § 208(b)(3)(A) to include parents of asylees.

