



## CENTER FOR GENDER & REFUGEE STUDIES

UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW

May 8, 2006

### Talking Points

#### Women Refugees at Risk in Comprehensive Immigration Reform

- **Expansion of the already controversial expedited removal process will expose more asylum seekers to the risk of being removed without any administrative or judicial review.** This will have a particularly devastating impact on women, who may be too fearful, traumatized or embarrassed to describe the details of the harms they suffered to an immigration officer immediately upon entering the country. If this law had been in place when Fauziya Kassindja – the young woman from Togo who fled female genital cutting and forced polygamy, and was granted asylum in the much-publicized *Kasinga* case – came to the U.S., she would have been summarily returned to Togo.
- Broadening the grounds for detaining asylum seekers places the U.S. in violation of its international obligations. **Detention has a severe adverse psychological impact on asylum seekers, and can cause many refugees to break down and risk death or other harm in their own countries rather than to remain in indefinite detention.** Ms. Kassindja's case is a compelling example of the impact of detention on traumatized asylum seekers. She remained in custody for well over a year under harsh conditions, and eventually asked to return to Togo and suffer the fate that awaited her, rather than spend another day in U.S. prisons. Her attorneys were able to persuade her to reconsider; she was ultimately released and granted asylum. Detention has a particularly devastating impact on women who are accompanied by children because they are separated from their children while they remain in detention. The detention of asylum seekers also makes it harder to secure legal representation, substantially lowering their chances of success. Representation also fosters a smoother functioning of the administrative and judicial system. The Lieberman-Brownback amendment (#3253) provides critical safeguards to protect refugees against indefinite detention. The amendment includes alternatives to detention and the use of less restrictive detention facilities for asylum seekers.
- The dramatic and retroactive expansion of the definition of an aggravated felony will increase the grounds for which an asylum seeker may be automatically barred from asylum and withholding of removal. **Under this provision, a trafficking victim who escapes from her traffickers and subsequently helps a trafficked friend could be barred from relief.** The deportation of refugees who face a threat to their life or freedom would violate U.S. obligations under domestic and international law.
- Criminalizing entry or an attempt to enter the country unlawfully or without inspection would statutorily bar many applicants from asylum and withholding. **These provisions do not take into account the fact that many asylum seekers have no other way of fleeing to safety.**

The findings and concerns in this statement are endorsed by the following organizations:

**National Network to End Violence Against Immigrant Women; Women's Commission for Refugee Women and Children; Lawyers' Committee for Civil Rights; Human Rights Watch; Human Rights First**



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### Comprehensive Immigration Reform Must Protect Refugees<sup>1</sup>

We are concerned about the devastating impact that pending comprehensive immigration reform proposals are likely to have on vulnerable groups of people, including asylum-seekers, children, trafficking victims, and others seeking protection in the United States. As recognized national experts on the issue of asylum for women fleeing gender-based violence, we believe that the enactment of provisions that would expand expedited removal and detention, increase criminal penalties and limit judicial review – while negatively affecting all immigrants – would have particularly serious adverse consequences for women asylum seekers seeking protection in the United States.

### Expanding Expedited Removal and Detention and Eliminating Stays of Removal

Section 227 of the Comprehensive Immigration Reform Act of 2006 dramatically expands the already controversial expedited removal process by making it applicable to all persons (except those from Mexico, Canada or Cuba) who have not been admitted or paroled into the U.S. and are found within 14 days of arrival and within 100 miles of a land border. These immigrants could be removed without any further hearing or review. Although the law provides exceptions for anyone who expresses an intent to apply for asylum or a fear of returning to his or her home country, a 2005 study of the expedited removal process conducted by the bipartisan U.S. Commission on International Religious Freedom (USCIRF) found an alarmingly high rate of noncompliance with these same procedures.<sup>2</sup>

While the expedited removal process negatively impacts all asylum seekers, it would have a disproportionate impact on women, who face many significant cultural and psychological barriers that prevent them from articulating their fears within moments of arriving in a strange new country. Low-level enforcement officers, with limited training in immigration law, would have the sole discretion to remove someone through this process. **If this rule had been in effect in 1996, at the**

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<sup>1</sup> **The findings and concerns in this statement are endorsed by the following organizations:**

- **National Network to End Violence Against Immigrant Women**
- **Women's Commission for Refugee Women and Children**
- **Lawyers' Committee for Civil Rights**
- **Human Rights Watch**
- **Human Rights First**

<sup>2</sup> U.S. Commission on International Religious Freedom, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (February 8, 2005).

**time that Fauziya Kassindja – the young woman from Togo who fled female genital cutting and forced polygamy, and was granted asylum in the much-publicized *Kasinga* case – came to the U.S., she could have been denied asylum.** Ms. Kassindja sought asylum upon her arrival at the airport in the U.S. However, she found mention of her fear of being subjected to genital cutting to be extremely embarrassing, and when questioned at the airport as to the reason for seeking asylum, she only mentioned that she was fleeing a forced marriage; she did not say a word about the female genital cutting. Without the opportunity to work with an attorney to help her articulate and document her claim, as well as the opportunity for further administrative review, she would have been deported back to face genital cutting in Togo. In order to protect young girls from that harmful and permanently scarring practice Congress itself criminalized the performance of FGC on girls under the age of eighteen in 1996.<sup>3</sup>

The immigration bill also expands the grounds for which immigrants could be detained. **We are aware of numerous tragic cases of women fleeing violent abuse in their home countries who, due to the trauma and stress of indefinite detention, were unable to sustain themselves for the duration of their lengthy appeals and who abandoned their asylum claims for an uncertain fate at home.** Moreover, detention has a particularly devastating impact on women who are accompanied by children because they are separated from their children while they remain in detention. Yet section 131 would make detention mandatory for individuals (other than Mexicans and Cubans) apprehended for entering without proper documents, with very narrow exceptions. Even a person who is found to have a credible fear of persecution could continue to be detained at the “sole, unreviewable discretion” of the Department of Homeland Security.

Section 202 of the bill would also give the Department of Homeland Security broad discretion (with virtually no judicial review) to detain immigrants whose cases are on appeal to the federal courts. Moreover, they could remain in detention indefinitely if they are ultimately denied asylum but no other country is willing to accept them. These provisions would have severe adverse consequences for asylum seekers. According to the USCIRF study, the harsh aspects of detention for persons who have suffered severe trauma prior to their detention represent a form of “re-traumatization.”<sup>4</sup> USCIRF concluded that incarceration caused many refugees to break down and risk death or other harm in their own countries rather than to remain in indefinite detention. The United Nations High Commissioner for Refugees has clearly stated that the detention of asylum seekers is “inherently undesirable” because it can have severe psychological consequences for people who have already suffered trauma and abusive treatment in their home countries.<sup>5</sup>

The detention of asylum seekers will also make it harder for them to secure legal representation. Asylum seekers are mostly represented by pro bono attorneys or non-profit organizations, who may not have the resources to contact their clients in detention, particularly if they have been detained in remote areas with restrictive phone and visitation policies. More and more asylum seekers will be forced to appear pro se, substantially lowering their chances of success. Having legal representation

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<sup>3</sup> 18 U.S.C. § 116 (2004).

<sup>4</sup> U.S. Commission on International Religious Freedom, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (February 8, 2005).

<sup>5</sup> UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers ¶ 1 (February 1999).

also fosters a smoother functioning of the administrative and judicial system by helping to ensure that immigration proceedings are more just, efficient and expeditious.<sup>6</sup>

**Ms. Kassindja's case is a compelling example of the impact of detention on traumatized asylum seekers.** She was placed in detention upon her arrival in the U.S. and remained in immigration custody for almost a year and a half under harsh conditions, during which time she was shuttled between four immigration detention facilities and jails. Eventually she requested that she be allowed to return to Togo and suffer the fate that awaited her, rather than spend another day in U.S. prisons. Her attorneys were able to persuade her to reconsider this request and to pursue her asylum claim, and she was ultimately released and granted asylum.

**The Lieberman-Brownback amendment could help address some of the problematic issues related to the detention of refugees and ensure that asylum seekers are treated humanely.** The Lieberman-Brownback amendment (#3253) provides critical safeguards to protect refugees against indefinite detention, including alternatives to detention and the use of less restrictive facilities for asylum seekers. The amendment also incorporates many of the strong recommendations of the bipartisan USCIRF report.

Section 227(c) greatly limits the ability of federal courts to stay the removal of immigrants while their case is pending in those courts. Under this section, an asylum seeker could be deported back to her country of persecution while her case is still before the federal court.

### **Dramatically Increasing Criminal Penalties**

Section 203 of the bill dramatically and retroactively expands the definition of an aggravated felony, thereby increasing the grounds for which an asylum seeker may be automatically barred from asylum and/or withholding of removal. The provision encompasses within the aggravated felony definition convictions for minor accessory roles in the conduct of others, certain document-related or misdemeanor offenses, or for providing some types of assistance to undocumented friends, neighbors and family members. Under this provision, a trafficking victim who escapes from her traffickers and subsequently helps a trafficked friend could be barred from relief. **The deportation of refugees who face a threat to their life or freedom would violate the U.S.'s obligations under domestic and international law.**

Section 132 of the bill makes entering or attempting to enter the country without inspection a criminal offense that would, under most circumstances, bar an applicant from asylum and withholding of removal. Section 206 of the bill also makes knowing unlawful entry or an attempt to make such an entry a crime that would also, under some circumstances, bar an applicant from protection. Section 208 could also result in the prosecution of asylum seekers for using a false passport to escape to the U.S. Although the section provides an exception for asylum seekers in some circumstances, the language leaves many unprotected. These provisions do not take into account the fact that many asylum seekers have no other way of fleeing to safety.

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<sup>6</sup> Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and The Challenges Ahead*, 14 Geo. Immigr. L. J. 589, 566 (2000).

## Limiting Access to the Courts

### *Eliminating Circuit Court Jurisdiction Over Immigration Cases*

Also under consideration are proposals to shift jurisdiction over judicial review of agency denials from the U.S. Circuit Courts of Appeals to the U.S. Court of Appeals for the Federal Circuit. The entire volume of immigration appeals currently being handled by eleven circuit courts should not be channeled into a single court, even with some increase in staffing at the Federal Circuit – especially one whose experience is mainly in patent and copyright law and not in immigration law. **The barriers that such a change would create could essentially eviscerate judicial review for many refugees.**

Further, these additional barriers to accessing federal court would only make pro bono attorneys and non-profit organizations less willing to take on federal appeals and exacerbate the shortage of counsel already faced by asylum seekers.

These proposals would also have an adverse impact on the development of immigration law. While it is appropriate to have a specialized court hear complex and scientific questions such as those involved in patent and copyright law, the same rationale cannot apply to immigration cases, where the range and breadth of issues benefit from the broader experience of the federal appellate judges at the circuit courts around the country.

It is important for federal courts to play their constitutional role as a check on the Executive Branch, rectifying mistakes made by lower level judges and the Board of Immigration Appeals (BIA) and ensuring that asylum seekers receive a full and fair consideration of their claims. In *Garcia-Martinez v. Ashcroft*, a 2004 case involving a Guatemalan woman who had been gang-raped by government soldiers during the civil war in her country, the Ninth Circuit reversed the finding of an Immigration Judge and the BIA.<sup>7</sup> The court found that, in the context of war, “rape is not about sex; it is about power and control,” and it is sometimes “used to intimidate a civilian population perceived to be in political opposition to the armed force in question.” **Without meaningful federal court review, Ms. Garcia-Martinez would have been denied asylum.**

The role of the federal courts in reviewing immigration cases became even more important in light of regulations adopted by Attorney General Ashcroft in 2002, which sharply curtailed the review of Immigration Judge denials by the BIA, and resulted in a significant increase in the number of cases being appealed to the federal courts. In January 2005, ongoing and sharp criticism by federal judges of the quality of adjudication by the administrative agency prompted Attorney General Gonzales to order a comprehensive review of the Immigration Judges and the BIA. The current compromise bill proposes in Section 707 a GAO study on this question of consolidation and certificates of reviewability. We appreciate the effort to address some of the problems created by the 2002 BIA regulations with the proposal to reinstate three-member review and to increase the number of board members, and believe that the resulting positive changes may obviate the need for such dramatic measures at the federal court level.

### *Creating a Pre-Screening Process for Judicial Appeals*

These proposals would further limit the access of asylum seekers to judicial review by creating a pre-screening process that would require all cases to be vetted by a single Federal Circuit judge after the

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<sup>7</sup> 371 F.3d 1066 (9th Cir. 2004).

filing of the opening briefs. Unless the judge issues a “certificate of reviewability” within 60 days, the case would be summarily dismissed and no appeal of this single judge’s decision would be permitted. In no other area of the law is the right to access the federal circuit courts limited in this manner. Given the high stakes involved in refugee cases – sending people back to a country where they may face death or other serious harm – it seems especially troubling that the right to appeal should be so sharply restricted.

This pre-screening process would create a second-tier system of justice for immigrants that is inconsistent with our constitutional system and our tradition of providing access to courts and ensuring that people are not subjected to harsh penalties without adequate judicial oversight. It would create tremendous pressure on an overburdened court to review cases within the 60-day deadline, and unfairly penalize petitioners whose cases do not get decided within the 60-day period, resulting in automatic dismissal with no option for further review.

### **Conclusion**

We recognize that there is a need to reform the immigration system. However, legislation that fails to contain safeguards and ensure due process for vulnerable groups seeking protection in the U.S. is not just bad policy. It is a radical departure from our tradition as a safe haven for those fleeing tyranny and oppression in their home countries. With the number of refugees arriving in the United States now down dramatically over the past five years,<sup>8</sup> we urge you to reconsider these and other provisions that impact refugees and to address the refugee-related issues in a realistic and fair manner.

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<sup>8</sup> Ruth Ellen Wasem, U.S. Immigration Policy on Asylum Seekers (CRS Report RL32621), January 27, 2006; BBC News, *Asylum numbers continue to fall*, March 17, 2006.