VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at: Field House

Heard on: 9 November and 18 December 2007

Before:

Senior Immigration Judge Jarvis
Mrs E Hurst JP

Between

VM

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr E Fripp of Counsel instructed by Switalski Solicitors
For the Respondent: Mr S Walker Senior Home Office Presenting Officer
Interpreter: Mr Chama Omar Matata (Swahili - English)

1. *It is important to determine whether a Kenyan claimant who fears FGM belongs to an ethnic group amongst which FGM is practised. If so, she may be a member of a particular social group for the purposes of the 1951 Refugee Convention*

2. *Uncircumcised women in Kenya, whether Gikuyu/Kikuyu or not, are not as such, at real risk of FGM.*

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3. *There is evidence that the Mungiki organisation seeks to impose FGM and other forms of violence, on women and children other than those who have been initiated into their sect. In particular, such women and children include the wives, partners, children and other female family members of those men who have taken the Mungiki oath. Insufficient protection is available from the Kenyan authorities for such persons.*

4. *It may be possible for a woman not wishing to undergo FGM herself, or not wishing her child to do so, to relocate to another community which does not follow the practice of FGM.*

5. *In general:*

   (a) *those who practise FGM are not reasonably likely (particularly in urban areas), to seek to inflict FGM upon women from ethnic groups or sub-groups which do not practise FGM;*
   (b) *a woman or her child who comes from, or becomes connected by marriage, partnership or other family ties, to an ethnic group (or sub-group) where FGM is practised will be at real risk only if the evidence shows that she is reasonably likely to be required by her parents, grandparents, or by others in a position of power and influence over her, to undergo FGM or allow her child to undergo it.*

6. *Internal relocation may be available in Kenya to a woman who is at real risk of forced FGM in her home area if the evidence shows: (i) she is not reasonably likely to encounter anyone in the place of relocation who would be in a position of power and influence over her and who would use that power and influence to require her to undergo FGM, or would cause her presence in the place of relocation to become known to such a person or persons (e.g. the Mungiki); and (ii) that the relocation is reasonable taking into account all the relevant factors including the religious and cultural context, the position of women within Kenyan society and the need for kinship links in the place of relocation in order to sustain such movement successfully. In particular, in the case of a woman from a rural area in Kenya, internal relocation to some other region or urban centre will not be available unless her circumstances are such that she will be able to survive economically (see Januzi v Secretary of State for the Home Department and others [2006] UKHL 5).*

7. *This guidance supersedes that in FK (FGM – Risk and Relocation) Kenya CG [2007] UKAIT 00041.*

DETERMINATION AND REASONS

1. This is the reconsideration of the appeal of the Appellant, a national of Kenya, whose date of birth is given as 12 December 1974. The Appellant arrived in the UK on 31 August 2002 and claimed asylum on 10 September 2002. She appeals the decision of the Respondent made on 19 February 2004, to give directions for her removal to Kenya, following refusal to grant

leave to enter or remain in the UK on asylum or human rights grounds.

2. The Appellant appealed to the Asylum and Immigration Tribunal ["the Tribunal") pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002, (the 2002 Act), and the Tribunal has borne in mind the grounds of appeal set out in that notice, which refer to alleged prospective breach of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as prospective breach of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR), as that Convention has been incorporated into United Kingdom domestic law by the Human Rights Act 1998.

3. Briefly, the procedural history of the matter is this. The Appellant claims that she left Kenya accompanied by an agent, with whom she arrived in the UK and who spoke to the Immigration Officer on arrival. The agent made all the arrangements. The Appellant has never had a passport or other travel document.

4. A screening form was completed on 10 September 2002; a written statement of evidence lodged, dated 17 September 2002, and the Appellant was interviewed on behalf of the Respondent on 7 November 2002. The Respondent set out his reasons for refusing to recognize the Appellant as a refugee and refusing to grant leave to enter or remain on human rights grounds in a letter dated 11 February 2004.

5. The Appellant appealed to an Adjudicator, Mr David A W H Chandler. Her appeal was dismissed on asylum grounds but allowed on human rights grounds under article 3 ECHR in a determination issued on 24 May 2004. The Respondent appealed to the Immigration Appeal Tribunal [IAT) and a Vice President of the IAT gave permission to appeal on 14 October 2004.

6. By a determination issued on 31 January 2005, the Tribunal allowed the Respondent's appeal, finding that there was an internal relocation alternative available to the Appellant in Kenya so that she was not at real risk of serious harm contrary to Article 3 ECHR.

7. The Appellant sought permission to appeal to the Court of Appeal and permission was granted by a Vice President on 29 March 2005 on the ground that it was difficult to see any significant differences between the situation which the Court of Appeal addressed in *P and M* [2004] EWCA Civ 1640 and the

situation in this case.

8. By judgment issued on 31 January 2006, the Court of Appeal allowed the Appellant's appeal to the extent that there was an order for remittal to the Tribunal for reconsideration of the question of internal relocation, upon which question the Court of Appeal found that the Tribunal had erred [*VNM v SSHD* [2006] EWCA Civ 47).

9. On 15 February 2007 the Tribunal decided that the previous panel had fallen into material error of law and that there should be a second stage reconsideration, in the following terms:

> 1. "Mr Fripp, on behalf of the appellant, conceded and we are satisfied that the adjudicator made a material error of law in his determination of the appeal. This was identified in paragraph 21 of the judgement of Wilson LJ, with whom the other members of the court agreed, in their determination of the appeal by the appellant against the determination of the tribunal in the instant case, reported as *VNM v SSHD* [2006] EWCA Civ 47, in which he said:
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> "My view, however, is that there was indeed an error of law in the adjudicator's determination of this point. I have considerable sympathy for him in that he lacked any oral assistance on behalf of the Secretary of State and had to collect the latter's points as best he could from the refusal letter. But there was a material gap in the expression of the adjudicator's reasoning: for he did not purport to explain – and there is nothing in his earlier paragraphs to demonstrate that he had considered – why, lacking access to state records, the Mungiki would be likely to discover that the appellant had returned to Kenya or, if so, to discover where in Kenya she had gone. In her statement the appellant had baldly averred that she would be so discovered. Her proposition may be valid; but its validity is not self-evident and needed to be expressly considered."
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> 2. We are not able to undertake the further reconsideration which is required since Ms Donnelly, who represents the respondent, did not have a copy of, and therefore had not been able to consider, the expert report from Dr Ben Knighton dated 8 February 2007.
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> 3. Mr Fripp, on behalf of the appellant, identified as possible issues to be determined at the second stage reconsideration hearing the following:
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> (i) whether the appellant would be at risk on return of a breach of her article 3 rights throughout Kenya;
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> (ii) if not, did the *Robinson/Januzi* test in relation to internal relocation apply to an article 3 claim;
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> (iii) if so, did the appellant satisfy that test;
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> (iv) if so could the tribunal reconsider the appellant's appeal on asylum grounds in the light of the decision of the Court of Appeal in 'P' and 'M' v SSHD [2004] UKAIT EWCA Civ 1640;

(v) if not, would the appellant be entitled to humanitarian (subsidiary) protection having regard to paragraph 23 of the AIT Practice Directions as amended on 9 October 2006.

4. We therefore adjourn the appeal for a second stage reconsideration of the appellant's appeal".

10. It is in this way that the matter comes before us now. At the outset of the hearing we satisfied ourselves that the Appellant and the interpreter were able to understand one another. We are also satisfied that they continued to understand one another throughout the proceedings and that the Appellant (who did not give oral evidence) was able to understand, and to otherwise participate in the proceedings appropriately, including being able to follow the expert evidence of Dr Knighton and the submissions of the representatives.

11. We have before us all the documents referred to above including interview records, and the Respondent's letter of 11 February 2004, in which he sets out his reasons for refusing the Appellant's application. Also before us were the parties' bundles and authorities which are detailed at the end of this determination, as well as the parties' skeleton arguments.

12. The matter first came before us on 9 November 2007 when it was adjourned part-heard, for lack of court time, to 18 December 2007 when the oral hearing was concluded. Not long after, there followed a series of extraordinary events in Kenya, as a result of which the parties were invited to lodge further submissions should they so wish as the Tribunal and the parties were concerned that the Tribunal should have before it all relevant evidence. An administrative delay in sending out directions meant that the further written submissions of the Appellant, and documentary evidence relied upon were not received by the Tribunal until late February 2008.

13. The Respondent has lodged no further submissions or evidence.

14. On 26 February 2008 the Court of Appeal issued its judgment in the case of *FK* (Kenya) v SSHD [2008] EWCA Civ 119, holding that the determination of the appeal of FK by the Tribunal could not stand.

15. On 25 March 2008 we received a letter from the Appellant's solicitors, Switalski's, referring to the power sharing agreement made between the leaders of the main parties in Kenya and attaching an article from the Economist of 28 February 2008 and an article from IRIN dated 1 March 2008, to which we return below.

The Facts of the Appellant's Case

16. As Mr Fripp states in his skeleton argument, the claimed factual basis of the Appellant's claim to international protection is usefully summarized by Wilson LJ at paras 3-10 of his judgment in the proceedings before the Court of Appeal in *VNM*:

> "3. The appellant is a member of the Kikuyu tribe and is now 31 years old. She was brought up in a village about 30 miles outside Nairobi and ran a business selling clothes. In 2000 she began to cohabit with her boyfriend. Shortly thereafter he began to show an interest in the notorious Mungiki sect. There was a mass of objective evidence before the adjudicator about the Mungiki. The adjudicator summarised it as follows:
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> > "the Mungiki is a cultural and political movement based in part on Kikuyu ethnic traditions which are controversial in mainstream Kenyan society. The CIPU Report, describes the organisation as small [but] the Appellant produces a considerable amount of background material which suggests that it is larger and more powerful than suggested by the CIPU Report. Its leadership claims to have 2 million members."
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> 4. The adjudicator accepted that a BBC news report dated 11 February 2003 provided a reasonably accurate picture of the sect. The report stated:
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> > "Their holy communion is tobacco-sniffing, their hairstyle that of the Mau Mau dreadlocks and the origin of the sect is still shrouded in mystery.
> > Since the late 1990's, the sect has left behind a trail of blood in its rejection of the trappings of Western culture. … Inspired by the bloody Mau Mau rebellion of the 1950's against the British colonial rule, thousands of young Kenyans – mostly drawn from Kenya's largest tribe, the Kikuyu – flocked to the sect whose doctrines are based on traditional practices."
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> The report went on to indicate that one of the practices of the sect was forcibly to inflict Female Genital Mutilation (FGM).
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> 5. By October 2001 the appellant's boyfriend had joined the Mungiki and he was soon elected as its leader in the village, also near Nairobi, where she and he had set up home. Early in April 2002 he told her that she should also join the movement but, being a Christian, she refused. About three days later a group of Mungiki elders, including her boyfriend, confronted her at home. They were carrying blood and rotten meat, both of which they use in their ceremonies, and also a razor with which to inflict FGM upon her. She pretended that she needed to go to the lavatory and from there she ran to her mother's home in another village. Her mother sought to hide her. A few days later, however, while she, her mother and her sisters were having lunch, the Mungiki came to the house, blew a trumpet and took hold of each of them. In the event the men did not inflict FGM on the appellant. Instead, however, either one or more of them raped her. When she recovered, friends took her to hospital.
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> 6. Upon discharge from hospital she returned to her family home but found that her mother and sisters were missing. She reported both her rape and the disappearance of her family to the police but was

told that they could take no action because the Mungiki were very strong and the government was unable to control them. She thereupon fled to Nairobi and stayed with a friend. She became aware that her boyfriend and other members of the Mungiki were still looking for her. She also discovered that, as a result of the rape, she had become pregnant. She was still unaware of what had happened to her mother and sisters. In August 2002, following an attack by the Mungiki on an estate close to where she was staying, she managed to arrange her flight to the U.K.

7. In January 2003 she duly gave birth to a girl, for whom she continues to care. She is still unaware of the fate of her mother and sisters. In the U.K. she has undergone weekly counselling in respect of her experiences and in particular her rape; has been undergoing psychiatric treatment; and has been prescribed anti-depressants and tranquillisers. Upon his examination of her in April 2004, Dr Buller, a consultant psychiatrist, considered that the appellant was clinically depressed and displayed many of the symptoms of Post-Traumatic Stress Disorder and he expressed concern that her forced return to Kenya might well lead to a further deterioration in her mental health, including the possibility that she would, as she has previously done, consider whether to commit suicide. The adjudicator rejected the appellant's appeal under the Refugee Convention 1951 upon the basis that her fear of persecution in Kenya could not be considered to be "for reasons of … membership of a particular social group".

8. In upholding her appeal under the Convention of 1950, however, the adjudicator held that the infliction of FGM would obviously infringe her right not to be subjected to inhuman or degrading treatment under Article 3; and that the objective material before him indicated that there was no reasonable willingness on the part of the Kenyan enforcement agencies to protect women from being forced by the Mungiki to undergo it. Then the adjudicator addressed the possibility of internal relocation.

9. In this last regard it is important to note four matters:

    a) In his refusal letter the Secretary of State had pointed out that Kenya had an area of 224,000 square miles; that in his view, regardless of the truth of her claim, the appellant could safely relocate to a different area of the country from that which she had previously occupied; and that it would be reasonable to expect her to relocate there.

    b) In her grounds of appeal to the adjudicator the appellant had complained that there was, on the contrary, no real option of internal flight and that in any event it would not be reasonable.

    c) In a statement placed before the adjudicator the appellant had said:

    > "I am afraid to be returned to any part of Kenya and not to a specific area…
    > All of Kenya has Mungiki who can travel freely around it and the Mungiki following are already spread everywhere in Kenya. I would not be safe and my daughter would not be safe…
    > If I was returned to Kenya I would be discovered by the Mungiki people. I am afraid

> because I know [my boyfriend] and the way the Mungiki people operate. I think [my boyfriend] and the group would make an example of me…
> Yes, if I went back to Kenya, at the very least I would be circumcised because Mungiki people would find me and circumcise me."

> d) The hearing before the adjudicator inevitably lacked focus because no one appeared for the Secretary of State, with the result that there was no cross-examination of the appellant and no greater stress was laid on his behalf upon any one of the points which had been made in his refusal letter than upon any of the others.
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> 10. In paragraph 42 of his determination the adjudicator found that:
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> > "The Respondent has contended that internal flight is an option. The absence of a representative means that no particular area of Kenya has been identified. I note that the Appellant is a Kikuyu which is the predominant tribe in Kenya. I note also that the Mungiki sect is largely Kikuyu. The problems faced by this Appellant all occurred within a short distance of Nairobi, the capital and largest and most cosmopolitan city in Kenya. The Appellant makes the point that if she is free to travel anywhere in Kenya so are those who wish to persecute her. I accept that internal flight is not an option."

17. The Court of Appeal in *VNM* found that both the Adjudicator at first instance, and the Tribunal on appeal, had materially erred in law:

> 24. In my view the deficiency in the tribunal's reasoning lies in its failure to consider whether, working from the foot of its conclusion that the Mungiki would be unlikely to discover the appellant in a different part of Kenya, it would nevertheless be unreasonable to expect her to relocate there. Mr Tam seeks to persuade us that this second point had not been taken below on behalf of the appellant. Although it often seems regrettably difficult for this court to discern precisely which points have been argued below, it is clear, as I have shown in [9(a) and (b)] above, that, quite apart from the issue as to whether the appellant's different whereabouts in Kenya would be discovered, she and the Secretary of State were also expressly at odds as to whether it would be reasonable for her to relocate in a different area of Kenya. There was, to put it at its lowest, no basis upon which the tribunal could conclude that such was no longer a second issue; and indeed it did not so aver. Put shortly, it failed to address the second issue in any way.
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> 25. It seems likely that the result of the appeals to the House of Lords from the decisions of this court in *Januzi v. SSHD* [2003] EWCA Civ 1187 and in *Hamid, Gaafar and Mohammed v. SSHD* [2005] EWCA Civ 1219, due to have been heard together on 18 and 19 January 2006, will clarify issues as to the arguably different factors relevant to enquiries into the reasonableness of internal relocation in the context of claims for asylum, for protection under Article 8 of the Convention of 1950 and, so one would hope albeit perhaps not directly raised, for protection under Article 3 of that Convention. In particular the result may illumine whether the enquiry in the present case should, as dicta

of this court in *E v. SSHD* [2003] EWCA Civ 1032; [2004] QB 531 at [67] suggest, embrace consideration of the appellant's situation in the U.K. But, putting that contentious issue to one side, it is obvious that the reasonableness of her relocation in a different part of Kenya requires consideration of the practicability of her settling elsewhere; consideration of her ability convincingly to present to those in her new milieu a false history relating to herself and to her daughter, including the latter's paternity, and a false explanation for their arrival there; and, in the light of her substantial psychological vulnerability, consideration of her ability to sustain beyond the short term a reasonable life for them both on that false basis.

26. Until his receipt of the supplementary skeleton argument filed by Mr Fripp, who came late to the case, on the day of the hearing before us, the Secretary of State could not reasonably have anticipated that this appeal would turn on the tribunal's failure to address the second issue. Nevertheless Mr Tam has sought to deal with the point and does not indicate that he would welcome further time before concluding his submissions upon it. In part the trouble stems from the slightly unfocussed terms in which the tribunal proffered the point upon which it granted permission to appeal. At all events I would permit the appellant so to amend her Notice as to take the point; would allow the appeal by reference to it; would set aside the tribunal's determination; would remit the Secretary of State's appeal from the adjudicator for fresh hearing by the Asylum and Immigration Tribunal; and would recommend to the tribunal that it should not hear the appeal until determination by the House of Lords of the appeals in *Januzi* and in *Hamid, Gaafar and Mohammed* above.

The Case Of FK

18. It is helpful at this stage to set out the Tribunal's guidance in the case of *FK*. The Court of Appeal noted the summary guidance given by the Tribunal in *FK,* and that they had not been invited to decide whether the global appraisal of risk in sub-paragraphs (2) to (4) of that guidance fully reflects the accepted evidence, because FK and her daughter manifestly come within the real-risk category described at (4).

"5. The decision of the AIT, before whom the appellant was represented by an advocate from the Refugee Legal Centre and the respondent by a presenting officer, is extremely thorough. Helpfully, it concludes with the following summary, intended to give guidance to other tribunals:

(1) It is important to determine whether the claimant belongs to an ethnic group, amongst which group FGM is practiced. If so she may be a member of a particular social group for the purposes of the 1951 Geneva Convention.

(2) All uncircumcised women in Kenya, whether Kikuyu or not, are not as such at real risk of FGM. The statistical evidence shows that at least fifty per cent, if not more, of women in Kenya have not been the subject of FGM. The objective

evidence shows an increasing pressure to abstain from such a practice both by many of the churches and communities, by the government and non-governmental agencies, by the promotion of an alternative "initiation rite".

(3) The decision to undergo FGM is one made by the individual if adult or by the parents if a child. Such a decision will no doubt be reflective of the cultural norms which exist within the particular community in which the woman or child resides. It is, however, possible for a woman not wishing to embrace the initiation of FGM for herself or her family to live in a community which does not subscribe to such practises. Those who practice FGM are not reasonably likely (particularly in urban areas) to seek to inflict it upon women from non-practising ethnic groups (or sub-groups).

(4) A woman will only be at real risk if she comes from an ethnic group (or sub-group) where FGM is practised and the evidence shows that she is reasonably likely to be required by her parents or by others, in a position of power and influence over her to undergo FGM.

(5) There is no evidence that the Mungiki seek to impose FGM upon women or communities other than those who have been initiated into their particular sect. The objective evidence speaks of the Mungiki as being involved in organised crime, transportation in urban areas and in public order offences. There is no evidence that they are engaged in any significant activity such as imposing FGM on groups or communities who do not support their political/cultural aims.

(6) The authorities are motivated to act against the Mungiki and in the past a significant number of arrests including the arrest of one of the leaders. The Mungiki seeks to reflect the traditional or cultural base of the Kikuyu. The sect generally is not found in areas occupied by those tribes whose ethnic groups (or sub-groups) which are not Kikuyu or which do not contain an element of the Kikuyu.

(7) Internal relocation will be available in Kenya to a woman who is at real risk of FGM in her home area if the evidence shows,(sic) (i) she is not reasonably likely to encounter anyone in the place of relocation who would be in a position of power and influence over her and who would use that power and influence to require her to undergo FGM; and (ii) she can reasonably be expected to live in that place, having regard to

the general circumstance prevailing in it and the personal circumstances of the appellant (paragraph 3390 of HC 395 (as amended). In the case of a woman from a rural area in Kenya, internal relocation to some other region or urban centre will not be available unless her circumstances are such that she will be able to survive economically (see *Januzi v Secretary of State for the Home Office and Others* [2006] UKHL 5).

(8) In considering internal relocation it is important to bear in mind the religious and/or cultural context particularly whether there is any family or sub-clan support available to the woman in the area proposed. It may be considered that it would be easier for a member of the Kikuyu tribe to relocate to an area with a similar tribal culture and support, rather than relocating into a different area. That having been said, however, much will depend upon the individual circumstances of the woman and of the availability of a support structure within the proposed area of return.

(9) Credibility will usually have an important part to play in determining whether a woman is at risk. In considering the issue of relocation it is important that the family and extended family situation and context be examined particularly as to cultural context, education, economic lifestyle and work experience."

19. In that light, we set out some detail about *FK* and the core of the findings of the Court of Appeal in *FK,* which are to be found in the judgment of Sedley LJ. It is important to note that the Court of Appeal did not find it possible to uphold Mr Jorro's complaint that the Tribunal's appraisal of the expert evidence was so flawed as to undermine their overall conclusion about the situation of women in Kenya. Their findings, however contentious, lay within their remit and were supported by evidence. What remained for the Court of Appeal to consider was whether, against that background, the Tribunal made a proper and adequate appraisal of the Appellant's own prospects of safe relocation with her daughter. In that regard, it was found that the Tribunal in *FK* had materially erred in its treatment of the testimony of Dr Knighton, when considering and assessing the risks to the Appellant upon return to Kenya, and that the Tribunal had not addressed adequately the questions of the reasonableness and safety of moving elsewhere in Kenya.

20. Presumably the position is the same for the Appellant in this case and the daughter (IWM) to whom she gave birth in the UK on 5 January 2003. It must also be recalled that the Appellant

has a son, (EMM) born on 19 February 2007. It was accepted by Mr Walker that the fact of the existence of the Appellant's son was to be taken into account by the Tribunal based upon the information provided as to the child's birth, within the skeleton argument.

21. At paragraphs 21 -30 the Court of Appeal in *FK* come to the nub of the case and their reasons for finding that the determination of the Appellant's case cannot stand:

> 21. Mr Jorro's critique of the tribunal's reasoning is that it fails entirely, or at least adequately, to engage with the specificity of the appellant's case: that she would probably need to relocate to a Kikuyu area in order to survive; that in any Kikuyu area, and equally in a non-Kikuyu area where her name would show her to be Kikuyu, there was a real risk that Mungiki would sooner or later locate her; and that, irrespective of whether the local community welcomed them, they were likely to exact revenge upon a mother and daughter who had violated tribal custom by fleeing from a Mungiki elder to whom her grandfather had given the daughter in marriage in return for a dowry, and had done so in order to avoid both the marriage and the genital mutilation to which the mother, under coercion, had consented. He points out that Dr Knighton's report gives explicit and documented support to this possibility but is not referred to by the tribunal.
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> 22. It was on these grounds that the appellant was found to have a fear which was both genuine and, were she to return to her home village, well-founded. The tribunal had therefore to be satisfied that, if she were to live elsewhere in Kenya, the fear would no longer be well-founded. They begin this part of their determination (§83) by noting that there are tribal areas where there is no societal pressure to undergo FGM, and that Musoma and Mombassa are multi-ethnic towns; but they base no finding on this, since the appellant's case turned not on societal pressure but on the risk of direct victimisation. This meant, if nothing else, considering with very great care whether the Mungiki, who had killed the appellant's husband for refusing to join them as his father had done, and who had evidently attempted to track down the appellant and her daughter when they fled to Nairobi, might by enquiry or by rumour learn where they were now living. If there was a real risk that they might do so, it would arguably be impossible to exclude a real risk of abduction and enforced genital mutilation.
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> 23. In our judgment the tribunal has failed to engage properly with this critical issue. Earlier in their determination (at §81) they say: "No example has been adduced before us of communities being targeted by the Mungiki, particularly to undergo FGM." This is a surprising assertion: what had happened to the appellant and her family was a very clear example of exactly this process. It is set in context, no doubt, by what they go on to note: that there are evidently millions of Kenyan women who are not required to undergo FGM and who therefore, it can be inferred, escape the attention of Mungiki. But that, like the first sentence of §103, cited above, does not meet the particularity of the appellant's case.
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> 24. Nor, with respect, does the second sentence of that paragraph do so. On the very clear evidence before the tribunal - both the appellant's

specific evidence and Dr Knighton's generic evidence – the penetration of Mungiki into communities where they have as yet no influence has little or nothing to do with whether they are welcomed. That is not how they operate. On the evidence, they operate by recruiting individuals where they can and, for the rest, by imposing their customs and practices on the community by violence and intimidation.

25. The tribunal's earlier remark (at §81) that "If whole communities came under such pressure with such violence, it is perhaps surprising that nothing in the media has been published" is not only speculative but appears to overlook the fact that the material part of Dr Knighton's report gives sources in the Kenyan press, the second of them derived from a statement by the provincial chief of police for Nairobi, for the Mungiki's revanchist policy and practice towards renegades. If a distinction is intended by the tribunal between the penetration of communities and the oppression of them, it does not seem to us illuminating in the present context.

26. It is in §101 that the tribunal set out to deal with the case they have set out in the previous paragraph. They begin by describing that case as a generalised statement, which in our judgment it is not. They then assert that there is little support for it in the detail of the evidence. For reasons we have already given, this too is incorrect: both the appellant and Dr Knighton had given detailed evidence capable of making out the case. Contrary to what the tribunal next assert, there was every reason, given such evidence, to suppose that the appellant both had been and would remain of particular interest to the sect because of what happened in Kiambu in 2002. The finding in the final sentence of the paragraph seems to us to verge on the perverse: by focusing solely (and dubiously) on the appellant and her father, it ignores the real agent of mischief, her father-in-law, and the strong likelihood that both the insult to him and the elder's lost dowry would be very well remembered.

27. A similar imbalance is apparent in §103-4. The suggestion that only the willing are drawn into the Mungiki orbit, contrasting the father-in-law on the one hand with the appellant and her husband on the other, fails to take account of what happened first to her husband, who was murdered, and then to the appellant's daughter, who narrowly escaped FGM. And the tribunal's further finding that "there is nothing advanced before us to indicate that [Mungiki] seek systematically to impose FGM upon non-initiates" overlooks the clear evidence that FGM *is* initiation, and that the appellant, in fear after the killing of her husband, had agreed to it: clear evidence, in other words, of systematic imposition.

28. Lastly, the finding that there was no reason to suppose that the appellant would necessarily stand out in a community where FGM is not practised fails to engage with Dr Knighton's evidence that her name would always identify her as Kikuyu and – to Mungiki – as a renegade. Whether her name stands out may therefore be beside the point: the question is whether it may sooner or later enable her to be identified and targeted.

29. For all these reasons we consider that the specificity of the appellant's case – which, we reiterate, relates not to the existence of a well-founded fear in her home village but to the reasonableness and safety of moving elsewhere in Kenya - has not been adequately addressed.

> We would add in this connection that the reasonableness of a particular relocation is not necessarily confined to what is objectively to be feared there, although that is ordinarily conclusive. There may be cases where the tribunal is satisfied that, objectively, the appellant can be safe on relocation, but the appellant is so traumatised by past events that she remains in genuine terror of being returned there. The Home Secretary, by her counsel, accepts that cogent evidence to such effect may be relevant to whether internal relocation is unduly harsh.
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> 30. In spite of the time that has gone by – not, so far as we know, through the fault of the appellant or her advisers – it seems to us that this case requires remission to the AIT so that the critical issue of the reasonableness of internal relocation can be properly determined. We invite counsel's submissions, initially in writing, as to what form the remission ought to take.

22. We have very much to the forefront of our minds the similarities between the facts in the case of *FK* and the facts in this case and we are mindful of the reasons given by the Court of Appeal for holding that the appraisal of Dr Knighton's evidence is flawed.

The Issues

23. In the case of *FK* the question whether she is a refugee is in play, but only insofar as the issue of internal relocation is concerned, it being accepted that FK and her daughter each has a well-founded fear of being persecuted in their home area, by having FGM and/or worse violence imposed upon them, at the hands of the Mungiki, from whom the state would be unwilling or unable to protect them, as well as the question whether she and/or her daughter faces a real risk of serious harm contrary to Article 3 ECHR.

24. In the appeal before us, as matters stand, only Articles 3 and 8 ECHR are clearly in play given the history which we have outlined.

25. A number of points arises, as indicated in the reasons for finding an error of law, as to the scope of the reconsideration before us which were not specifically dealt with by the Tribunal when directing that there be a second stage reconsideration:

    - Can the Appellant revive her claim to refugee recognition?
    - If yes, is she a refugee by reason of there being no internal protection alternative available to her and her children?
    - If she cannot rely here upon a claim to refugee status, has she made good a claim to humanitarian protection?

- Has she made good her case under article 3 ECHR?

- Or is it the law that she must show that there is either a real risk of her experiencing serious harm contrary to article 3 ECHR throughout the whole of Kenya? Or, is the case that it must be shown that there is such a real risk in her home area, and that there is no other part of Kenya to which it would be reasonable to require her and her daughter and son to relocate to?

- Will removal of the Appellant and her two children to Kenya cause the UK to be in breach of its obligations under article 8 of the ECHR?

Revival of the Claim to Recognition as a Refugee

26. As Mr Fripp has argued, although the Appellant did not, at the time, appeal the adjudicator's decision to refuse to recognize her as a refugee, which was based upon his finding that it had not been shown that the Appellant's fear of being persecuted was for one or more of the reasons set out in Article 1(A)(2) of the 1951 Refugee Convention, in hindsight, it appears plain that the Adjudicator erred in law in rejecting the Appellant's refugee claim on the basis of his conclusion that women did not constitute a particular social group for the purposes of the Refugee Convention.

27. Mr Fripp draws attention to a number of cases to support his contention in this regard:

- *P and M v SSHD*[2004] EWCA Civ 1640

- *SSHD v Fornah; K v SSHD* [2006] UKHL 46, [2007] 1AC 412, [2006] 3 WLR 733

- *FK* (FGM - risk and relocation) Kenya CG [2007] AIT 00041 (and now, of course, the judgment of the Court of Appeal in *FK* on unrelated points. The Court of Appeal heard the appeal of *FK* in December 2007 and in a judgment of 26 February 2008 ([2008] EWCA Civ119), remitted the appeal of *FK* to the Tribunal to enable full and proper determination of the critical issue of the reasonableness of internal relocation.

28. Mr Fripp submits that it is strongly in the interest of timely and comprehensive resolution of the Appellant's claim to international protection that the Tribunal now consider not only whether Article 3 ECHR avails the Appellant, but also whether she is a refugee. He relies upon *DK (Serbia) and Ors v SSHD* [2006] EWCA Civ 1747 at paras 20-22 to support his argument

that there is a greater degree of flexibility within reconsideration proceedings under section 103A of the 2002 Act than was previously possible (this case falling under the transitional provisions as it does is to be treated as if it began its life under the current Tribunal regime).

29. In short, Mr Fripp says that the point is '*Robinson* obvious' and that as it has, in effect been so within these proceedings since the hearing before the Court of Appeal on 19 December 2005, it is right that it be dealt with now, rather than the Appellant having to make yet further applications.

30. Although the matter had been listed as an intended country guidance case, there was no skeleton argument lodged by the Respondent at or before the hearing on 9 November 2007, so that when the matter was adjourned part-heard, for lack of time, after receipt of expert evidence from Dr Benjamin Paul Knighton (see below), it was directed that the Respondent file and serve a skeleton argument, addressing all the issues, including the questions whether the concept of internal relocation and its associated learning applies when considering a deciding a case under Article 3 ECHR; and as to whether the Appellant could now revive her claim to recognition as a refugee, in the light of jurisprudence that has clarified the meaning of 'particular social group' when considering women who fear FGM, the Appellant relying upon the submission that it is now a "Robinson obvious" point.

31. Mr Walker, in his skeleton argument of 14 December 2007 makes clear that the Respondent relies upon the case of *FK* (FGM- risk and relocation) Kenya CG [2007] UKAIT 00041 as he takes the view that the Appellant's situation is on all fours with that of FK so that her appeal should be dismissed. The Respondent submits that in *FK* the Tribunal made findings when considering the evidence presented by Dr Knighton, which he had again presented in this appeal, and that this Tribunal should follow *FK* in dismissing this appeal.

32. The Respondent has lodged no further skeleton argument or written submissions in these proceedings.

33. The skeleton argument of 14 December 2007 does not address the issues relating to Article 3 ECHR or to the proposed revival of the claim to recognition as a refugee. We therefore proceeded on the basis that the refugee appeal was to be included as potentially live before us and requested Mr Walker to address us upon those points at the reconvened hearing on 14 December 2007, but he had no real point to make, whether for or against revival of the refugee claim or in relation to the existence or

otherwise of an 'internal relocation test' within article 3 ECHR.

34. We turn then, to consider whether the refugee claim is to be treated as in play. A key point, when reviewing the history of this case, is that the adjudicator who decided the appeal, Mr David Chandler, did not have the benefit of hearing from a presenting officer, and thus, as the Court of Appeal has stated, the hearing lacked focus.

35. The adjudicator reaches his findings on the question whether the Appellant is a refugee at paragraph 33 of his determination, where we see that Counsel for the Appellant relied upon the case of *Shah and Islam* [1999] Imm AR 283 to support the Appellant's claim that she is a refugee by reason of her membership of the particular social group of women in Kenya. The adjudicator did not agree because, he states, "…the overall picture does not show that women in Kenya are unprotected by the state to the same extent as in Pakistan…The government appears to be alive to gender concerns."

36. Counsel for the Appellant then apparently agreed with the adjudicator that the Appellant could not claim to be a member of the social group "women facing FGM" as this would be outside the definition provided in *Shah and Islam*."

37. Mr Fripp, who has more recently come to represent the Appellant, had to accept that there was no challenge on behalf of the Appellant to the refugee aspect of the adjudicator's decision. It must be said that this is somewhat surprising given the adjudicator's dubious reasoning and findings. However, that cannot be regarded as the fault of the Appellant who must, perforce, rely upon her lawyers. Mr Fripp submits that the issue has been 'live' since this matter was itself before the Court of Appeal, although it would not appear that the Court of Appeal was specifically requested to consider the arguments now raised, as Mr Fripp conceded before the Court of Appeal that because the Appellant did not cross appeal the decision of the adjudicator, no question of legal error on the part of the tribunal in that regard could arise. Mr Walker may perhaps be regarded as resting his submission on this point.

38. Mr Fripp refers us to the judgment of the Court of Appeal in *P and M v SSHD* [2004] EWCA Civ 1640. We note that neither the adjudicator nor the parties had the benefit of this guidance as it was not issued until 8 December 2004, whereas the adjudicator heard the appeal on 10 May 2004. However, the Court takes the view that 'women in Kenya' are capable of forming a particular social group for the purpose of Article 1A2 of the 1952 Refugee Convention:

> 37. First, on the evidence available, there was no reason why the Adjudicator should not have come to the conclusion that women in Kenya are a particular social group. If the position was not made clear by the decision in *Shah & Islam*, it is made clear by the decision of the Australian High Court in *Applicant S v MIMA* [2004] 8 CA 25, that we would apply also in this jurisdiction. The Adjudicator's decision was correct on her findings of fact as to the position of women in Kenyan society.

39. Mr Fripp further relies upon subsequent express endorsement of that judgment in speeches in the House of Lords in *SSHD v Fornah and K v SSHD* [2006] UKHL 46, [2007] 1 AC 412, [2006] 3 WLR 733. *Per* Lord Bingham of Cornhill at [26] and [31], expressing views concurred in by other members of their Lordships' House:

> 26. First, claims based on fear of FGM have been recognised or upheld in courts all round the world. Such decisions have been made in England and Wales (*Yake v Secretary of State for the Home Department*, 19 January 2000, unreported; *P and M v Secretary of State for the Home Department* [2004] EWCA Civ 1640 [2005] Imm AR 84), the United States (*In re Kasinga* (1996) 21 I & N Dec 357, *Abankwah v Immigration and Naturalization Service* 185 F 3d 18 (2d Cir 1999), *Mohammed v Gonzales* 400 F 3d 785 (9th Cir 2005), Australia (*RRT N97/19046,* unreported, 16 October 1997), Austria (*GZ 220.268/0-XI/33/00*, unreported, 21 March 2002), and Canada (*Re B(PV)* [1994] CRDD No 12, 10 May 1994; and *Compendium of Decisions*, *Immigration and Refugee Board*, February 2003, pp 31-35). Secondly, such agreement is consistent with clearly expressed opinions of the UNHCR. Representative of its consistent view is a memorandum of 10 May 1994 on Female Genital Mutilation, which in para 7 says:
>
> > "On this basis, we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered as a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice."...
>
> 31. Departing from the submission made below, but with the support of the UNHCR, Miss Webber for the second appellant submitted that "women in Sierra Leone" was the particular social group of which the second appellant was a member. This is a submission to be appraised in the context of Sierra Leonean society as revealed by the undisputed evidence, and without resort to extraneous generalisation. On that evidence, I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. They are perceived by society as inferior. That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to

the persecution complained of: it is a characteristic which would exist even if FGM were not practised, although FGM is an extreme and very cruel expression of male dominance. It is nothing to the point that FGM in Sierra Leone is carried out by women: such was usually the case in Cameroon (*GZ*, above) and sometimes in Nigeria (*RRT N97/19046*, above), but this did not defeat the applicant's asylum claim. Most vicious initiatory rituals are in fact perpetuated by those who were themselves subject to the ritual as initiates and see no reason why others should not share their experience. Nor is it pertinent that a practice is widely practised and accepted, a contention considered and rejected in *Mohammed v Gonzales*, above. The contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. FGM may ensure a young woman's acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority. I cannot, with respect, agree with Auld LJ that FGM "is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society". As I have said, FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2). Had this submission been at the forefront of the second appellant's case in the Court of Appeal, and had that court had the benefit of the UNHCR's very articulate argument, it might, I think, have reached the same conclusion. If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone. This was the solution favoured by Arden LJ, and in my opinion it meets the Convention tests. There is a common characteristic of intactness. There is a perception of these women by society as a distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure.

40. *Per* Baroness Hale of Richmond at 108:

"108. While the *Quijano* decision explains why Mrs K's case had to reach this House, it is much harder to explain why Miss Fornah's had to do so. We have been referred to case law from many different jurisdictions in which FGM has been held, not only to be persecution, but persecution for a Convention reason. We have been referred to none at all where it has not. The United Kingdom is apparently alone in the civilised world in rejecting such a claim. Nor do we reject them all: the Court of Appeal in *P and M v Secretary of State for the Home Department* [2004] EWCA Civ 1640; [2005] Imm AR 84 had no difficulty in accepting the claim of a young Kenyan Kikuyu woman who feared that her father would force her to undergo FGM."

41. We were then referred to *FK (FGM) - risk and relocation)* Kenya CG [2007] AIT 00041, at [63], the AIT accepted that the evidence before it

"strongly supports the view, in the light of the proper legal criteria

now clarified by [*Fornah]* that Kenyan women belonging to those ethnic groups where FGM is practiced are properly to be regarded as falling within a particular social group for the purpose of being a refugee...**".**

42. We would agree with Mr Fripp that it is strongly in the interest of timely and comprehensive resolution of the Appellant's protection claim that the AIT be able to consider not only whether the Appellant's removal would breach article 3 ECHR but also whether the Appellant, given the clarification of the law in the decisions referred to above, is a refugee.

43. Procedurally, the situation appears to be as follows. The Appellant's appeal to the Court of Appeal from the IAT led to that Court's remittal to AIT by application of section 103B (4) NIAA 2002 (as amended): Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005. It might appear that the present proceedings may be rendered more comprehensive only by the Appellant's bringing of an out-of-time application for reconsideration of the Adjudicator's decision under section 103A NIAA 2002, leading to grant of an Order for Reconsideration and formal inclusion of the Appellant's claim to Refugee Convention status within the scope of the present reconsideration. Against that, the judgment of Latham LJ giving the judgment of the Court of Appeal in *DK (Serbia) & ors v SSHD* [2006] EWCA Civ 1747 [20]-[22] suggests that in reconsideration proceedings under section 103A NIAA 2002 a more flexible approach than previously possible might be required:

> 20. For my part, I consider that the reasoning of the Tribunal was essentially sound as to the jurisdictional ambit of a reconsideration. But that does not provide the complete answer to what should be the scope in practice of any particular reconsideration. The jurisdiction is one which is being exercised by the same tribunal, conceptually, both at the first hearing of the appeal, and then at any reconsideration. That seems to me to be the key to the way in which reconsiderations should be managed in procedural terms.
>
> 21. In the first instance, in relation to the identification of any error or errors of law, that should normally be restricted to those grounds upon which the immigration judge ordered reconsideration, and any point which properly falls within the category of an obvious or manifest point of Convention jurisprudence, as described in *Robinson* (supra). Therefore parties should expect a direction either from the immigration judge ordering reconsideration or the Tribunal on reconsideration restricting argument to the points of law identified by the immigration judge when ordering the reconsideration. Nothing in either the 2004 Act or the rules, however, expressly precludes an applicant from raising points of law in respect of which he was not successful at the application stage itself. And there is no appellate machinery which would enable an applicant who is successful in

> obtaining an order for reconsideration to challenge the grounds upon which the immigration judge ordered such reconsideration. It must however be very much the exception, rather than the rule, that a Tribunal will permit other grounds to be argued. But clearly the Tribunal needs to be alert to the possibility of an error of law other than that identified by the immigration judge, otherwise its own decision may be unlawful.
>
> 22. As far as what has been called the second stage of a reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. The most important is that any body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis that any factual findings and conclusions or judgments arising from those findings which are unaffected by the error of law need not be revisited. It is not a rehearing: Parliament chose not to use that concept, presumably for good reasons. And the fact that the reconsideration may be carried out by a differently constituted tribunal or a different Immigration Judge does not affect the general principle of the 2004 Act, which is that the process of reconsideration is carried out by the same body as made the original decision. The right approach, in my view, to the directions which should be considered by the immigration judge ordering reconsideration or the Tribunal carrying out the reconsideration is to assume, notionally, that the reconsideration will be, or is being, carried out by the original decision maker.

44. Mr Fripp has argued, and we would agree with him, that the ability to raise "an obvious or manifest point of Convention jurisprudence" presumably applies to 'protection claims' whether under the Refugee Convention or under article 3 ECHR: there is no principled basis at all for any other conclusion. Once this is accepted, and given the unitary nature of the reconsideration process, there is no reason why, faced with a relatively unusual situation such as the present one, a claimant should not be allowed to revive consideration of the Refugee Convention aspect of the protection claim.

45. On this basis, though with some reticence, Mr Fripp suggests that the Tribunal is able to raise the question of Convention reason under the Refugee Convention in present proceedings. Thereafter, says Mr Fripp, resolution of that aspect of the appeal would turn on consideration of internal relocation issues, the Adjudicator's earlier consideration whether applied to article 3 ECHR or to the Refugee Convention being erroneous for the reasons given by the Court of Appeal.

46. We find ourselves in agreement with Mr Fripp as to the way forward in this regard, for the reasons that he has advanced. Like him we also express some reticence, but we bear in mind all of the jurisprudence and the other relevant factors to which he has so ably referred us, not least of which are the 'unitary nature' of

the reconsideration, the undesirability of yet further applications and proceedings in this matter, and, extremely importantly, that the decision of the adjudicator was wrong in law. We accept that the latter is a 'Robinson obvious' point and bear in mind that any such point can only be 'Robinson obvious' in a situation where the law is correctly understood, argued, and applied by those responsible for so doing. Whilst the argument should, of course, have been raised earlier by her lawyers, upon whom the Appellant must rely, in particular before the Court of Appeal, she is not to be treated as fixed with their failings so that she is left without recourse. It is understood that the present representatives were only involved relatively recently so that in the circumstances it may be regarded as understandable that this was not done.

47. We therefore proceed on the basis contended for by Mr Fripp, and applying the guidance of the House of Lords, and of Lord Bingham in particular, as summarized above, in *Fornah and K*; namely, on the basis that the refugee appeal is live before us.

48. In those circumstances, we re-visit the question of the issues that are now before us in the light of the current legal framework as it applies to this case, albeit that the appeal began under a previous regime.

49. In the event that we are wrong in treating the refugee appeal as live before us, then our consideration and finding in this determination will serve to deal *obiter* with the Refugee Convention issue, and, as Mr Fripp submits, the Appellant will in due course have to consider (taking into account the outcome of the reconsideration of article 3 ECHR issues) whether to enter into correspondence with the SSHD seeking acknowledgment of representations as amounting to a fresh claim to protection as a refugee, under para 353 Immigration Rules HC 395.

50. Apart from the refugee appeal, article 3 ECHR is in play before us, on the basis that the Appellant has already shown that she is at real risk of serious harm contrary to Article 3 in her home area, by reason of her fear of forced FGM, whether in respect of herself only, or herself and her daughter.

51. In his skeleton argument, Mr Fripp has also submitted that following the Practice Direction of 9 October 2006, consideration must be given to the question whether the Appellant is entitled to humanitarian protection, although we cannot see that he has pursued this argument in his oral submissions. However, given the history of the matter and what we have said relating to the unitary nature of the AIT, its proceedings, and the transitional provisions, it seems to us that in the light of the Practice Direction, it would follow that humanitarian protection would fall

to be considered in the event that we were to find that the Appellant is not a refugee, and that procedurally, that aspect would fall to be considered before moving to consider the article 3 aspect.

52. The provisions of SI [2006] No.2525 "The Refugee or Person in Need of International Protection (Qualification) Regulations 2006" now bring into United Kingdom domestic law the Council of the European Union Directive 2004/83/EC of 29 April 2004 on 'minimum standards' for the qualification and status of third country nationals or stateless persons as refugees or as person who otherwise need protection and the content of the protection granted, normally referred to in the United Kingdom as the Qualification Directive. Commensurate changes were made in the Immigration Rules by means of Statement of Changes in the Immigration Rules also taking effect on 9 October 2006.

53. The determination we have made has approached the issues in this appeal from the perspective of the 2006 Regulations and in particular has applied the definitions contained there, in deciding whether the Appellant is a refugee under the 1951 Geneva Convention. We have also applied the amended Immigration Rules. These have permitted us to consider whether the Appellant is in need of Humanitarian Protection as being at risk of serious harm, as defined in paragraph 339C of the Rules. Finally, we have gone on to consider whether the Appellant is at risk of a violation of her human rights under the provisions of the ECHR.

54. The burden of proof is upon the Appellant. The standard of proof has been defined as a '*reasonable degree of likelihood*', sometimes expressed as 'a reasonable chance' or a '*serious possibility*'. The question is answered by looking at the evidence in the round and assessed at the time of hearing the appeal. We regard the same standard as applying in essence in human rights appeals although sometimes expressed as '*substantial grounds for believing*'. Although the 2006 Regulations make no express reference to the standard of proof in asylum appeals, there is no suggestion that the Regulations or the Directions were intended to introduce a change in either the burden or standard of proof. The amended Rules, however, deal expressly with the standard of proof in deciding whether the Appellant is in need of Humanitarian Protection.

55. Paragraph 339C of the Immigration Rules defines a person eligible for Humanitarian Protection, as a person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of suffering serious harm. It

seems to us that this replicates the standard of proof familiar in the former jurisprudence and, by implication, applies the same standard in asylum cases.

56. Accordingly, where below we refer to 'risk' or 'real risk' this is to be understood as an abbreviated way of identifying respectively:

i. whether on return there is a well-founded fear of being persecuted under the Geneva Convention;

ii. whether on return there are substantial grounds for believing the person would face a real risk of suffering serious harm within the meaning of paragraph 339C of the amended Immigration Rules; and

iii. whether on return there are substantial grounds for believing that the person would face a real risk of being exposed to a real risk of treatment contrary to Article 3 of the ECHR.

57. In reaching our conclusions as to whether the Appellant will be at real risk on return, we have been further mindful that the amended Immigration Rules (Cm 6198) contain among other provisions, paragraph 339K which deals with the approach to past persecution and serious harm, and paragraph 339O headed "*Internal Relocation*".

58. It follows that the questions to be answered here are:

- Whether there is a sufficiency of protection available to the Appellant and /or her daughter, from the authorities, anywhere outside her home area in Kenya, so that she would not then be a refugee or at real risk of serious harm contrary to article 3.

- Whether, in the event that there is such a sufficiency of protection, it would nevertheless be unreasonable, in the sense that it would be unduly harsh to require the Appellant and her children to relocate to the place (one of the places) where it is said that she may reasonably be expected to go, so that she is nevertheless a refugee.

- Whether, if the Appellant is not a refugee, she is entitled to humanitarian protection.

- Whether, in considering and deciding a claimed prospective breach of article 3 ECHR, there is a requirement to apply the concept of 'internal flight' or 'internal relocation' or 'internal protection alternative.'

- Whether, further or in the alternative, removal would be contrary to the United Kingdom's obligations under article 8 of the ECHR.

59. Before deciding any of these issues, we return to the evidence before us, and consider next the expert evidence of Dr Knighton which is relevant to the questions that we have identified, as well as the other background evidence to which the parties have drawn our attention.

The Expert Evidence of Dr Knighton

60. As was noted by the Court of Appeal in *FK*, Dr Knighton's credentials are impressive. He is a fellow of the Royal Anthropological Institute and gives this account of his qualifications:

> "I have lived and worked in Uganda and Kenya for nine years altogether, starting in January 1984. My work there for the Anglican church involved hundreds of interviews to test the probity, financial and personal inter alia, of many categories of people. Most of my time in the UK since 1983 has been spent in the study and research of East Africa, including my doctoral thesis in the University of Durham (Knighton 1990). I lived south of Mount Kenya and worked among the Agĩkũyũ (Kikuyu) from 1991-8. I have returned there in connection with my academic work about annually on average, and did so in December-January 2005, when I interviewed Agĩkũyũ women about their initiation which involved Female Genital Cutting (FGC) in every case. I have taken an interest in Mũingiki (Mungiki in the English press) for more than four years. I am part of the African Studies circle in University of Oxford_and Ph.D Programme Leader in the Oxford Centre for Mission Studies. I have ongoing contact with many Kenyans and Agĩkũyũ, some among my research students. I am thus in a relatively advantageous position to understand the context from which FK, 'the Appellant', comes.

61. Since then, we note (page C1-C2 of the Appellant's bundle, first report of Dr Knighton in this matter, 8 February 2007) that he has made a further visit to Kenya in November-December 2006 during which time he undertook field work in and around Karen, Ngong, and when in Central Province, stayed at the vicarage at Wangige, whilst conducting interviews.

62. He states at paragraph 2 that he has read the relevant documentary evidence in this matter as there listed, and that the Appellant is not known to him, nor is any member of her family, so that he is able to be as objective as possible about the case, which would be his academic tendency in any event.

63. Dr Knighton has prepared reports dated 8 February 2007 and 24 October 2007 (Appellant's bundle, section C, pp C1-C61 and pp C62-C108). His second report is able to include responses to

findings and conclusions reached by the Tribunal in *FK* (which determination was, it will be recalled, remitted by the Court of Appeal on 26 February 2008).

64. Before hearing oral evidence from Dr Knighton, we requested that the Appellant's daughter leave the hearing room, accompanied by an appropriate carer, our having taken the view that it was not in her best interests to remain to hear the rest of the proceedings or to witness any response her mother may have during the course of the hearing.

65. In summary, as stated in his two reports, Dr Knighton's opinion is that given the particular history, characteristics and circumstances of this of the Appellant, a lone Gikuyu woman who has a young daughter (a child born of rape) and a young son, who has defied the Mungiki, who has no home or known family members to turn to, and who is unlikely to be able to seek protection with a new husband, she cannot return in safety to Kenya.

66. Given the history of the matter, we here set out a detailed summary, the oral evidence of Dr Knighton, who adopted the content of his two reports, bearing in mind the width and complexity of the issues and that we are 'looking at a moving target'.

67. Dr Knighton explained that the Tribunal has used "Kikuyu" whereas the orthography that he uses is "Gikuyu". Kikuyu is from the Imperial age and is an Anglicisation. The orthography is Gikuyu, also written with vowel marks to help with the pronunciation.

68. "Mbara" means "Sub-clan"- most easily represented by a portion of land marked out by a clan member from forestland and is very important for the determination of land rights. It is very difficult to split family title without agreement of all the elders of a sub-clan – it is important socially and economically and the sub-clan has unity and follows the same customs.

69. The level below, that is between the Gikuyu people and Mbara. The strata used to be age and class but that is now vestigial. Agikuyu is the tribe and is hardly ever a political people because it is so large but it is limited by language and united in particular by the next level down, the clans, which are matrilineal and known as "the nine clans" and they still figure in feminine names and the sub-clan is part of the clan and a person remains in a clan until they marry out. The "full nine" is the correct number which of course means ten. Mbara is the unit below the clan. Districts reflect this in the Nyeri,

Kirinyagu, Murangu, and Kiambu – where they were expanding when the British arrived. Kiambu spread west and are widely dispersed. They spread wide and there are other areas of Kikuyu across the country often where British settlers are.

70. The terms FGC and FGM are not used locally in Kenya, although they are referred to on occasion in the English press. The used term is female circumcision and circumcision. "Cut" is less pejorative and value laden as a term and is a word used in Kenya rather than mutilation. A great many people do not see the cutting as a form of mutilation, rather it is seen as an act which is enhancing of a woman's standing and seniority.

71. The normal strategy for someone in the position of the Appellant, who was moving around inside Kenya, would be, if she were able to identify a member of her family or her husband's family, to rely on them, if possible. The usual strategy is to move around with your kith and kin – this is famously how Nairobi is made up and reinforced by the British – you will be known/recognised in Nairobi as being of your tribe.

72. For many reasons, people do live elsewhere than with their tribe. For example, land appropriation, to do business, to escape problems. However, the Kikuyu are notorious for colonising Kenya in terms of business and land appropriation. Business is done by who you know and who you can trust – very much to the forefront today is resentment against the Kikuyu because of their advantages in the past and they do tend to do better. For them, that the President may be removed may mean it is very difficult to buy land even though much of the land is still in common ownership in Kenya and most are pastoralists and anyone coming as a new person comes at the mercy of the pastoralists who practise very high levels of FGC except the Turkana who are in the north west rift in a very difficult area of Kenya.

73. As to whether successful relocation is connected to or dependent upon the sex of the individual, Dr Knighton stated that normally the son or first son is required to go out and open a new "Kibeka" – a tract of land, and once he has done this, he then attracts women around him. Kikuyu women can be very enterprising and are to the fore in local markets and can be big as cereal dealers.

74. At page 40, paragraph17, of his report, the possibilities of internal relocation are referred to, and the question was raised with him as to how "the city" as a place of relocation applies to this Appellant. Dr Knighton noted that the Appellant has had a secondary education and shown early proclivity to trade, but

that this depends on being in the forefront of the public eye, meeting people and knowing people. In the slums there will be a Mungiki presence and a Gikuyu presence. The more you trade the more you become known, and when there are Gikuyu and where there are Gikuyu there are Mungiki or there were recently, or will be in future, Mungiki. The Mungiki are, said Dr Knighton, luminous in the transport area, and are very often "Mutatu Touts" – a person who shoos people into taxis and takes the money from them.

75. In terms of transport, including in the country areas, the Mutatu are, said Dr Knighton, very, very important. There are large buses to do long journeys and of course lorries. These buses and lorries are slow. The railway is slow and is not a real passenger business and in fact is decreasing in the number of passengers it carries. Most people rely on Mutatu. The Gikuyu are dominant in the Mutatu in ownership and in running it. In 2006 there was a newspaper report which says that the Mungiki have returned to the whole country via the Mutatu industry.

76. As to what forms of Mungiki are on the transport, Dr Knighton observed that David Anderson in Oxford has written to say that the Mungiki are an urban protection racket over controlling the Mutatu, but they are also very much present in rural areas where people have been oathed, including because of land clashes. The Mungiki are, in the main, said Dr Knighton, a core of unemployed, semi-dispossessed Gikuyu youth with distinctly dim prospects of becoming honoured men. This was the bedrock of the Mau Mau and the children of the Mau Mau are the Mungiki. It is not just a socio-political organization, it is also religious. He referred to his first report – religion is used through the secret oath of secrecy and loyalty and in this it is close to the Mau Mau. There is reliance on the wrath of God and there are similar methods and initiation to the Mau Mau. Backsliders from the Mungiki are murdered in Nairobi and it is very difficult for researchers to penetrate the organisation. The oath is very strong and secretive: "May this oath kill me if I disclose the secrets of the oath". Other Mungiki will lean on potential backsliders and that is why the government finds it so difficult to deal with them – there had been eight years of emergency powers under British rule to deal with the Mau Mau. Now, the government is speaking of use of emergency powers again and it has spoken of the Mungiki as a "national crisis".

77. Referred to his written evidence at C41, regarding internal relocation, Dr Knighton was asked to comment on someone in the Appellant's position, seeking to escape a risk of contact with the Mungiki, in particular as to what ability she would have to develop a new tribe, new Mbara, family.

78. Dr Knighton was clear that the only tried and tested route is to marry out of the tribe. This is very difficult when there are children because children belong to the first husband and the system is patriarchal in that the wife goes to live in the husband's house. But even in Meru, to the west, women who have married into a cutting tribe or family, find that even their husband cannot guarantee bodily integrity. Gikuyu women also have a reputation for leaving a marriage with all the household goods so there is a reluctance to marry such women (who have left a husband) even if they will engage in sexual relations. Further, if you marry a Gikuyu you do not know if he will turn into a Mungiki.

79. Dr Knighton was referred to the judgment of the Court of Appeal in *VNM* (D45, paragraph 25) (Mr Fripp read to the words to the end of paragraph 25). He was then asked how practicable it is, for this appellant, seeking to avoid her own tribe, to maintain a false account of her identity and history or to say nothing about her background. Dr Knighton explained that society in Kenya is not as private as in the United Kingdom – there is no such proverb as "home is a castle". People like to associate communally and go to church and meet. People are concerned with where you are from and who your father is. What is your sub-clan will be the second question after what is your name. Even in an urban area you do not belong to Nairobi, you belong to the land outside Nairobi where you have come from and where you want to be buried. Most people want to be buried in their homeland. This is a normal part of daily intercourse to pry, to ask questions – you cannot come from nowhere and you will be pinpointed and connections will be made. That is so even here in the UK. In her home area and wandering across Kenya are the platoons of Mungiki and they will know of her as a one time leader's wife. Wangiku is a thoroughfare. The same applies to Kiambu and other areas.

80. As to how much interest a person would take, given that this story is in the past, Dr Kinghton's evidence was that it is an event in Mungiki history, and a person who had taken the Mungiki oath would be duty bound to report the Appellant's presence. Also it is good gossip and would come out unless an individual took pity on her.

81. At the time when Dr Knighton gave his evidence, we did not yet have the benefit of the judgment of the Court of Appeal in the case of *FK* in which Dr Knighton's evidence upon very similar issues was considered. (See tab L of the appellant's bundle of authorities and see page 17 of *FK* at paragraph 66). Asked to comment on the Tribunal's view of his evidence in that case, Dr

Knighton stated that it is a rather mangled understanding of what he was saying. It is true a substantial number of Gikuyu do not cut their daughters, but there is no division in district/territorial terms of this, neighbours would not even know because the cutting is done secretly now. Even government employed medics will perform it. So there are Mbara who will perform it even though Christian and some who, with influence of the church, will not. A mother may be against and a grandmother for it and if she is father's mother then she (grandmother) may win. There is a great deal of diversity and the finding by the Tribunal at para 66 that there are many areas within the Gikuyu territory in which the inhabitants do not seek to practise FGM, does not hold. It is not static either, because Mungiki bring back FGC and the rise of secret communal ceremonies have been known. There used to be public communal ceremonies of cutting and the British stopped them.

82. Dr Knighton was taken to paragraph 67 of the determination of the Tribunal in *FK* where the Tribunal expresses disagreement with the opinion of Dr Knighton that church communities in Kenya would not provide protection to the Appellant. Asked to comment, he explained that he was taken to Africa by the church and worked for the church for nine years. Importantly, the church does not come to <u>replace</u> culture but to establish itself <u>as</u> the church and has hardly even tried to change the socio-cultural base and has even tried to reinforce the land based, self sufficiency goal and the Kenyatta, Kiabi line of self-sufficiency holds. The Kenyan Church does not have the long Augustinian tradition of the Western Church. Rather, it is the extended family of the Kenyan nation as a whole and there is no social service and there are no abbeys or church-based organisations to run institutions to provide shelter to persons, whether ladies or children. After the police round up people or round up children they will be returned home. It is, in his personal experience, very difficult to run church-based organisation against this tradition. The church does <u>not accommodate</u> people. A domestic servant or a spouse is the only woman who will be taken in, plus divorced women do return to their families. There is now murderous pressure on land and self-sufficiency is increasingly difficult.

83. Dr Knighton was of the opinion that domestic service is an 'escape route' for some women, but one would be considering the 'ex-patriot' service because of the Appellant's age and her children. Usually no cash is paid and the benefits are all in kind. It is usually a phase in life for poor young girls from poor families who then go on to marry. The usual form of protection is a husband, but a Gikuyu woman with a son is unlikely to find a husband because you do not bring another man's son

into your home and in addition there are also inheritance problems.

84. Ex-patriots usually have staff who are of Gikuyu origin, so even in the ex-patriot community there is a strong Gikuyu presence. Also one would need a recommendation from an ex-patriot or to go through an agency, or one would need to be the relative of an existing employee.

85. Dr Knighton stated, referring to his supplementary report, that the year 2007 has brought the most intense violence yet from the Mungiki ('Muingiki' as he refers to them) and the most violent and unrestrained response from the police, following a decision by the inner cabinet of President Kibaki to confront the Mungiki with no holds barred. This destabilized areas where Mungiki activity has been visible to the authorities. It follows clashes between Mungiki and police in Kiambu district in March and April with police alleging 112 deaths in June around highly populated Gikuyu areas, including 27 killed by the Mungiki, of whom 11 were police officers (Daily Nation 3 July 2007).

86. The Archbishop of the Anglican Church of Kenya, the Most Reverend Benjamin Nzimbi said that "…the peace that had in the past been in the country was being replaced with fear. These killings are scaring and we ask the Government to intervene now and find a lasting solutions (sic) to these senseless criminal attacks" (Daily Nation 9 July 2007). Dr Knighton continued that scores of bodies have been found in Ngong forest, apparently dumped there by anti-Mungiki police squads, having been killed at close quarters (Mukinda, Fred "Killings Linked to the War Against the Mungiki sect", Daily Nation 23 October 2007). There remains plenty of lethal activity in Kiambu (which is a town, district centre and district but not a village as stated by the Tribunal in *FK*). Reference is made to the shooting dead by police of two suspected Mungiki said to have been engaged in extortion.

87. Young women who discover that their partners are or may be Mungiki are obliged to remain with them or risk ill treatment including gang rape and other forms of torture and serious harm should they try to leave the home and they dare not divulge that a partner is or may be Mungiki (Daily Nation, 27 September 2007).

88. Nobel Laureate Wangari Maathai has submitted that in the first nine months of 2007 the police had shot dead 476 suspects, at least 50 in circumstances indicating summary execution [Daily Nation 9 August 2007).

89. Dr Knighton noted that the Tribunal in *FK* had stated that he had not given any specific figures for membership of the Mungiki. He points out that there is inevitably no reliable census of membership of a secret society, but that he did give a range of reported numbers that newspapers have seen fit to print and country reports to quote. He draws attention in his supplemental report to more recent figures, mostly going back to Mungiki leaders, who do know best, if believed, as it is they who keep registers of members:

> "The exact membership figures of the movement remain as controversial as its operations, ranging from 1.5 million, 2 million, 4 million and more recently 7 million, according to its leaders. (Daily Nation, 24 June 2007).
>
> Sadly, the Kenya government's iron-clad response to the Mungiki extremists – estimated at between 1.5 and 2 million and mainly youths between 18 and 40 years, with 400,000 of them as women-reveals an unsettling lack of appreciation in official circles of the depth and complexity of Africa's youth crisis. (Kagwanja, Peter 'Africa Insight' : When Africa ignores the youth, its warlords celebrate' (Daily Nation, 22 June 2007)."

90. Dr Knighton points out that when giving evidence in *FK,* he gave 500,000 as a very likely bottom- of -the –range estimate of those who have been oathed. Even Archbishop Beecher considered that 95 percent of his own Anglican Agikiyu had been oathed by the Mau Mau.

91. Although the Mungiki is abhorrent to the much larger middle class of today, it is perfectly possible that many more have been oathed, if insincerely, than 500,000. He points out that at para 34 of its determination in FK, the Tribunal states that half a million Agikuyu are said to amount to '1.47 per cent' of the Agikikyu. However, since it is accepted that there are at least 6 million Agikuyu of all ages, this indicates that there are at least 8.5 per cent of the post adolescent population who are Mungiki, or one in 12. Yet, at para 71 of the determination in FK, the Tribunal does not take note of Dr Knighton's evidence as to the minimum figure of 500,000, and then goes on to hold that this would in any event represent but a very small percentage indeed of the Gikuyu population as a whole. Dr Knighton adds, referring to his supplemental report (C66) that the percentage of about 1 in 12 or 1 in 13 is a significant number, in particular when it is considered that children are not registered.

92. Dr Knighton states that whilst *JA* (Mungiki-Not a Religion) Kenya [2004] UKIAT 00266 found the Mungiki to be 'small', that does not alter the facts on the ground. Further the news in 2007 clearly and widely portrays Mungiki to be one of the biggest challenges to the Kenyan state and to peace for its citizens. Whatever the number of active adherents at any one

point in time, its impact is huge.

93. As to what is stated in the Appellant's submissions in *FK* regarding FGM, (FGC as Dr Knighton prefers), (para 50) he reiterates that only those women well past child bearing age would be spared FGC if that were to be forced. As to para 81 of FK, of course the Mungiki target small numbers if they want to force actual operations of FGC.

94. On the matter of figures and statistics, Dr Knighton noted that the Tribunal in *FK* had held that 'many millions' of women and girls have not been subject to FGC, but even on KHDS figures, only two million at the most, more likely 1.5 including infants and young children, have not experienced FGC. Assuming that adolescent girls or 'young women', constitute a quarter of the female population, then we are talking of 850,000 young females, of whom 561,000 might not have undergone FGC, certainly not 'many millions'. The Kenya Demographic and Health Survey (KDHS) statistics cannot be relied upon as hard facts. He had dealt with them meticulously before the Tribunal, explaining the necessary caveats, in particular under reporting, for numerous reasons. The outcome of this scrutiny is that 34 percent is a figure on the extreme bottom range of the proportion of Agikuyu over 15 years of age who have experienced FGC, whilst the top end could be around 50 percent. Of course, all statistics in the region, except where customs are near universal, should be taken with a great deal of caution. For example, a Zambain research student reported a respondent stating that he had a black and white television when she knew full well that he had no television at all. The desire to appear acceptable to modern trends can be very deceptive. It is still possible that any marked changes in this very private area of life are more due to under reporting than to a shift in practice. [We recall the concern of the late President Jomo Kenyatta that an end to FGM would signal the end of the Gikuyu tribe (A51]).

95. With regard to the wider issue of risk to women in Kenya, at para 42 of the determination in *FK,* it is stated that the Tribunal were not addressed on that wider issue, but, Dr Knighton pointed out, he had dealt with the matter at length at paras 5-9 of his first report (C6-C17, and also paras 10-12, C17-C22), see post].

96. As to the Tribunal's view in *FK*, at para 83, that the Appellant could go to live in another tribal area, such as that of the Luo and Luyia who do not practise FGM, in particular Musoma, Dr Knighton referred to an earlier report of his in another matter, in which he included evidence of a Gikukyu woman being at

real risk of forced FGM in a strongly Luyia area.

97. Regarding the report of a German agency (this is a reference to the German Development Organization, which is quoted by Miss Sigley Presenting Officer, in her submissions to the Tribunal in *JA* (above). This organization's report refers to a: "'successful' education programme aimed at eradicating FGM in Kenya, which involves an alternative rite of passage in which girls were taken through all the formalities attending FGM but not the actual cut. Some five thousand girls had participated. Those who had been circumcised were now condemning FGM in impressive numbers".

98. Dr Knighton points out that reliance upon this report ignores his evidence from a Gikuyu woman campaigner against FGM who was committed to promoting the alternative, that this programme had, if anything, a negative effect in deterring young girls who were later going in for the 'real thing'. In his judgment, her evidence has the ring of objectivity and not self-interest.

99. Dr Knighton deals with what he refers to as the 'NGO industry' at para 10 of his first report (C17-C20). The explicit aims of an NGO project tell little if what it actually accomplishes in the long term…when we see an NGO fulminating against FGM, what we see mostly is an expression of the West's abhorrence of a selected African custom (though its origins are Semitic) rather than any fundamental change in the custom and its practitioners. Kenyan NGOs national presence can be interpreted as office premises in a number of urban centres with a limited number of office workers. The shift toward advocacy means that an NGO may have no hands on project, and refuge accommodation is extremely rare, for it would be inundated by the poorly housed. Although there is mention of the Centre for Rehabilitation of Abused Women (CREAW), which provides legal aid to abused women, there is no mention that the safe house for 15 women ever found the funding that it needed (IRIN 25 October 2005). The V-Day Safe House for Girls, started in 2002 in Narok, a semi-arid area, is said to operate the first safe house in Kenya for young Maasai girls (Daily Nation, 8 December 2004). World Vision is said to have a rescue centre for Sabawot girls on Mount Elgon (Daily Nation 8.12 2004). Whether the personal funding continues for the planned 40 bed safe house after 2004 is not at all clear.

100. The UN Family Planning Association of Uganda claims to produce and disseminate information, education and communication focused on youth sexual and reproductive health, but not to implement its teaching. Maendeleo Ya Wanawake (MYWO 2000) claims to have 600,000 groups and

two million members paying an annual subscription of KSh 20 each, but it does not answer all enquiries and has not finished constructing its website which was last updated in June 2000. Its Advocacy Strategy for the Elimination of FGM has been funded by the Ford FoundatIon, yet it offers nothing for young women who choose to leave home to avoid it. The Chair is a KANU MP. Although MYWO has been a means of aligning women with a political party, it has not enjoyed the mass support which KANU lost in the 1960s.

101. NGO's will apply for what funding is available, but that any NGO will achieve its stated aims can never be presumed. There are said to be 80,000 development projects in Africa spending $2-3 billion pa (Cleobury and Morgan 2004) with a general lack of accountability and indulging in 'mission creep', following funding availability rather than their own expertise. If 7 NGOs followed up by Cleobury and Morgan, six had vanished. In de Waal's words [1997:143): "…there is in fact a tendency towards systemic duplicity. The language that relief agencies use to their peers, donors, and constituents, is a systemic distortion of the realities of their work on the ground…This is the language of pragmatic deals, compromises and turning a blind eye."

102. Dr Knighton was reminded that he has given evidence about the level and mode of transportation rates by the Gikuyu. Asked to comment on the conclusion by the Tribunal in *FK* that most activities are in Nairobi and the absence of arrests shows a lack of activity by the Mungiki, he said that the reports are in Nairobi papers and Nairobi-based, and the reports come into Nairobi. This stretch of Kiambu is very much the breeding ground of the Mungiki, incidents are recorded in the area although less than the slums of Nairobi. Mungiki has been particularly strong in these areas. There are many more areas of societies of Mungiki wielding power over the masses in Kiambu. Groups of men go out at night after dark and stop anyone going out and they insist that they escort people home and insist on payment of 50 shillings. The Mungiki are willing to attack the police and they disrespect the police.

103. Dr Knighton said that he has been advised by a Christian pastor with integrity that he should not risk interviewing a Mungiki. There has been 'the mother of all crackdowns' on the Mungiki and the Mungiki say they will 'fight fire with fire' so this finding, (by the Tribunal in FK) that because there are no reports nothing is happening, is wrong. Now we have heard that police have shot 500 in the back of the head. The Kenyans do <u>not</u> think that the Mungiki have gone away. Numbers of Members of Parliament are implicated with the Mungiki and Professor Anderson supports him on this. An election is due and he was going in two weeks to Kenya. Everyone fears that the

Mungiki are the youth wingers, the warriors to support the political parties. It is fair to say that the president has tried to deal with them because most voters do not like the Mungiki and so a shoot to kill policy has been used against this politico-religious movement of great persistence over the years.

104. Dr Knighton was asked to comment on para 82 of *FK.* (We here insert para 82 for completeness):

> "82. There are millions of Kikuyu women in Kenya who live their lives in a way which might not find approval by the Mungiki sect members. As we have indicated, there is nothing within the objective evidence to indicate any widespread or significant targeting of such women by the Mungiki sect. The activities of this sect, as can be gleaned from the reports, link it more to their criminal activities and business interests rather than seeking to enforce the widespread use of FGM. Were an individual to frequent the minibus premises in Nairobi she is more likely to come to meet Mungiki sect members than were she to live in a town or village that did not espouse such values as the sect reflects."

105. In Dr Knighton's opinion, it is very generalised and he was not sure where the Tribunal took their figures from. He referred to his supplemental report. 850,000 eligible Gikuyu women have not been circumcised. Those against the Mungiki and FGC may be in the Pentecostal and other Churches. They are against the Mungiki who are a minority of the Gikuyu, but are a virulent minority that penetrates all activities save perhaps in the Protestant Churches. He stated that he did not want to sensationalise, but that the Mungiki have assumed targets against women. The main form of disciplining women is at the level of the home and the sub-clan and it is mother, grandmother and aunt who will persuade and carry power.

106. Paragraph 83 (of *FK*) – refers to the Luo. The Luo do not circumcise. But because it is said that FGC prevents HIV, which has been backed by the USA and the Bill Gates Foundation, it is now being taken up.

107. Asked could the Appellant go to a Luo area to be safe, as the Tribunal in *FK* had suggested, Dr Knighton replied that when the Tribunal say 'Musoomu' in the determination in *FK* they mean Kusumo which is the third largest town in Kenya. "Musoma" is an "educated person". What they were doing here, said Dr Knighton, was to look, in his presence, for an area to which the Appellant might relocate. The Luo are a very self confident people who hope to have the next president. Their land is very, very overcrowded and unhealthy and there is no land available. Also they are at odds with the Gikuyu so there would be a problem. The election will be between the Luo young

blood and the Gikuyu. There is a great deal of animosity between the Luo and the Gikuyu and very little trust. The Luo had the wrong end of the stick after the end of independence and the Gikuyu the right end. There is fighting between the Luo and the Gikuyu.

108. In cross examination, Mr Walker noted that Dr Knighton had said that a colleague had an interpretation of the Mungiki as a quasi religious group. Dr Knighton agreed that Anderson wrote to give a secular interpretation of them as an urban group based on protection rackets. As to whether the Mungiki had changed since its conception, he said that it was founded in 1989 on a religious basis on the other side of the Rift Valley when the Gikuyu were pushed out by the Kalenjin. It is still a politico-religious movement which does not depend on any particular leader. Of course it changes and it has confrontation with and collaboration with agents of the state – there are membership drives. People are obliged to go underground.

109. The ethos is not a 'mafia' ethos, it is seen as a form of traditionalism and Kenyans see a religious side, <u>not</u> a Mafia. It is not so simple as traditionalists wanting to go back to their forefathers, it is the answer to marginalisation in the contemporary world. As to how that sits with protectionism and vigilantism, Dr Knighton said that it is a form of discipline and of power and an alternative government. It is taking power back and promoting the unity of the people – the oath is one of unity, like the Mau Mau, and so the old chiefs and loyalists and collaborators will be marginalised.

110. Mr Walker pointed out that before the Immigration Judge at first hearing (page 80 of the February 2007 bundle) there is an article by Grace N. Wamue. She describes the Mungiki as mostly low earners, as Jua Kali – running small businesses in the open air. Dr Knighton agreed that many of the Mungiki are poorly educated. Many of them are against Western education whereas most Kenyans are incredibly for education. Although they have money and power over land and people from their activities of extortion and theft such as 'selling title' to land that they do not own.

111. Dr Knighton agreed that to go to school until 19 years of age equals being well educated. The Appellant's husband was an estate agent in Nairobi. As to whether that would be a "middle class" occupation, Dr Knighton did not know. It was unclear whether he was involved in the unlawful selling of land or had been targeted for membership of the Mungiki because of his work. He was relatively young, living at home in his family area and had not spread his wings. Dr Knighton does not confine

the Mungiki merely to the Jua Kali. Many are in transport too, or living on a little patch of land.

112. The Appellant's husband lived in Nairobi, just thirteen miles from his home. Dr Knighton would not class this as well off, although they might have become so. The Mungiki also inhabit government offices. The husband very quickly became the Chair of Wangiku branch in the location so that would go toward becoming middle class. A youth in Kenya equals at least up to 35 years and it will attract a discontented older person as well as a discontented youth.

113. The appellant is believed to be Roman Catholic. The Roman Catholic Church in Kenya has never taken a public stance against FGC and saw it as a means of benefiting at the distress of the Protestants. That does not stop some individuals from standing out against it.

114. Dr Knighton understood that the Appellant has not undergone FGC. One can assume that it was not done to her sisters either, because they reached marriageable age and normally it would be done at around the time of the arrival of menses. He agreed that it is very difficult to know how many undergo FGC after 13 years old. The 2003 survey by the KDHS only interviewed those between 15 and 49. Dr Knighton had done a calculation that if you added in the women of 50 and over it would equal 41% of the population and of the Gikuyu population 43%. That assumes that the sample was representative and he knows the interviewers did not go to outlying areas in Kenya, and assumes that people were truthful with the young surveyors. He regards the survey as showing a minimum rate of FGC. The more rhetoric there is in the media the more secret it becomes or the more they want to please the interviewer so that it is not a question of importing hard facts but a matter of social negotiations.

115. To add in those aged 50 and over would include women who were subjected to it before. There have been changes since the Missionaries attacked the practice in the 1920s. The Wamue family were against it. It is taken to be a Protestant family given the use of Isaiah as a name.

116. It was put to Dr Knighton that he had explained about Gikuyu in Nairobi and that it is difficult for them to move outside. Dr Knighton was clear that he did not say that. Rather, he said they are very happy to go anywhere where they can insert themselves without too much trouble.

117. As to whether the Mungiki have a base in Mombassa, Dr Knighton stated that it rises and falls with the position of the Agikuyu who are there because it is a port. There is low-level paid employment or there are shops and small traders and so the Mungiki is present. He was there in 1997 and the Agikuyu were driven out. It is a coastal area and very Islamic as a place and there are local politics and it is not an anonymous place. It is not to be regarded as a melting pot. There are many tribes represented. There are Mungiki in Mombassa. Dr Knighton had read a report only the day of the hearing, of the Mungiki saying "we are opening an "official branch" now" implying that there had been an unofficial branch before.

118. At page 35 the Kenyan police were accused over deaths – he said that the Mungiki were fighting fire with fire. The police are doing the same and they have shot more people than the Mungiki. Whether they shot the right people he does not know. The strength of this response shows that they have been unable to deal with the Mungiki despite crackdown after crackdown. The Cabinet is not at one. An Inner Cabinet Minister is often accused of being pro-Mungiki. Many say that talking and reconciliation will bring the Mungiki into the fold. The Mungiki have been used by the government as its strong arm. But the Luo leader uses the Luo Taliban in the slums of Kibera. The Luo vigilante group in the slums of Nairobi who fight in the slums take the name Taliban from the Afghans and use it for their own purpose. They also take names such as "Hitler" and the like.

119. As to relocation, Dr Knighton was referred to *FK* at paragraphs 67 and 93 bottom of page 17 "We can see little reason …" and asked to comment. We set out those two paragraphs for completeness.

> "67. It is noted that there is opposition to the practice from many churches both Pentecostal and Roman Catholic. Dr Knighton speaks of the lack of feasibility of individual church congregations giving refuge in the long term. Such seems to us, however, to fundamentally misunderstand the nature of the relocation which is being sought. Clearly it would not be right to expect an individual to remain in hiding or be sent to some remote area in a dry desert or a cold climate to live virtually as a prisoner. However, from what we understand of church culture in Kenya a church informs the morality and the community spirit of the community which forms around it and worships within it. There may indeed be churches which, according to Dr Knighton, would say one thing and practice another. We are concerned, however, with those congregations, and we find that there would be many, who provide a focus for the community. We do not consider that Dr Knighton's view, that such church communities would demand that the individual be self sufficient, is consonant with the evidence showing the active work done by the church to help all of the congregation. It is difficult to understand

what he means by such terms. We can see little reason why a caring church community would not offer assistance and support. There are a number of CBOs and NGOs operating within Kenya. We have regard to the letter from the British High Commission in Nairobi of 14 November 2005. All these organisations that are set out therein could potentially provide support and assistance. The letter from the British High Commission is, as we so find, fairly balanced in its response to the questions posed. There are indeed high unemployment rates, "throughout Kenya the CPO's, NGOs and self-help groups do give assistance to the destitute and those girls and woman attempting to avoid FGM". Dr Knighton sought to dismiss that letter as emanating from an organisation with a "cloistered existence". Once again that is somewhat of an overstatement of reality. For our part we can see no basis for that statement. It is the function of the embassy to be well informed and there is nothing to indicate that it is not so.

93. The appellant in her village worshipped as part of Christian family. There is no reason to believe that she would not be welcome in other churchgoing communities. We have no doubt that a caring church community would offer assistance to the appellant in order for her to establish herself and her family. After all, her own experience has been of receiving considerable generosity from a church with which she had only the briefest association; the Priest being willing indeed to provide the funds for her to come to the UK. It is of course to be recognised that without her husband the appellant may be at a disadvantage. However, there must be many widows who survive within the Kikuyu community".

120. Dr Knighton said he was unclear as to where the Tribunal got this information from. It was not from him. The first sentence is not factual because the Roman Catholic Church has not spoken out against FGC and the church does not provide accommodation – help can be prayer, visiting, laying on of hands, famine relief. He has not seen any offer of short term accommodation. He has seen occasional payments of school fees and perhaps the odd hostel for a young girl, but it is very infrequent and very, very hard to sustain.

121. Paras 40 – 43 of *FK* refer to Catholic relief. This is pastoral, assistance with access to water, health, education, vaccination, but not organising how people can live outside the community. Mr Walker referred to page 43 – last paragraph and suggested that it can't be said CRS is not helping people with HIV outside their community. Dr Knighton replied that para 41 is about the CRS in Kenya and there is nothing there on accommodation. Paras 42-43 are primarily on Uganda and 42-43 do not mention Kenya. Emergency support provided is temporary until people can go home or feed themselves again. The micro finances are for those who can convince the NGO that they can repay the loan. If she (the Appellant) had a clean bill of health and a home, he was of the view that this Appellant could benefit from a micro finance loan, but the more you do business the more the Mungiki is likely to identify you.

122. As to whether the Appellant could go to Mombassa, Dr Knighton stated that there are Agikuyu there and so it cannot be ruled out that there are Mungiki there, even if it is wished that they are not there. Most would wish that they are not there. There have always been Agikuyu in Mombassa. People in Mombassa do not regard it as home and still regard home as the homeland. The population of Mombassa does not exceed half a million. Nairobi is 3,000,000 to 4,000,000. Then you have Kisumu, perhaps Eldoret and then after that Kenya is increasingly rural.

123. As to the chances of the Appellant fitting into a community of half a million, she is recognisably Agikuyu and is immediately put in the slot by those there – she will not be anonymous and people will want to know more and more about her. In Mombassa these are coastal people and they look very different. They have Melanesian influences and are Muslim and go about in black robes. This appellant could not pretend to be one of them. Dr Knighton has been there a number of times and had students there. He is returning to Mombassa at the end of next year. He first went to Nairobi in 1984 and lived in the Central Province mostly and progressed towards the Ugandan borders. He worked for the Anglican Church across the whole country and has students and colleagues across the country from the Ethiopian border to the Maasai. He visits their homes whenever he can.

124. Mr Walker stated that the appellant fears the Mungiki would find her and attempt to force FGC upon her. This is a fear of hers. As to the likelihood of that, Dr Knighton stated that the risk is not limited just to the Mungiki. If she fell into a larger family of Agikuyu or even a Gikuyu family with pro-FGC ideas or that became pro-FGC she would be at risk. He says there is a serious possibility that the Mungiki will find her and that she will be forced to undergo FGC. There was a trial of Mungiki in 2006 in which the DPP offered security to witnesses. Also, in 2007 the government offered security to witnesses. If they didn't do so no one would testify or give evidence that would convict a Mungiki. The DPP was offering safe haven abroad to witnesses and whistleblowers (see pages C91 – C92) If the Appellant were an ordinary member of the public this would not apply, but she has annoyed the Mungiki in Wangiku, and her husband would be conscious of having to set an example and he and the platoon would need to avenge. The Mungiki will mix in Nairobi and all the places they go to, unpredictably, according to the casual employment and their own family networks that they pick up. The Appellant's husband may have been shot in the back of the head, but his followers will not have forgotten that a wife has shamed her husband and has

been against discipline. Gikuyu women may be headstrong and get up and go, but the men will say this is very bad.

125. Mr Walker put it to Dr Knighton that there is a large population who would say that the Appellant was right to leave her husband. Dr Knighton replied that they would not say she was right or that she had a right to leave her husband. What goes on inside the home is to be withstood. But it is right that the Mungiki have taken a battering. He stood firmly by his opinion that the normal situation is to find a man and she would need to marry outside her clan.

126. Dr Knighton agreed that there must, of course, be single women working in banks and the like. They may delay marriage that is all. There will be women whose men have left them who are coping, with difficulty, with the support of kin, namely parents, siblings etc where the individual woman has a home – an urban/rural exchange. Salaries are not sufficient to live upon. You have to live by a variety of means, most of which rely on kith and kin. The appellant was able to use her own money to leave. Presumably she sold goods to do so – divested herself.

127. In re-examination it was put to Dr Knighton that he had said that the Appellant would have annoyed the Mungiki locally and her husband or his supporters would recall this. The Appellant says her family disappeared and because, she says, of her, and the same reasons. Could she enquire safely of their whereabouts?

128. Dr Knighton replied that she is Mrs _________. She may want to call herself Ms _________. She may possibly be able to use ethnic networks to try to trace her mother and siblings, but there is a risk that someone will tell the Mungiki to get money, or out of loyalty to the Mungiki. The police will not help and she risks exposure to the Mungiki. Most Mungiki will be unaware of the husband's anger and his platoon but one does not know where the husband and his Mungiki platoon are, or when they will come to hear of her, and so her fear is with reason.

129. Asked about some headstrong Kikuyu women leaving the home, he said that they often "wear the trousers" and may be headstrong and outspoken – for example the Minister of Justice whom he knows. It does not mean one gets social approval and one gets to such a position only from a position of strength, via the upper or the middle class family, the elite. There are not many that climb that ladder. He added that where a woman has separated from her husband or partner, he expects to see her go home to her family, or if none, to her rural homeland. The

response is not automatically to welcome such women because of the problems it causes.

130. We asked Dr Knighton whether he had any comment on the Operational Guidance Note (Respondent's OGN, 3 September 2007, Respondent's bundle, pp47-57). He referred to page 49, 2.8 of the OGN, John Githongo, there mentioned, is a friend of his. He has had to leave. It has been said that because the mass of the Mungiki are poor they do not have access to office, but they do enrich themselves by their activities and they have numbers in the police and the government and this is one reason why they are still around – if your Member of Parliament is 'batting' for you he can make the bureaucracy yield.

131. As to para 2.10 – domestic violence is widespread. This gives space for the Mungiki to spread. There are women Mungiki and they are, of course, very much in favour of FGC, and girls and women, a great number, will undergo FGC. As to 3.62 on FGM – only four of the groups did not practise. The Teso are really Ugandan. They are up against the Ugandan border. The Turkana live in a very hot desert and are highly nomadic and it would be unreasonable and impossible for a Gikuyu woman to live in such conditions. The Luo have already been discussed and even then there is a great deal of FGC (following publicity that it prevents HIV). As far as he Luyia are concerned, Dr Knighton had come across a case in a Luyia town, of a small minority Agikuyu community, where the grandmother insisted the child undergo FGC against the mother's wishes and she fled to Nairobi. The Mungiki will also be a feature then, albeit not in strong platoons.

132. At page 55 – medical treatment – 4.44 of the OGN supports his general analysis and it is terrible generality. He concluded that this survey of Kenya as a whole on mental health, mental health care, seems reasonable.

133. Having referred to the OGN, we set out an extract for completeness, this being the most up to date background report in the form of documentary evidence that we have before us from the Respondent, (the others being the March 2006 United States Department Report (USSDR); Country of Origin Information Report (COIR) April 2003; IRBC Research Response on FGM, 16 February 2005, upon which the OGN draws, together with a December 2005 article 'banking on women'; BBC News 6 November 2007: Kenya police accused over deaths, and internet articles from Catholic Relief Service, Kenya, 2007):

> "3.6.2. Treatment. The law prohibits FGM; but it is still practised particularly in the rural areas. According to the Government's August 2004 Demographic and Health Survey, 32% of the women

had undergone FGM. FGM is usually performed at an early age. In September 2004, an international conference on FGM in Nairobi reported that, of the county's 42 ethnic groups, only four (the Luo, Luhya, Teso and Turkana) did not practise FGM. According to an NGO (Development of Women), the percentage of girls undergoing the procedure was 80%-90% in some districts of Eastern Nyanza and Rift Valley Provinces.

3.6.3. In 2006 there was more public awareness and programmes to stop the practice, in which government officials often participated. Some churches and NGOs provide shelter to girls fleeing their homes to avoid the practice, but community elders and some politicians frequently interfered with attempts to stop the practice. A media report in January 2006 noted that the frequency had dropped in one district to 54% compared to 93% in 1999. In 2005 there were a number of arrests of individuals accused of applying forced FGM. In 2006 government officials continued to attempt to stem FGM. In December 2006 the provincial commissioner of Rift Valley Province was quoted as having declared that any civil servant condoning or supporting FGM(such as nurses or local chiefs) would be fired. He added that the parents of girls subjected to the practice would be arrested.

At 3.6.5. and 3.6.6. there is reference to examples of the authorities arresting and prosecuting those accused of performing forced FGM and to the creation of 'no cut' initiation rites for girls, for example, by the Family Planning Association of Kenya ('initiate me through education').

3.6.7 Internal relocation. The law provides for freedom of movement and the government generally respected that right in practice… FGM is a regionalized practice, mainly in Eastern, Nyanza and Rift Valley Provinces. Having regard to the guidance in *FK,…*it is unlikely to be unduly harsh for those who fear being forced to undergo or perform FGM to internally relocate to another region to escape this threat."

134. As to the Mungiki, the OGN has this to say:

"MUNGIKI SECT

Apologetics Research Resources on religious movements, cults, sects, world religions and related issues has reported on Mungiki that:_ "The formation of Mungiki sect remains a mystery to many Kenyans. There have been contradicting statements. Some reports say the group possibly started in 1988 with the aim of toppling the government of immediate former president of Kenya, Daniel Torotich arap Moi. Those who share this thinking believe the group was an offshoot of Mwakenya, an underground movement formed in 1979 to challenge the Kenya African National Union (KANU) regime. Other reports indicate that Mungiki was founded in 1987 by some young schoolboys." (Apologetics Research Resources) **[41]**

Confronted by authorities, their swift defence would be that theirs was a group of traditionalists interested only in re-introducing and promoting traditional way of life among the Kikuyu ethnic group. They posed as a traditional religious group, but an unusual one because taking snuff during worship was their trademark. But their hardline stand against Western idiologies put them on a collision course with the police. They started stripping naked in public, ladies wearing miniskirts and long

trousers, and violently promoted female cut [Female circumcision - AI]. They would engage police in fierce running battles, and on a number of occasions, violently raided police stations to 'free arrested members'." (Apologetics Research Resources) **[41]**

Their violent activities intensified. They systematically and forcefully began taking over management of commuter service vehicles, popularly known as Matatu. In March last year, they clashed with a vigilante group in Nairobi, and later unleashed terror on residents of a slum area, killing 23 people and injuring several others. This prompted the government to outlaw their grouping. They however, continued to exist, and even more openly propagated their warlike activities." (Apologetics Research Resources) **[41]**

BBC News has reported in an article 'Kenya's secretive Mungiki sect', dated 24 May 2007, that: "Today, Mungiki followers no longer sniff tobacco in public and have traded in the dreadlocks and unkempt appearance for neat haircuts and business suits. The religious bit is just a camouflage. It's more like an army unit. They extort, engage in fraud, robbery, murder and even kidnap their victims. Media reports say the sect has evolved over the years into an organised and intimidating underworld gang with bases in the capital, Nairobi, and parts of Central and Rift Valley Provinces. They control public transport routes and demand illegal levies from operators. Mungiki followers reign supreme within city slums, notably Mathare in the east of the capital. Here they provide illegal water and electricity connections to hundreds of makeshift shacks." (BBC News, 24 May 2007) **[10f]**

The BBC article also reports that: "Residents of the slums also have to pay a levy to the sect to be able to access communal toilets and for security during the night in the crime infested slums. Following the latest gruesome murders, the government has vowed to wipe out the group but many Kenyans feel there is a lukewarm approach to counter activities of the sect. Its leadership has openly claimed to have two million members around the country and to have infiltrated government offices, factories, schools and the armed forces. "Mungiki is a politically motivated gang of youths," says Ken Ouko, a sociology lecturer at the University of Nairobi. Mr Ouko suggests that security forces should infiltrate Mungiki to be able to counter its growing influence in Kenya. But the sect is known to operate in secrecy, a fact that is complicating efforts by the police to identify its members as the crackdown on them continues." (BBC News, 24 May 2007) **[10f]**."

135. As to women and as to FGM and HIV/AIDS, the OGN states as follows:

"WOMEN

Although all forms of violence against women are prohibited, domestic violence against women was a serious and widespread problem. The penal code does not contain specific provisions against domestic violence, but treats it as an assault. Police generally would not investigate in cases of domestic violence, which they considered private family matters. The 2004 Kenya Demographic and Health Survey revealed that more than half of women had experienced domestic violence after the age of 15 years. Wife beating was prevalent and largely condoned by much of society. NGOs, including the Law Society of Kenya, provided free legal assistance to victims of domestic violence. On July 14, [2006] President

Kibaki signed into law the Sexual Offenses Act, which criminalized rape, defilement, child pornography and sex tourism, and sexual harassment; the law had not been implemented by year's end." (US State Department: Human Rights Practices Kenya 2006) **[4a](section 5)**

The new law maintained the existing penalty of up to life imprisonment for rape, although actual sentences usually were no longer than 10 years. The law established minimum sentences for both rape and defilement, with higher penalties for the latter. The rate of prosecution remained low because of cultural inhibitions against publicly discussing sex, a fear of retribution against victims, the disinclination of police to intervene in domestic disputes, and the unavailability of doctors who otherwise might provide the necessary evidence for conviction. Moreover, traditional culture permitted a husband to discipline his wife by physical means. Neither the new law nor previously existing laws specifically prohibit spousal rape. According to police statistics, there were 2,736 rapes nationwide during the year [2006] compared with 2,867 reported in 2005.Available statistics underreported the problem, since social mores discouraged women from going outside their families or ethnic groups to report sexual abuse. Human rights groups estimated that over 16,000 rapes were perpetrated annually." (US State Department: Human Rights Practices Kenya 2006) **[4a](section 5)**

FEMALE GENITAL MUTILATION (FGM)

The law prohibits FGM, but is still practiced, particularly in rural areas. According to the UN Children's Fund (UNICEF), 32 percent of women had undergone FGM. In 2004 an international conference on FGM in Nairobi reported that of the country's 42 ethnic groups, only four (the Luo, Luhya, Teso, and Turkana, comprising 25 percent of the country's population) did not traditionally practice FGM. According to the NGO Maendeleo Ya Wanawake (Development of Women), the percentage of girls undergoing the procedure was 80 to 90 percent in some districts of the Eastern, Nyanza, and Rift Valley provinces. There were more public awareness and programs to stop the practice in which government officials often participated. For example, in December a Methodist and a Presbyterian church group conducted alternative ceremonies for 500 girls and boys." (US State Department: Human Rights Practices Kenya 2006) **[4a](section 5)**

FGM usually was performed at an early age. Some churches and NGOs provided shelter to girls who fled their homes to avoid the practice, but community elders frequently interfered with attempts to stop the practice. A January media report noted that the frequency had dropped in one district to 54 percent compared to 93 percent in 1999 before awareness campaigns began targeting FGM. Despite anti-FGM programs, which increasingly focused on young men to convince them to marry women who had not undergone FGM, women and children who had not undergone FGM faced social stigma." (US State Department: Human Rights Practices Kenya 2006) **[4a](section 5)**

In December 2005 there were a number of arrests of individuals accused of applying forced FGM. For example, four parents were arrested along with a man who performed FGM. In mid - December 2005 a woman in Nyandarua District plead guilty in court for subjecting four girls to FGM. During the same month, the Kuria district commissioner called for police to arrest parents who forced their daughters to undergo the procedure. In April 2005 17 girls in Marakwet District fled to avoid FGM and were given shelter in Eldoret by the NGO Center for Human Rights and Democracy.

In April 2005 police forcibly removed the girls from the shelter and returned them to their villages. According to a media report, 20 girls were still in hiding with the aid of a church in Marakwet District three years after they fled their homes to avoid FGM. Government officials continued to attempt to stem FGM. In December, the provincial commissioner of the Rift Valley Province was quoted as having declared that any civil servant condoning or supporting FGM (such as nurses or local chiefs) would be fired. He added that the parents of girls subjected to the practice would be arrested." (US State Department: Human Rights Practices Kenya 2006) **[4a](section 5)**

HIV/AIDS

The [HIV/AIDS] epidemic in Kenya peaked in the late 1990s with an overall HIV prevalence of 10% in adults; this declined to 7% in 2003, and the most recent sentinel surveillance evidence indicates that adult prevalence has now fallen to 6.1% as of end 2004. (UNGASS)[8a](p5) Currently all provincial hospitals and 70 district hospitals are providing comprehensive HIV care including core components of counselling services, prevention and treatment of OIs [opportunistic infections] and ARV [anti-retro virals]. ... Because of reduced costs, mobilisation of resources, and the development of guidelines and systems, there has been a six-fold increase in the number of patients on ARV therapy, from 3,000 patients in 2002 to 54,000 by September 2005 (Report on the Joint AIDS Programme Review 2005, NACC). Just over nineteen and a half percent (19.7%) of women and men with advanced HIV infection received antiretroviral therapy in the first 3 quarters of 2005." (UNGASS) **[8a] (p26)**"

136. That we have referred here to the above mentioned evidence does not mean that we have not had regard to the other articles and reports dealing with the situation in Kenya and with the Mungiki and with FGM, which have been produced by the parties, all of which we have listed in Annex A to this determination, and all of which we have borne fully in mind, and some of which we refer to further below.

137. We have, in addition, borne in mind the reports concerning the Appellant from clinicians, therapists and counsellors:

a. Psychiatric reports of Dr Christopher Buller dated 27th April 2005 and 17th November 2006 (A's bundle section A pp 162-177 and section B pp 1-21);

b. Letter of Karen Williams CPN for SW Yorkshire Mental Health NHS Trust dated 22nd January 2007, with annex copy note of Dawn Hart CPN (A's bundle section B pp 22-24);

c. Report(s) of Anne Wilkinson of Kirklees Rape and Sexual Abuse Counselling Centre dated 28th April 2004 and 19th January 2007 (A's bundle section A pp 37-38, section B p 25)

138. Dr Buller, in the 2006 report, notes some improvement in that the Appellant is not any longer suffering full blown post traumatic stress disorder and there is no longer active suicidal ideation, although she is affected by the loss of her family and may be mildly or moderately depressed, which depression may be attributable to these continuing proceedings. Despite previous rape, she had progressed to being able to have a relationship with a man, although there remained fear of groups of men. The doctor, does, however, state that he would have significant concern should the Appellant be subjected to forced removal to Kenya, specifically that she may attempt to take her life, and that her ability to care for her children may be adversely affected.

139. Karen Williams, Community Psychiatric Nurse, in her letter of 22 January 2007 states that the Appellant was referred to the Community Mental health team in June 2003 suffering from Post Traumatic Stress Disorder (PTSD), moderate depression, social isolation and poor authorization, these mental health problems were felt to be as a result of her traumatic experiences in Kenya, including rape and the loss of her mother and siblings. Ms Williams or her colleagues have monitored the Appellant since 2003 and in 2006 her anti-depressant medication was reduced due to her pregnancy. However, due to definite decline, in October 2006 she began taking medication again, which resulted in improved mood and ability to cope with daily tasks. She is a good mother to her daughter who has settled well at school. Ms Williams relies upon a statement of Dawn Hart, a colleague who worked with her, dated 3 March 2005, in which it is also stated that the Appellant is a good mother to her daughter. But concern is expressed at the negative effects upon the Appellant of these proceedings, and it is her opinion at that time that should the Appellant be forcibly returned to Kenya, she may attempt to take her life.

140. Anne Wilkinson, of Kirklees Rape and Sexual Abuse Counselling Centre refers in her report to the counselling that the Appellant has been undergoing since August 2003. As of 19 January 2007, it remains her opinion that the Appellant continues to need counselling because of her mental health problems of depression and suicidal ideation as a result of rape and other abuse endured in Kenya, the loss of family members, and as a result of the prolongation of these proceedings.

141. We are mindful that these reports are not dealing with the up to date position as of today, but remind ourselves that the Appellant's case is not based upon resistance to her return by reason of her mental health alone, rather her state of health as reflected at the times when these reports were written, is to be

considered as part of her personal history and characteristics when deciding whether she is at real risk on return, and in relation to article 8 ECHR.

142. In addition, we have, of course taken into consideration the statements of the Appellant herself, bearing in mind that there is no challenge to her credibility.

The Law and the Burden and Standard of Proof

143. In reaching our decision we have borne fully in mind the relevant law and immigration rules, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and the Handbook on Procedures and Criteria for Determining Refugee Status ('The Handbook') (Geneva, January 2000). By Article 1(a) (2) of the Refugee Convention the term "refugee" shall apply to any person who:-

> "Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable, or, owing to such fear, is unwilling to return to it."

144. We remind ourselves of the provisions of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, and of the other directions we have set out at paras 51-56 above.

145. The Appellant places specific reliance on Article 3 of the ECHR. It is for an Appellant to show that there are substantial grounds for believing that he or she is at real risk of ill-treatment contrary to Article 3 ECHR, which prohibits torture, inhuman or degrading treatment or punishment. Where there is a failure to show a breach of Article 3, there may be a breach of the right to physical and moral integrity under Article 8. Unlike Article 3, Article 8 rights are qualified rights protecting the right to respect for private and family life, home and correspondence. It is for an Appellant to show that one or more of such qualified rights is engaged and that there is an interference with such a right or rights.

146. In coming to our determination, following Section 85 (4) of the 2002 Act, we may take into account evidence about any matter which we think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

Submissions, Consideration and Findings

147. Mr Walker in his submission placed reliance upon the written skeleton argument, which itself relies, as we have indicated, solely upon the guidance in the case of *FK* to which we have referred in great detail above, so that we do not repeat those points here.

148. There is no challenge to the credibility of the Appellant and the relevant facts are as summarized above, in particular, although not exclusively, in the summary from the Court of Appeal.

149. Mr Walker submitted that because there had not been a presenting officer before the adjudicator there was very little evidence about the Appellant's family in Kenya. That may be so, but there was no application for an adjournment and no written submissions were provided by the Respondent which might have drawn the focus of the adjudicator and the Appellant's then Counsel to the point. The situation serves to highlight the importance of the presence of properly prepared representatives for each of the parties at appeal hearings. Had that been the position before the adjudicator, then we may not be where we are now. It is recalled that the Appellant was not permitted to give oral evidence before the Tribunal. Mr Walker made no request that the Appellant be called to give oral evidence before us.

150. The Appellant's evidence as to her family members in Kenya is to the effect that her mother and sisters disappeared at the time when the Appellant was raped by the Mungiki, and have not been seen since. Although the rapes, the threats of forced FGM on the Appellant and her mother and sisters, and the disappearance of her family members were all reported to the police by the Appellant and they were informed where they could find the members of the Mungiki, including her former boyfriend, _________, the police did nothing and did not arrest or detain anyone in connection with these incidents. The background evidence, for example, Amnesty International, USSDR, CIPU/COIR/OGN; Human Rights Watch, shows that there continues to be a culture of impunity within the Kenyan authorities, including the police and other security forces, and insurmountable obstacles are faced by victims of rape and domestic violence who seek to bring perpetrators to justice.

151. We find that the Respondent cannot and does not now impugn the credibility and reliability of the Appellant and her claim, so that we are concerned here with deciding whether, on the facts there is evidence to show to the reasonable degree of likelihood that her case is made good.

152. Whilst Mr Walker sought to rely upon the negative findings of the Tribunal in *FK* in relation to Dr Knighton and his evidence, he did not go so far as to formally challenge his credibility or reliability, as opposed to the form of his expression of his opinion evidence.

153. We find that Dr Knighton was understandably concerned at what he perceived to be the attack upon him and his reputation by the Tribunal in *FK,* which may have led to a certain sharpness of tone, if we may put it that way, when he began giving his evidence before us, although that had dissipated before long. We would respectfully concur with Sedley LJ in his view that Dr Knighton's credentials are impressive, and we have also noted the extensive bibliography attached to his reports. It is plain that Dr Knighton is a highly respected academic who is also steeped in the ways of Kenyan society, including its churches, and who has a deep and wide level of knowledge and understanding of the Kenyan people. In our judgment, in his reports and in his oral evidence, he has at all times striven to provide the Tribunal with knowledge and information frankly and to the best of his knowledge, belief and understanding, with the aim of assisting the Tribunal in its task, and we can find no reason why we should not receive and accept his expert evidence on the basis that he is an unbiased and accurate witness. He has made plain that he does not know the Appellant and that he has approached his task objectively.

154. We recall that Dr Knighton expressed the view that the Tribunal in *FK* did not like the view of the church that he had portrayed and that the Tribunal was seeking ways and reasons to show that this Appellant could return to Kenya in safety. We simply mention briefly here that although it may have so seemed to Dr Knighton, the Tribunal will rather have been seeking to fulfil its task of ensuring that all the relevant probative evidence necessary to making a decision in the case was actually before it. Sometimes, where the parties have not dealt with such matters, it is necessary for the Tribunal itself to raise them.

155. The great importance of kin, of close family, within Kenyan society and the way of life has been clearly highlighted by Dr Knighton. We note that enormous reliance is placed upon the family by each individual, as an entity that sustains the individual throughout his or her whole life, not just during childhood; in economic, social and cultural forms, as well as in the form more focussed upon latterly in European society of emotional and psychological reliance, as more and more individuals have been able to become economically independent

within European society over time, and to form more social and cultural links outside the family.

156. That the Appellant continues to attach importance to her family members, and continues to be adversely affected in her mental health by what is to her the loss of those family members, is evidenced in the reports of the clinicians and therapists to which we have already referred.

157. Her case, said Mr Walker, was that she feared forced FGM after her husband had become a member of the Mungiki. From the evidence of Dr Knighton and from the IRBC response to information request of 16 February 2005, we had before us some statistics regarding FGM and the latter document referred to research published in July 2004 (Kenya Demographic and Health Survey (KHDS)) which showed that the prevalence of FGM varied according to certain factors such as age, education and ethnicity.

158. Mr Walker submitted, placing reliance upon the research, that as an adult Gikuyu woman who is a Christian, who is educated, and who has not had to undergo FGM because of any family constraints, the Appellant would not be at real risk of forced FGM on return to Kenya now.

159. Mr Walker relied upon paragraph 67 of *FK* as showing that the Appellant, as a Christian, would be able to rely upon the assistance of the church to meet her needs so that she was able to live in safety in Kenya with her children. At page three of the IRBC document, there was reference to intervention by the Austrian Embassy in Nairobi, and by a Kenyan church, to rescue 500 school girls from forced FGM in or about February 2005.

160. However, we note that this report does not state what form the intervention took, nor what continuing assistance, if any, was afforded to the children. In addition, we note from the same paragraph of that document, that in 2003 and 2004, some 100 children and young women were forced to undergo FGM, whilst some 800 more were in hiding from or under pressure from parents to undergo forced FGM.

161. In any event, we are satisfied that the church in Kenya does not provide continuing quotidien support to women, whether with children or otherwise, and that the kind of assistance provided is much more limited, and pastoral in nature, as stated by Dr Knighton. For example, the provision of help can be prayer, visiting, laying on of hands, famine relief (see para 119 above).

We are satisfied that this Appellant cannot turn to the church in Kenya to provide her, in any durable, sustainable way shape or form, with a home or access to a home, or employment or access to employment, or safety, or access to safety. This is because the church in Kenya is unable to provide any of these. There simply is no such provision.

162. Mr Walker submitted that Dr Knighton had accepted that there are differing views as to the nature of the Mungiki. He pointed out that the COIR states that they are outlawed (as was shown by the BBC News article of 6 November 2007 stating that police had been accused of the execution style killing of almost 500 persons said to be Mungiki), and are associated with extortion from small traders and taxi drivers. Dr Knighton had said that they are able to infiltrate all tiers of government and police and so influence politics, whereas other evidence says they are just involved in extortion and 'gangsterism'. The Appellant's husband was an estate agent who became involved with the Mungiki it is said. Dr Knighton had agreed that the Mungiki were mainly from the uneducated, the lower levels of Kenyan society, whose basic tenets are return to traditionalism and rejection of the mores of western society. Mr Walker queried whether an estate agent could become a high level member of the sect. However, this seemed to us to be seeking to re-open the assessment of primary factual matters that are not in issue before us now, there having been no challenge so far as we understand it, as previously indicated, to the credibility of the Appellant and her claim.

163. As to the reach of the Mungiki and whether the Appellant could relocate, Mr Walker submitted that there was no evidence to show that the Mungiki could have information on people throughout Kenya given its large population, and Dr Knighton had confirmed that Mombassa was a 'melting pot' of tribes and nationalities, so that it was difficult to see how, on the facts of the Appellant's case, her return to Mombassa could become known.

164. Further, in the case of *FK*, Dr Knighton's evidence had been criticized because he said that no-one could return to Kenya without the Mungiki finding out. The Tribunal had found that Dr Knighton made generalized, un-informed comments, was partisan, and was therefore wrong in his overall picture of the level to which the Mungiki had infiltrated Kenyan society.

165. With the benefit of the judgment of the Court of Appeal in *FK,* as we have said, it is now clear that the appraisal by the Tribunal in *FK* of the evidence of Dr Knighton was held to be unfair and otherwise flawed.

166. We remind ourselves that Dr Knighton was very emphatic that he was not saying that Mombassa is a 'melting pot'. Rather, he was saying that there are persons living there from numbers of different tribes and backgrounds, but that this does not mean that everyone blends into a 'melting pot'. Far from it, in this case. Dr Knighton's evidence, which we accept and adopt, was that the Appellant is immediately identifiable as Gikuyu by her name and appearance, and that Kenyan society is one in which probing questions are asked of all newcomers to a place, so that her arrival would not go un-noticed. Further, as we understood his evidence, other Gikuyu, who may also be Mungiki, would take note of her presence and sooner or later, by transfer of information, including via the Matatu, and whether for money or out of loyalty to the Mungiki, the Mungiki would come to know of her presence, and she would thereby come to be linked to her husband and to past events, and would be at real risk of retribution through forced FGM or worse. Moreover, her daughter, as her female child, born of rape by a Mungiki, would likewise be at real risk, with all the attendant anguish and suffering that risk places upon the Appellant, to which must also be added anguish and suffering over the future well-being of her son.

167. We take note that Dr Knighton was also extremely emphatic in his reassertion of his evidence before the Tribunal in *FK*, including in relation to his assessment of the size, nature and reach of the Mungiki. Further, in cross examination he very firmly stood by his evidence that the way for a woman such as the Appellant to survive in Kenya would be for her to find a man to marry and in that way have access to land, but this Appellant would, in her particular circumstances, need to marry outside her clan, which she was unlikely to be able to do.

168. We note from the documentary evidence, including the USSDR, Amnesty International and Human Rights Watch, that the Law of Succession which governs inheritance rights, provides for equal consideration of male and female children; however, in practice most inheritance problems did not come before the courts. Women often were excluded from inheritance settlements, particularly if married, or given smaller shares than male claimants were given. Moreover, a widow cannot be the sole administrator of her husband's estate unless she has her children's consent. Most customary law disadvantages women, particularly in property rights and inheritance. For example, under the customary law of most ethnic groups, a woman cannot inherit land and must live on the land as a guest of males who are relatives by blood or marriage. Wife inheritance was practiced in some communities, which

restricted a woman's right to choose her mate and placed her at risk of contracting a sexually transmitted disease such as HIV/AIDS.

169. Women made up approximately 75 percent of the agricultural work force and had become active in urban small businesses. Nonetheless, the average monthly income of women was approximately two-thirds that of men, and women held only an estimated 5 percent of land titles. Women had difficulty moving into non-traditional fields, were promoted more slowly than men, and were laid off more. Societal discrimination was most apparent in rural areas.

170. Maendeleo Ya Wanawake, the nation's best-known women's rights and welfare organization, was established as a non-political NGO during the colonial era, but was aligned closely with the ruling KANU party and consequently suffered diminished credibility as an independent body. A growing number of women's organizations were active in the field of women's rights, including FIDA; the National Council of Women of Kenya; the National Commission on the Status of Women; the Education Centre for Women in Democracy, and the League of Kenyan Women Voters.

171. The Women's Political Caucus, formed in 1997, continued to lobby over matters of concern to women and to increase the influence of women on government policy.

172. It is noted from the article in the Daily Nation of Monday September 15 2003, that two NARC Members of Parliament had spoken in public in support of the outlawed Mungiki sect and had called upon the police not to harass its members. It is also noted from the background evidence that the members of the Mungiki are predominantly of the Gikuyu tribe. They support female circumcision, a return to some Gikuyu traditions, and have been known for their long, unkempt hair, for taking snuff, wielding weapons and for having been involved in recent violence that hit some city slums and other parts of the country.

173. It is clear that this involvement in violence is not a new departure. The evidence reveals that in March 2002 Mungiki were involved in an attack in Nairobi when at least 23 people were killed. This was apparently retaliation against a local vigilante group known as the Taliban. It was following this massacre that the Mungiki was banned. However, despite the ban, the Mungiki group was able to become increasingly active in the pre-election period, during which hundreds, some armed, held rallies in support of the ruling party KANU. Police did not

intervene. The group also expressed threats to use violence against anyone who insulted President Moi.

174. That involvement in violence pre and post election is an aspect of the matter to which we return below, in the light or very recent unhappy developments in the course of the election that has just taken place.

175. We observe that although there is now a Children's Act of 1 March 2002 to outlaw FGM, child prostitution and child labour, these practices did not cease, and a number of girls fled their homes after their community refused to recognize an alternative rite. We also note that whilst the Children Act 2001 enables prosecution of any who subject a minor to genital cutting, there have been only one or two actual prosecutions referred to and sentences have been lenient (two years probation for subjecting a fifteen year old girl to FGM, Amnesty International 2004, C9-C11).

176. For those over eighteen years of age, there is only the remedy of seeking a prosecution for ordinary assault. Laws and decrees against FGM and other sexual violence in Kenya are not applied, despite the fulminations of politicians and NGO leaders, which, says Dr Knighton, and there would appear to be force in what he says, is for consumption by Western donors. Police in general are most reluctant to interfere in domestic matters and in FGM in particular, because it is an acknowledged custom across Kenya. We find that there is a low level of trust in the police, especially to produce arrests or convictions, not least because the perpetrator can be expected to bribe his way out of the criminal justice system. We find that there are no government or government funded, or church or NGO shelters or refuges to provide a sufficiency of protection to women who fear being forced to undergo FGM.

177. From the evidence of Dr Knighton, the reports to which he refers and the other reports produced to us, it is noted that when women separate from their husbands they are often expelled from their homes with only their clothing. Women's property rights violations are not only discriminatory, they may prove fatal. The HIV/AIDS epidemic magnifies the devastation of women's property rights violations in Kenya where about 15% of the population between the ages of 15 and 49 is infected with HIV/AIDS.

178. We find that a woman's access to property usually hinges upon her relationship to a man, as Dr Knighton has stated, and when the relationship ends the woman stands a good chance of losing her home, the family to which she belongs, namely that of her

husband or partner and its support in economic, social, emotional and cultural forms as well as her form of financial support. The devastating effects of these deprivations, including poverty, disease, violence and homelessness – harm women, their children and Kenya's overall development. It would appear that for decades, government has ignored this problem. Bills that may have assisted have languished in Parliament; government ministries have had no appropriate programmes to promote equal property rights, and at every level government officials shrug off this injustice, saying that they do not want to interfere with culture.

179. Mr Walker submitted that the Kenyan government was doing its best to eradicate FGM. We note that the OGN states that in 2006 the government of Kenya "continued to attempt to stem" FGM. We have to say that whilst all efforts to eradicate the practice, not least because it is said to be against the law in Kenya, are to be welcomed, nevertheless, 'continuing to attempt to stem', apparently by attempting to prosecute a handful of persons, and threatening persons such as nurses with loss of their jobs and or prosecution, falls well short, in our judgment, of providing a sufficiency of protection to the women and girls of Kenya who are at risk from the practice.

180. The more so for persons similarly situated to the Appellant who is of adverse interest to the Mungiki. The Appellant, if Dr Knighton is correct in his opinion, and we have found no good evidential reason to reject it, based as it is upon his research and the evidence of persons he has interviewed, as well as other cases in connection with which he has prepared expert reports, and upon journal, newspaper and background reports, would sooner or later (he does not say that she would necessarily be discovered immediately on return) come to the attention of the Mungiki who would then avenge the sect and her husband, despite the passage of time since she left the country.

181. We see no reason to reject Dr Knighton's analysis of the countrywide information network of the Gikuyu and of the Mungiki in particular, who may well be regarded as the children of the Mau Mau, and as an organization that both uses and is used by government. A BBC news report of February 2003 describes the Mungiki as a secretive sect whose origins are unclear, and which, since the 1990s has left behind a trail of blood in its rejection of western culture. It is said to be the politically motivated wing of a religious organization, and akin to an army unit. Mostly drawn from the Gikuyu and inspired by the Mau Mau rebellion of the 1950's against British colonial rule, thousands of young Kenyans flock to the sect. It is claimed by the leadership that it has at least 2 million members around

the country who have infiltrated government organizations, offices, factories and schools. They have been involved in battles with the police and have raided police stations to free detained members. Instead, or as well as clubs, machetes and swords, they are now wielding AK-47 assault rifles. Other articles suggest that the authorities are unwilling or unable to control the Mungiki.

182. Force is given to the latter point when the actions of the Mungiki at election times are examined. At such times it appears that the Mungiki acquire sudden prominence and a sudden ease of access to sectors of towns and cities where they have been able to commit acts of violence, not only in the earlier election as mentioned above.

183. We turn to consider the articles and reports lodged by the Appellant to address the most recent violence around and post the December 2007 election.

184. From the Economist of 3rd January 2008, we note this:

> ”The mayhem that killed hundreds of people following Kenya’s election on 27 December completes a depressing cycle of democratic abuses in Africa’s biggest countries…In stealing the election, Mr Kibaki has also invited a dangerous backlash against his Gikuyu tribe, the country’s largest. Tense tribal divisions have long threatened to widen as the minority groups, including opposition leader Raila Odinga’s Luo, have come to feel marginalized by the concentration of power in Gikuyu hands. If the current violence does evolve into something worse, perhaps even civil war, Mr Kibaki and his henchman will bear much of the blame”

185. In the accompanying article, the Economist recorded the reaction in Kenya following the flawed election:

> “The reaction to the swearing-in was immediate. Nairobi's slums exploded in rage. The poor killed each other. Across the country came a swelling up of tribal violence, sometimes Kikuyu against Mr. Odinga's Luo tribe, more often Luo and other tribes against Kikuyu. Hundreds have been killed so far and 80,000 displaced. Gang rapes and mutilations are widespread. Police have orders to shoot to kill. There has been looting in Kisumu, riots in Mombasa and pitched battles in Eldoret… Kikuyu hiding in a church near Eldoret were burned alive by a mob…
>
> Taken together, this amounts to a pulling apart of Kenya's rich national fabric. Some 97% of Kikuyu voted for Mr. Kibaki. Everywhere else he was trounced. Muslims, for instance, voted against Mr. Kibaki by 70% or more. The Kikuyu highlands encircling the glaciers of Mount Kenya increasingly feel like a state within a state. The division is even more troubling when the parliamentary vote is taken into account. Mr. Kibaki lost half his cabinet, including his vice-president, as well as a large number of seemingly unassailable members of parliament. This government may find it impossible to pass a budget.”

186. These events go to undermine the picture of full ethnic integration set out in the Tribunal's previous determination in *FK.* They strongly support the evidence of Dr Knighton concerning the continued importance of ethnic grouping in Kenyan society.

187. Of particular note in the ongoing reports is the theme of increased division between members of different racial groups, and of violence between members of different groups. This possesses obvious and immediate relevance to the Appellant before us, whose prospects of relocation depend upon her paradoxically separating herself from other Gikuyu and in particular from those of her own family, *mbari*, and area, to which she would otherwise be expected to look for protection. There is also reference to an upward spiral of sexual violence against women and female children in Kenya, against a background of more generalized violence caused by the election and its sequelae. In "Gang rape spirals in violent Kenya" (BBC News, 23rd January 2008) this phenomenon is described:

> "Every day women turn up at the doors of Nairobi's hospitals and clinics telling the same story.
>
> > "I could not run away. They gagged my mouth and pinned me down," one woman remembers.
> >
> > "After raping me they blindfolded me and led me to a nearby forest. That's where they left me."
>
> Her experience - doctors, officials and the UN say - is echoed by hundreds of other women who have survived a spiralling number of sexual attacks.
>
> Many are gang rapes, carried out by groups of armed men.
>
> Staff in the Nairobi Women's Hospital - one of Kenya's leading centres for the treatment of rape and sexual violence - say they have seen double the number of cases affecting women, teenagers and girls since January.
>
> > "Since the beginning of the month, we have had 140 cases of rape and defilement," said Rahab Ngugi, patient services manager at the hospital.
> >
> > "We were used to seeing an average of about four cases a day, now there is an average of between eight and 10."
>
> Almost half of the cases at the hospital's specialised clinic are girls under the age of 18, Ms Ngugi said. One case was a two-year-old baby girl.
>
> She knows that such a dramatic rise in numbers presenting at the clinic indicates that the reality beyond is far worse.
>
> Tip of iceberg
>
> Only a small percentage of women actually come to receive medical treatment and counselling in the immediate aftermath of a sexual attack,

she said. It means they do not get access to the drugs which might prevent the onset of HIV.

> "It is the tip of the iceberg," Ms Ngugi said. "At any time of unrest, of violence, or rioting, women and children are targeted. It is revenge, it is war. People are fighting and the weakest ones get abused."

…

"Women's position of relative weakness in society is emphasised in times of conflict" Kathleen Cravero, Director of the UNDP's Bureau for Crisis Prevention and Recovery said.

> "Battles are fought on women's bodies as much as on battlefields. It is not so much that women are targeted in some deliberate way but their vulnerability makes them easy targets for anger, for frustration, and for people wanting to cripple or paralyse other segments of the community in which they live."

She says there is no evidence as yet that Kenya's high levels of sexual violence are ethnically motivated rather than opportunistic and criminal.

But the doubling of rape cases, she says, is "a very, very strong indicator of a serious problem" adding that the actual numbers are without doubt far higher."

188. This evidence points to the sharply increased vulnerability of women (such as the Appellant) or female children (such as the Appellant's young daughter) to sexual violence, whether motivated by race or by opportunism or otherwise. In their particular cases isolation from other Gikuyu is likely to increase the risk to them exponentially.

189. An aspect of the current situation highlighted by the reports is the strengthening of the Mungiki sect by the onset of disorder. We recall the evidence of Dr Knighton that at least some senior politicians were suspected of association with the Mungiki for political ends, and that at election times the Mungiki (and their Luo opponents, the so-called "Luo Taliban") might be called upon by politicians belonging to their tribes. In "Kenyans "forcibly recruited to fight"" (BBC News, 29th January 2008) the BBC described the Mungiki coming into the Rift Valley town of Naivasha, without restraint by the authorities, in order to press-gang Kikuyu into violence against other ethnic groups:

"A Kenyan (who wishes to remain anonymous) in the Rift Valley town of Naivasha describes how members of an outlawed sect - the Mungiki - are forcibly recruiting members of their Kikuyu ethnic group to kill non-Kikuyus - allied to the opposition.

The BBC observed that: "*Kenyan politics is polarised and because of this, when a community feels threatened, groupings or gangs arise in their defence.*"

190. The violence appears to have affected even educated and successful Kenyans, a university professor of Luo background

married to a Kikuyu describing the resulting attack by a mob upon their home ("Targeted for marrying a Kikuyu" (BBC News, 30th January 2008)). The scope of the violence which had by then occurred, and of the *de facto* ethnic partition this enforced, was described by the Economist at the end of January ("Kenya: More mayhem than mediation" (Economist, 31st January 2008)):

> "The Rift Valley has become a hub for much of the ethnic violence that has worsened sharply in the past fortnight. In Nakuru, north-west of Naivasha, at least 80 people have been killed. Now it is often a case of simple revenge, Kikuyus striking back against their Luo and Kalenjin tormentors who, in turn, did most of the killing immediately after the disputed election of December 27th. At least 1,000 have since died and 200,000 been driven from their homes. The cycle of bloodshed may be gathering its own momentum beyond the control of Kenya's political leaders…
>
> In any event, the shooting dead, in separate incidents, of two Orange MPs, set off more spasms of lethal riots in the capital's slums and elsewhere. One was Mugabe Were, a Luhya who was popular in Nairobi; the other was David Too, a Kalenjin. In the Luos' provincial capital, Kisumu, more Kikuyus were butchered and "necklaced" with burning tyres by Luo youths.
>
> Kenya is rife with rumour. Some say there are furious disagreements within Mr. Kibaki's circle in State House. Others say he is poised to impose a state of emergency. Among Kikuyus, there is fearful talk of Luo militias loyal to Mr. Odinga being trained in southern Sudan…
>
> All sides realise that an escalation in violence from machetes to machineguns would be ruinous for all Kenyans. So far, the use of traditional weapons, including clubs and poisoned arrows, has caused the flight of several hundred thousand Kenyans who belonged to ethnic minorities in their places of abode—for instance, Luos in Central Province and Kikuyus in the west. Wholesale slaughter has yet to occur on the scale of Rwanda in 1994, but the prospect hovers in people's minds. Indeed, the fear spreading across the country may offer Mr. Annan his best chance of success.
>
> … if there is no breakthrough, Kenya could tear apart even more drastically along ethnic lines, with Mr. Kibaki's Kikuyu-dominated government controlling the wealthy centre of the country up to Nakuru, north-west of Nairobi, while Mr. Odinga's Orange opposition holds sway over the west and much of the north. Most of the Kalenjin people in the Rift Valley are hostile to Kikuyu political domination.
>
> For many Kenyans this is both an appalling and, until recent events, incredible prospect. The country's largest newspaper, the *Daily Nation*, which had slightly favoured Mr. Kibaki during the election campaign, has lost patience with him. An editorial declared that the government's "inertia and ineptitude" were "exposing base instincts and driving the country back to pre-colonial times".

191. An article in the National Post (one of the two main Canadian national newspapers), recorded that:

> "During the last few weeks, the world has watched in horror as rival gangs of Kenyan slum dwellers attack and kill one another. Even Members of Parliament are now being targeted.
>
> The anti-government vigilantes from the Luo tribe have come to call themselves "Taliban" (this despite the fact that these Luo are mostly non-Muslims). Pitted against them are the Kikuyu --in particular, Kikuyu followers of the "Mungiki.
>
> On Jan. 9, Maina Kiai, head of the state-funded National Commission of Human Rights, accused President Mwai Kibaki's Kikuyu dominated government of "activating" members of this mysterious, formally banned sect. Government spokesmen have dismissed the claim as groundless. But Muthoni Wanyeki, the chairperson of an independent Kenya-based human rights monitoring group, suggests politicians from both tribes are financing and encouraging semi-organized tribal militias. Given the Mungiki sect's particularly violent history, it would be surprising if one side or the other hadn't sought to co-opt them."

("From Mau Mau to Mungiki: 50 Years Later, Kenya is Still a Bloody Mess" (National Post (Canada), 5th February 2008).

192. Accounts of ethnic violence and division have continued. On 7th February the Economist returned to the subject ("Kenya: Ethnic cleansing in Luoland"):

> "As the road approaches Kisumu, Kenya's third-biggest city and capital of the Luos, the country's third-biggest but angriest ethnic group, it becomes littered with rubble and burnt vehicles. A man beats at a smouldering ambulance's number-plate with his machete. "See," he explains, "this belongs to the government of Kenya." Mobs cry out for their fellow Luo, Raila Odinga, to be made president of Kenya. They plead for guns. An earnest man pushes to the front of one mob. "What we are saying is give violence a second chance."
>
> On a bridge outside Oyugis, a small town a couple of hours' drive south of Kisumu, angry Luos have overturned a lorry, pulled down a telegraph pole and are waiting. When your (white) correspondent happens along, they take aim with stones, machetes and poles. But what they wanted was a Kikuyu to kill—any Kikuyu. All the main roads in the area are punctuated with road blocks. Some travellers do not get through. At least 25 have been hacked to death or killed with poisoned arrows in Nyanza in the past few days.
>
> Across Luoland, from the unlettered to the university-educated, they tell the same tale of woe: that they have been politically and economically maltreated since independence. Provision of electricity and roads is far worse than in Kikuyuland. Many government projects in Nyanza, including cotton- and rice-growing, have failed. It irks Luos that the fish they catch in Lake Victoria are processed by Kikuyus in distant Central Province. A brain drain of able Luos into Kenya's civil service has dried up. Luos say that a Luo name is sometimes a handicap in getting a job in business. Poverty among Luos has risen, even as Kenya's economy has grown.
>
> In the past few weeks, Kisumu has been ethnically cleansed. The Luos have driven out 20,000 or so Kikuyus from a population of 380,000; few

will return. Every Kikuyu business and home has been looted and burned. The UN recently chose Kisumu as a “millennium city”, with plans to turn it into a kind of hub. Now many of its streets are gutted and charred. Thousands of jobs have been lost; nearly three-quarters of Kisumu's people are out of work…

Nobody has been angelic

Kenya's 4m or so Luos, most of them in Nyanza, voted overwhelmingly for Mr. Odinga in the disputed election on December 27th. The Kikuyu-led party backing his rival, the incumbent president, Mwai Kibaki, was most blatant in ensuring that his tally of votes in the Kikuyu heartland north of the capital, Nairobi, was inflated. But Mr. Odinga's Orange Democratic Movement was not spotless; some ballot boxes in Nyanza were reportedly stuffed on his behalf. In any event, nearly all Luos still want Mr. Kibaki forced from office. If he stays, they say, it will mean civil war. There is a risk that Luoland might peel off—and a further risk that Mr. Kibaki may feel forced to send in troops to stop that happening. For the time being, the Luo areas look ungovernable by Mr. Kibaki or by any Kikuyu-led administration.

In other parts of Kenya, not just in Luoland, the mood is so febrile that it is hard to see how the social fabric can be restored. Atrocities have been widespread. Most of the Luhya (the country's second-biggest group, unrelated to the Luo), most of the ten or so Kalenjin-speaking peoples of the Rift Valley, most of Kenya's Muslims and most of Kenya's poor in the vast slums that ring Nairobi backed Mr. Odinga. Many of them are angry. Some have vented their spleen against Kikuyus living among them, often chasing them away, burning their houses and shops and sometimes killing them.

The violence has been especially bad in parts of the Rift Valley where different groups had intermingled as a result of the redistribution of former white-owned land since independence. In other parts of the country, especially in the Kikuyu heartlands, Mr. Kibaki's backers have treated Luos with similar harshness.

But it is wrong to paint a picture simply of Kikuyus and the closely related Embu and Meru, who together make up about 28% of Kenyans, pitted against the rest. Many groups have mixed allegiances. Most of the Kamba, Kenya's fifth group, which has been traditionally well-represented in the army, backed a 54-year-old former foreign minister, Kalonzo Musyoka, who won about 9% of the presidential poll and was promptly appointed vice-president by Mr. Kibaki. As a result, many Kamba may rally to his cause—and perhaps even join a pro-Kibaki coalition in the (so far unlikely) event of a fresh election. Other tribes, such as the Kisii (6% of the total) have been divided, though most of them voted against Mr. Kibaki.

Amid this messy ethnic mayhem, peace talks in Nairobi look unlikely to restore calm any time soon. A former UN secretary-general, Kofi Annan, has managed to bring representatives of Mr. Kibaki's government and Mr. Odinga's movement to the negotiating table, which is progress of a kind. But the president has so far shown no sign of making serious concessions. Mr. Annan has also gathered some of the country's leading businessmen to stress the damage being done to the economy. Tourism and agriculture have been badly hit… Meanwhile, the human toll is rising. The local Red Cross says that more than 1,000 people have been killed in the past five weeks or so, and more than 300,000 displaced.”

193. There is evidence that recent events have strengthened the reach and power of the Mungiki. On 11th February 2008 BBC News ("Kenyan militia strike back") reported that:

> "First they sent leaflets saying they would avenge the killings of their tribesmen when violence flared following Kenya's disputed election. Then they told other tribes to leave certain areas.
>
> People's fears had come true. The Mungiki were back.
>
> Hundreds of men wielding machetes and clubs, attacked their opponents beheading and dismembering them in characteristic style.
>
> The violence has largely abated for now, as politicians negotiate their way towards a political settlement, but the re-emergence of this quasi-religious group could plague Kenya for years to come.
>
> The Mungiki has been outlawed by the authorities, with whom it has been engaged in a protracted battle spanning more than 20 years.
>
> At first they styled themselves as the guardians of Kenya's largest community, the Kikuyu, who include President Mwai Kibaki among their number, saying they would re-establish ancient traditions.
>
> Attracting large numbers of jobless teenagers, the group soon became an underground youth wing for politicians, who used it to unleash terror on their opponents.
>
> Mungiki became a criminal gang terrorising urban slums and demanding protection money from transport operators.
>
> "We received leaflets warning us to leave or face death," Amunga, a resident of a town in central Kenya, told the BBC.
>
> "They said they would behead anyone who supported the opposition. They gave us just seven days to leave.""

194. The article referred to other ethnically based militias formed to combat the Mungiki, namely the Luo Taliban and a parallel organization amongst a subgroup of the Kalenjin tribe. Concerning the resurgence of the Mungiki the BBC News article stated that:

> "Re-emergence
>
> Before the elections, police vowed to eliminate the Mungiki once and for all.
>
> At one point human right organisations accused the police of executing more than 500 members of the group.
>
> Although the police denied the accusation, the recovery of hundreds of bullet-ridden bodies on the outskirts of Nairobi made some think the Mungiki had at last been wiped out.

> But the post-election violence appears to have breathed new life into this group.
>
> Their re-emergence followed the killing of hundreds of Kikuyus in opposition strongholds in western Kenya.
>
> The Mungiki scented blood and wanted vengeance.
>
> Soon Mungiki gangs were attacking members of other tribes and hacking them to death.
>
> It is not clear who finances the Mungiki, although it has been suggested they are in the payroll of some politicians.
>
> Recently the Mungiki have been confronting women wearing trousers, forcing them to change into skirts or long dresses.
>
> They say wearing trousers goes against the Kikuyu culture.
>
> It is feared that if the electoral crisis persists, the gangs could become even more dangerous."

195. Unhappily, Dr Knighton's predictions would appear to have come to pass, although there has since been the more potentially positive development of the agreement brokered by Kofi Annan, whereby Kibaki remains president and Odinga becomes prime minister. It remains to be seen how effective an agreement it is.

196. We recall that on 26th February 2008 a power sharing agreement was made between the leaders of the main parties. The Appellant's solicitors have written on 20 March 2008, to state, put simply, that (i) the Appellant was entitled to succeed, on the evidence, as at the time of the hearing, for reasons set out in contemporaneous submissions; (ii) her need for international protection was particularly emphasized given dramatic post-election developments involving inter-tribal violence and ethnic separation, addressed in written further submissions of 17th February 2008; (iii) the power sharing agreement may resolve immediate violent conflict, but is unlikely in the short to medium term to resolve the increased ethnic separation and mistrust engendered by events since December 2007, whilst the continuation of the agreement is provisional upon continued willingness to share power on the part of longstanding political opponents who have already failed once to do so successfully. Accordingly any suggestion that the power sharing agreement removes risk to the Appellant would be ill-founded.

197. In this context we note two judgments of highly respected sources, to which the Appellant has referred. The United Nations Integrated Regional Information Network [IRIN] in an article dated 29th February 2008 (attached) states that:

“NAIROBI, 29 February 2008 (IRIN) - While lauding the agreement between Kenya's two main political parties on power-sharing, humanitarian actors say the hard work has yet to begin - resettling the displaced and reconciling all Kenyans.

[…]

Under their agreement, Kibaki and Odinga will share power, with the creation of a prime minister's post to accommodate Odinga's Orange Democratic Movement.

In Nakuru, IDPs had mixed reactions to the deal. "Most IDPs here in the camp [almost entirely Kikuyu] feel President Kibaki has sold them out - they see this agreement as strengthening their enemies," Jesse Njoroge, the camp's coordinator, told IRIN. "Similarly, many Kalenjin people in town feel shortchanged - the post of prime minister, they feel, should have gone to William Ruto, and so they feel all the hard work they did in the run-up to the election has been lost to Nyanza Province."

The Nakuru Showground is hosting at least 12,800 IDPs.

> "The announcement has had no major effect here," Njoroge said. "The IDPs feel that an agreement at the national level does not guarantee their safety and security at the grassroots level - these agreements don't always trickle down."

He said the IDPs would only consider returning to the homes once the security situation improved significantly, "to a point where they are able to live safely side by side with the people who evicted them. A few IDPs are ready to leave the camp yet they are waiting to see if they will be compensated for what they've lost," he said.

He added: "What is important is not co-existence of leaders, but co-existence of Kenyans."”

198. The Economist journal of 28th February 2008 states:

“Mr Odinga will become prime minister, with wide-ranging executive powers; Mr Kibaki will stay as president. Cabinet posts will be shared between their nominees. Parliament will entrench some constitutional amendments to shift the balance of power between president and prime minister.

It remains to be seen how the sharing of power will work in practice, especially after all the bad blood that has been spilt between the pair over many years. But the creation of the post of prime minister, which had not existed, was a victory for Mr Odinga. Mr Kibaki's people had previously insisted that, if there were to be a prime minister, he should have limited executive powers. This, it seems, will not be the case.

The other most ticklish issue was whether the presidential election, which most independent observers reckoned was rigged, would be run again—and, if so, when. It is unlikely to be held in the near future. But it remained unclear whether Mr Kibaki would serve a full five-year presidential term.

It will take time for confidence to be rebuilt. Well over 1,000 people have been killed in the post-election violence. At least 300,000 people have

been displaced by ethnic cleansing. Many of them will be wary of returning to their old homes soon. Kenya's economy has taken a bad knock. Above all, the country's reputation as a hub of stability and moderation in a volatile region has been sorely damaged. Even if the agreement signed this week holds, things will not easily return to normal."

199. At the core of the present case is the proposition that a Gikuyu woman in Kenyan society is expected to look for protection to her own husband or partner, to her *mbari*, or to members of her tribe. In seeking to establish herself away from her own area (as the Appellant would have to do, given earlier acceptance of risk to her in her home area) a woman in the Appellant's position would have to look to precisely those groups, we find, despite the fact that this would also carry a risk of eventual discovery by her potential persecutors.

200. We note here the BBC News report of 29 April 2008 (Kenya banned sect members killed) of killings of and seemingly by the Mungiki, in particular the killing by beheading, a few weeks ago, of the wife of one of the jailed leaders of the Mungiki, and the shooting dead of Charles Ndungu, said to be the Chair of the sect's political wing :

"Kenyan police have shot dead two members of the outlawed Mungiki sect in a chase in a slum of the capital.

Police spokesman Eric Kiraithe confirmed that the two had been evading arrest and were killed after they ignored orders to surrender.
The incident comes a day after Charles Ndungu, chairman of the sect's political wing, was shot dead.

No date has been given for talks due to be held between the new government and Mungiki leaders to stop the violence.

There have been fears that the planned meeting would be aborted following Mr Ndungu's killing, but sect members have not commented on the incident.

Police have denied involvement in the killing and have launched an investigation.

They suspect he may have been killed by a rival group within the Mungiki sect.

The Mungiki, mainly drawn from President Mwai Kibaki's Kikuyu ethnic group, run transport rackets in the capital, Nairobi, and are likened to Kenya's version of the mafia.

Deadly riots

Correspondents say the sect has a large presence in Dandora slum to the east of the capital, the scene of Tuesday's shooting.

> "The two were wanted for a robbery and a string of murders and beheading within and outside Nairobi and our officers caught up with them in Dandora," Mr Kiraithe told the BBC News website.

> Two weeks ago the wife of the Mungiki's jailed leader was found beheaded, sparking deadly riots in the capital and surrounding areas.
> It was only after Kenya's new Prime Minister Raila Odinga agreed to meet the group and address their concerns, that threats of further disruption were withdrawn.
>
> Last year, more than 100 suspected sect members were killed in a police crackdown after a series of grisly beheadings blamed on the sect.
>
> Sect members accuse the police of extra-judicial killings and want a special unit set up to counter their activities to be disbanded."

Refugee Convention Reason

201. The Appellant contends that she is a member of a particular social group for the purposes of Article 1(a)(2) of the Refugee Convention.

202. In *ZH* (Women as a Particular Social Group) Iran CG [2003] UKIAT 00207 Ouseley J, President of the IAT as he then was,, in starting with a consideration of the case of *Islam and Shah* (above), begins with a caution which we consider worth repeating here:

> "We emphasise what both Lord Steyn and Lord Hoffmann said: everything depends on the evidence and findings of fact in the particular case: 'generalisations as to the place of women in particular countries are out of place when dealing with issues of refugee status".

203. Membership of a social group is a concept that has been the subject of considerable litigation. The characteristics of a particular social group can be identified both in negative and positive form. As extracted from the leading case law (including *Ward v Canada*[1993] 2 SCR 689; *Shah and Islam* [1999] INLR 144, *Montoya – v – SSHD* [2002] EWCA Civ 620, and *SSHD –v- Skenderaj* [2002] EWCA Civ 567) these can be summarised as follows:

    a. There is no requirement for there to be a voluntary, associational relationship

    b. Members need not be homogenous nor does the group have to exhibit any particular degree of internal cohesion

    c. A particular social group may include large numbers of persons.

d. The group may not be defined simply on basis of a shared fear of being persecuted. The persecution must exist independently of and not be used to define the social group.

204. Following this three categories of the "particular social group concept" can be identified:

a. Groups defined by an innate or unchangeable characteristic; whatever the common characteristic that defines the group it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience.

b. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association

and

- Groups associated by a former voluntary status, unalterable due to historical permanence.

205. In the light of all the evidence that is before us, in particular, but not limited to that to which we have specifically referred, bearing in mind that the question whether a person is a member of a particular social group is a mixed question of fact and law, we find that women (and girls) in Kenya have the innate characteristic of being female and that the background evidence to which we have referred, in particular at paras 168-179 above, shows that women and girls in Kenya are discriminated against in the law of the country and in the enforcement of such laws as do exist, in particular in relation to protection from sexual and other violence including rape, FGM and domestic violence. We recall the extremely rare event of a prosecution relating to FGM, and the sentence of a probation order in respect of the offence of performing FGM on a girl of 15 years (Amnesty International). Whilst male circumcision does take place in Kenya, the evidence does not show that either the act or its consequences may be properly regarded as inflicting serious harm comparable to that which is inflicted by FGM. We find that neither the criminal law nor the civil law provides effective protection to women and girls in this regard.

206. The background information before us makes clear that female genital mutilation is increasingly internationally recognised as a form of violence against women. Indeed, in the UK, on 3 March 2004, the Female Genital Mutilation Act 2003 came into force,

creating a number of criminal offences which may be committed either in the UK or abroad. The consequences of FGM for physical, psychological and psycho-sexual health of women and girls are devastating and in many cases life threatening.

207. Health risks and complications associated with FGM itself depend on the gravity of the mutilation, hygienic conditions, skill of the operator and the struggle of the victim. But whether immediate or long term, they are grave in terms of physical and psychological mutilation. Harmful effects including pain, vaginal tract infections and difficulty giving birth continue during life. Complications giving birth are significant. Subjection to FGM is therefore not simply one event but an event with continuing consequences.

208. According to the background information there have been attempts by the Kenyan state to ban FGM and by churches and civic groups to stamp out the practice. This has not been successful. In some areas of the country the number of girls and women subjected to FGM is increasing despite the procedure having to be carried out away from state medical facilities. Despite the world abhorrence for the practice it is still not illegal for all women. There was sparse if any evidence before us of the punishments meted out to those who subject women or girls to FGM or acquiesce in such practices. The evidence indicated that none had been charged prior to the implementation of the December 2001 legislation despite the two presidential decrees having been in existence for over 10 years. The high prevalence of FGM (up to 53% overall and as high as 90% in some areas – UN Integrated Regional Information Networks 11.02.03) together with the increasing numbers in some areas, indicates either a lack of willingness on the part of the state to enforce its own decrees or an inability to do so in the face of the cultural demands for it to occur.

209. On the totality of the evidence, we find that there is active support for the Mungiki on the part of some members of Parliament and a level of infiltration by Mungiki into government through its members taking posts in central and local government offices. We do find that the influence of the Mungiki and the government's response to it and its beliefs and actions, are such as to show that the government is to be regarded as reluctant to act against the Mungiki, in effect condoning its actions , or is unable to do so.

210. We further find that there is discrimination against women and girls in relation to the provisions of the law and its enforcement in both family and property law, so that they are, in general, unable to achieve civil or economic independence from their

fathers or male partners, or from family. This is particularly so in relation to customary law which prevails and is adhered to country wide, as well as statute law.

211. The Appellant also needs to show a causal nexus between the harm feared and membership of the social group in question. In *Islam and Shah*, no final choice was made between the 'but for' and the 'effective cause' tests, but the 'but for' test was said to require a taking into account of the context in which the causal question was raised and of the broad policy of the (Refugee) Convention." In our judgment, the Appellant's case would meet either test.

212. Like Lord Bingham in *Fornah and K* (above) when referring to women in Sierra Leone, we find no difficulty in recognizing women in Kenya as a particular social group for the purposes of Article 1A2 of the Refugee Convention. Were we to be wrong in so finding, then like his Lordship, we would accept the alternative and less favoured definition to which he refers (para 31 of his judgment, above), that of : "intact women in Kenya".

213. The circumstances in Kenya, as we have found them to be, suggest a degree of risk in the light of which, we find that the Appellant, (and her daughter) if returned face a real risk of being persecuted under the Refugee Convention and/ or of ill-treatment contrary to Article 3 ECHR, namely torture, inhuman and degrading treatment, by reason of membership of a particular social group, namely women (girls) in Kenya (alternatively intact women (girls) in Kenya) either at the hands of the Mungiki or at the hands of members of other tribes by reason of a Gikuyu background, and from whom the authorities are unwilling or unable to protect her (them).

214. We therefore find that it has been shown, the primary facts not being in issue, that the Appellant has a well-founded fear of being persecuted in her home area in Kenya at the hands of members of the Mungiki, from whom the state is unwilling or unable to protect her, by reason of her membership of the particular social group" women in Kenya" (alternatively 'intact women (girls)'). As, in fact, it would seem does her daughter.

215. We make clear that we find that the Appellant has made good her case under both the Refugee Convention and article 3 of the ECHR, (as would have her daughter were she an appellant) based upon the evidence that she had produced, for the reasons argued by Mr Fripp, as at the date of the hearing on 18 December 2007.

Internal Relocation

216. We turn next to consider whether the Appellant has shown that she has a well-founded fear of being persecuted throughout the country. It may be possible for a woman not wishing to undergo FGM herself, or not wishing her child to do so, to relocate to another community which does not follow the practice of FGM. A thorough examination of all the relevant factors must be undertaken in each case, given the position of women within Kenyan society and the usual need for kinship links in the place of relocation in order to sustain such movement successfully. For example, we recall, under the customary law of most ethnic groups, a woman cannot inherit land and must live on the land as a guest of males who were relatives by blood or marriage.

217. We find that it is plain from the evidence following the events post-election, that the Mungiki, the primary source of relevant risk to the Appellant, have been emboldened and strengthened by recent developments, and are likely to remain so into the medium term given the paralysis of state structures, the recourse to Mungiki as "protectors" of other Gikuyu, and the strong motivation for continued alliance with the Mungiki on the part of at least some government politicians.

218. Second, in those areas formerly considered as potential areas of relocation, we are satisfied that the Appellant was in any event at real risk of discovery in any area of relocation, by the Mungiki, sooner or later, via their network, whether by a member or through the loyalty of a non-member to the Mungiki, given her particular history and characteristics, and that the Appellant is now likely to face relevant risks as a Gikuyu. We do not say that the Appellant would necessarily be identified by the Mungiki or those who would inform them immediately, for example, on arrival in Mombassa with her two young children. But we are satisfied that sooner or later information about her is reasonably likely to be passed to Agikuyu networks in Mombassa (or elsewhere in Kenya) and thence to the Matatu and so to the Mungiki. She is obviously a lone Gikuyu woman with two children who is not from Mombassa and questions would be asked by those who surrounded her and her children as to her antecedents and her reasons for moving to Mombassa, with her two children. We see no reason not to accept Dr Knighton's analysis and opinion on the workings of Kenyan society in this respect. Moreover, we are satisfied that she is at additional risk post-election by virtue of her Gikuyu origins.

219. These risks, in turn are likely to be exacerbated by her absence of male or non-Gikuyu protection. On the evidence set out above, those risks include death, physical harm, and sexual violence (which even if opportunistic, would be increasingly

likely given the unprotected status of a Gikuyu woman outside Gikuyu majority areas). Whilst we do not find that the Appellant would be at real risk of being persecuted or of other serious harm on return to Kenya simply as a Gikuyu woman, without more, the new risks, if we may call them that, post election, when regarded cumulatively with the pre-election risks to this particular Appellant, do, we find, only serve to increase the weight of evidence going to show that there is real risk to her on return to Kenya now.

220. We find that the Appellant's vulnerability is increased by her responsibility for two young children, one a daughter, who despite her young age would be herself a potential target for sexual violence. This is an aspect of the Appellant's own vulnerability to persecution: see paras 51-53 UNHCR Handbook (also relevant as to the question of the Appellant's own physical and emotional health) and article 9(2) Council Directive (2004/83/EC) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

221. This not only increases the risk in the Appellant's home area, where the Tribunal had already accepted that she could not go by reason of relevant risk to her: in effect the rising risk level means that she cannot go elsewhere without facing relevant risk.

222. In addition, we are satisfied that it has been shown that even if relevant risk is not effectively nationwide, then no reasonable internal relocation alternative arises, not only for reasons developed at length in previous evidence and submissions (including the Appellant's health as set out in the relevant reports, which at the very least compromises yet further her ability to care for and defend herself and her children), but also now because:

(i) Among Gikuyu the influence of the Mungiki is likely to be deeper and more pervasive than previously, by reason both of its ability to inflict retribution unhindered by the state and its *de facto* role as defender of Gikuyu communities from other militias, such the as Luo Taliban. This greatly increases the risk of detection of the Appellant by Mungiki attached to any attempt at relocation and the motivation of other Gikuyu, even if not themselves Mungiki, to act as informers to them;

(ii) the claimed option of relocation to non-Gikuyu areas relied upon on behalf of SSHD has effectively been foreclosed by the large scale ethnic division in Kenya, enforced by violence, seen since the elections and unlikely to disappear in the short or medium term due to the political stalemate between government and opposition. Insofar as violence has decreased, this evidently is due to the effective partition of almost the whole territory of the country following so-called ethnic cleansing of minority populations;

(iii) The very recent beheading of the wife of one of the Mungiki sect's leaders (BBC News 29 April 2008) can only increase concerns as to the risks to family members of those belonging to the Mungiki sect, particularly those who may have had a leadership role, as did the Appellant's partner.

(iv) Assuming that it were actually to be safe for the Appellant, with her children, to relocate, which we have not found, we ask whether it would be reasonable to require her to do so. We are satisfied that the economic circumstances which would permit a lone Gikuyu woman with two young children and the characteristics and history of this Appellant, to survive in Kenya, have been shown on the evidence not to exist in the absence of assistance from family and fellow *mbari* or tribe members. Even if the Appellant could, pre-election, have found work of some lawful nature, for example as a domestic servant to ex-patriots, through an agency, of which we are not persuaded, not least bearing in mind her ethic origin, compromised health, and her need to provide safety and care to her two young children, any such possibility has now been fundamentally undermined as a consequence of post-election violence and division;

(v) Other socio-economic circumstances, because of the large scale displacement of populations and disruption in food and health systems brought about by the post-election violence and ethnic division, would additionally tend to show relocation to be unreasonable in the sense that it would be unduly harsh.

223. We find, for all the above reasons, that the Appellant has shown both that there is no sufficiency of protection from being persecuted or from experiencing other serious harm in any part of Kenya.

224. The Appellant is, (as is her daughter) as we have already found, at real risk of being persecuted and/or of ill-treatment contrary to Article 3 ECHR (not only FGM, but other punishment for her disobedience to imposed social custom in breach of female subservience in Gikuyu society) throughout the territory of Kenya for reasons outlined most particularly in the evidence of Dr. Ben Knighton, in particular the extent of Gikuyu distribution within Kenya, the proliferation of Mungiki within the Gikuyu community throughout Kenya, the extent to which a newcomer's history is likely to emerge in the community of attempted relocation. As the Tribunal has accepted in *FK* (FGM) - risk and relocation) Kenya CG [2007] AIT 00041, there is no sufficiency of protection in Kenya for a woman in the Appellant's position.

225. The Appellant also points to the factors highlighted by the Court of Appeal previously (*VNM*, at para 25):

> "But, putting that contentious issue to one side, it is obvious that the reasonableness of her relocation in a different part of Kenya requires consideration of the practicability of her settling elsewhere; consideration of her ability convincingly to present to those in her new milieu a false history relating to herself and to her daughter, including the latter's paternity, and a false explanation for their arrival there; and, in the light of her substantial psychological vulnerability, consideration of her ability to sustain beyond the short term a reasonable life for them both on that false basis.".

226. We find, in relation to the refugee aspect of the appeal, and, if right and necessary in law to do so, in respect of the article 3 aspect of the appeal, that the Respondent has not identified any place in Kenya outside her home area where she might either live in safety, or to where it would be reasonable, or not unduly harsh to expect her to go, in the light of the evidence that she has produced. We are satisfied that none of the towns mentioned such as Mombassa, nor the rural areas, avails the Appellant as a place of safety or as a place to which it would be reasonable in the sense that it would not be unduly harsh, to require her and her two small children to go. It follows that the Appellant has made good her claims under both the Refugee Convention and article 3 ECHR, having shown that there is no sufficiency of protection available to her anywhere in Kenya whether at the time of her departure, date of the decision appealed or today.

227. In so finding we make clear that whilst the power sharing agreement is a development that is very much to be welcomed, and may resolve immediate violent conflict, in our judgment it is unlikely in the short to medium term to resolve the increased ethnic separation and mistrust engendered by events since December 2007. We are mindful that Kibaki and Odinga are long standing political opponents whose past record of power-sharing has been unsuccessful. We are not persuaded that the power-sharing agreement reduces or removes the real risk faced by this Appellant on return to Kenya.

228. In those circumstances, it follows that the Appellant is not entitled to humanitarian protection. However, as we have made clear, the answer to the question whether the Appellant was entitled to revive the refugee aspect of her appeal was not entirely straightforward. For completeness, therefore, we add that even if she is not a refugee because there is no Refugee Convention ground, or because we are wrong in holding that she may revive her appeal on refugee grounds, she would nevertheless make good a case for humanitarian protection under Para 3390, although it has been no active part of her argued case, based upon the evidence that is before us, for the same reasons as we have given above relating to the Refugee Convention and to article 3 ECHR, upon which she has substantively relied. Under Article 15(b) of the Qualification Directive she is entitled to a status and to rights not dissimilar in very many respects to those of a refugee under the Refugee Convention.

229. Given the importance to the Appellant of achieving finality in the present litigation, she has asked through Mr Fripp, that the Tribunal, even if satisfied that the Appellant faces relevant risk throughout Kenya, set out a finding in the alternative addressing in detail issues of internal relocation. We are mindful of the adverse effects upon the Appellant of the prolongation of these proceedings as has been highlighted by the clinicians and therapists who have been working with her. We are also mindful of the need within the law for certainty and finality.

230. However, given the findings in favour of the Appellant which we have already made, in relation to the refugee, humanitarian protection and article 3 ECHR aspects of this appeal, we find that is it not strictly necessary for us to consider the position in the alternative. Further, we are aware that there are differing opinions upon the issue, and we are mindful that we received no assistance from the Respondent on the point. We therefore conclude that this is a matter best left to another occasion.

Article 8 ECHR

231. In addition or in the further alternative, the Appellant relies upon article 8 ECHR.

232. The Representatives lodged, or we have had regard to, the following cases:

- *R(Iran) and Others v SSHD [2005]INLR 637*
- *AG(Eritrea) v SSHD [2007] EWCA Civ 801*
- *HB(Ethiopia) and Ors v SSHD [2006] EWCA Civ 1713*
- *Huang[2007] UKHL 11*
- *Kugathas v SSHD [2003] EWCA Civ 31*
- *Senthuran v SSHD [2004] EWCA Civ 950*
- *Mukarakar v SSHD [2006] EWCA Civ 1045*
- *MT(Zimbabwe) v SSHD[2007]EWCA Civ 455*
- *AT(Guinea v SSHD [2006] EWCA Civ 1889*
- *CH(Jamaica) (Effects of delay-HB reaffirmed) [2007] EWCA Civ 792*
- *KR(Iraq) v SSHD [2007] EWCA Civ 514*
- *AC v IAT [2003] EWHC 389*
- *GS(Article 8-public interest not a fixity) Serbia and Montenegro [2005] UKAIT 00121*
- *MG(Assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113*
- *AL(Serbia) v SSHD [2006] EWCA Civ 1619*
- *AG and Others (Policies; executive discretions; Tribunals powers) Kosovo[2007] UKAIT 00082.*
- *AB(Jamaica) v SSHD [2007] EWCA Civ 1302 6 December 2007*

233. Insofar as Article 8 rights are concerned, applying the guidance in *AG (Eritrea)* (above), and, of course, that in *Razgar [2004] UKHL 27* and in *Huang [2007] UKHL 11*, we find that it is clear that private and family life is enjoyed, in particular private life within the UK and private life as it touches and concerns the right to respect for physical and moral integrity and that removal of the Appellant would interfere with that enjoyment. Family life is enjoyed with her two children and whilst they would go with her to Kenya, the impact upon them of removal, including upon their private life and the degree to which their circumstances as a result of removal would have an adverse effect upon their mother, including the existing degree to which her health is compromised, and would be further compromised, and the adverse affects upon her ability to care for her children as a result, as well as the degree to which their own rights are adversely affected, within the scope

set out by the Court of Appeal in *AB (Jamaica),* must all be taken into account. Mr Walker did not seek to argue otherwise.

234. We refer to paragraph 28 of *AG* (Eritrea): the threshold to be reached in order to engage Article 8 rights is not a high one.

235. It is not in issue that the decision to remove is in accordance with the law and it has not been argued that it does other than to meet a legitimate aim, presumably the maintenance of immigration control in the economic interests of the UK.

236. The rights are engaged says the Appellant and the interference would be serious and disproportionate.

237. The Appellant has been in the United Kingdom since the end of August 2002, or more than 5 years in all. It is already accepted that, at best, she would return to Kenya on the basis of an expectation that she could not contact her own family or return to her own home area, by reason of the risk of persecution or breach of article 3 ECHR rights. She is a single mother both of whose children were born in the United Kingdom: her daughter on 5 January 2003 and her son on 19 February 2007. As Dr Buller observed (A's bundle section B pp 10-11) "[A] appears to have settled well in Huddersfield, and has developed a supportive network of friends and also regularly attends a local church. (The Appellant) has also been attempting to pursue some further education…".

238. Not only the Appellant's life, but also the lives of her children, would be seriously affected by removal from the United Kingdom, a factor relevant on the analysis of Lord Justice Sedley in *AB* (Jamaica) v SSHD [2007] EWCA Civ1302.

239. Mr Fripp has also drawn attention to an earlier case holding similarly in that regard, per Jack J in *R (AC) v IAT* [2003] EWHC Admin 389; [2003] INLR 507.

240. In all the circumstances, for all the above reasons, including in particular, as we have stated, those in relation to the article 3 aspect of this appeal, in the light of the facts of this case, we find that the removal of the Appellant from the United Kingdom would constitute a breach of her private life sufficiently serious to be disproportionate to the legitimate public interest(s) engaged.

Conclusions

241. In coming to our determination, we have been mindful of the guidance set out at sub-paragraphs 1-9 of paragraph 113 of *FK,* albeit that it does not remain intact following the judgment of the Court of Appeal, the case having been remitted to the AIT for reconsideration in order that the guidance might be considered after a further assessment of all the evidence, in particular that of Dr Knighton. The Court of Appeal in *FK*, per Sedley LJ at para 12, said this of the Tribunal's guidance:

> "We have not been addressed on the tribunal's findings under these heads. Without doubt deliberately, these are not expressed as conclusions because the tribunal have yet to come, as they do next, to the appellant's own situation. The provisional findings are, in short, that within Kikuyu areas FGM can often be avoided; that Mungiki are not as serious a threat there as Dr Knighton suggests; and that in any event relocation to a non-Kikuyu area is feasible for a Kikuyu woman. We would comment only that in relation to a country where, despite laws forbidding it, up to half the women have undergone FGM and about a third are still expected or required to undergo it, it is particularly important to keep distinct the existence of a risk to women and the possibility of their finding safe refuge from it."

242. It is in that light and in the light of all the new evidence that we have now received, and of which the Tribunal in *FK* did not have the benefit, that, we conclude that we are only able to concur with the guidance in *FK* in part. In our view the correct current position is as follows:

    1. It is important to determine whether a Kenyan claimant who fears FGM belongs to an ethnic group amongst which FGM is practised. If so, she may be a member of a particular social group for the purposes of the 1951 Refugee Convention.

    2. Uncircumcised women in Kenya, whether Gikuyu/Kikuyu or not, are not as such, at real risk of FGM.

    3. A decision to undergo FGM is said to be one made by the individual woman if an adult and by the parent(s) or other family members (e.g. a grandparent) if a child. However, since the practice is outlawed under the Children Act 2001, it would not appear that an adult could lawfully consent on behalf of a child. A child cannot lawfully consent to such a procedure. In law, an adult woman who does not consent to FGM may only rely upon making a complaint of assault under the criminal law. A woman may be placed under undue pressure by family, including her husband or partner and his family, and/ or community members, to agree to

FGM for herself or for her child (see 6 below). There are only one or two examples of prosecution of those who have performed FGM, whether on children or women and sentences have been lenient.

4. It may be possible for a woman not wishing to undergo FGM herself, or not wishing her child to do so, to relocate to another community which does not follow the practice of FGM. A thorough examination of all the relevant factors must be undertaken in each case given the position of women within Kenyan society and the usual need for kinship links in the place of relocation in order to sustain such movement successfully. For example, under the customary law of most ethnic groups, a woman cannot inherit land and must live on the land as a guest of males who were relatives by blood or marriage.

5. Those who practise FGM are not, in general, reasonably likely (particularly in urban areas), to seek to inflict FGM upon women from ethnic groups or sub-groups which do not practise FGM.

6. In general, a woman and/or her child will only be at real risk of FGM if she comes from, or becomes connected by marriage, partnership or other family ties, to an ethnic group (or sub-group) where FGM is practised and the evidence shows that she is reasonably likely to be required by her parents, grandparents, or by others in a position of power and influence over her, to undergo FGM.

7. There is evidence that the Mungiki seek to impose FGM and other forms of violence on women and children other than those who have been initiated into their sect. In particular, such women and children include the wives, partners, children and other female family members of those men who have taken the Mungiki oath. There is also evidence of the Mungiki imposing political and cultural beliefs upon others, for example by confronting in public women who are wearing trousers, stripping them and forcing them to change into skirts or long dresses.

8. The Mungiki is an organization that both uses and is used by government, with links to some politicians. It is an extremely secretive sect, the origins of which are unclear, whose members are oathed, and which, since at least the 1990s has left behind a trail of violence in its

rejection of western culture. It is said to be the politically motivated wing of a religious organization, and to also have an armed wing akin to an army unit. Mostly drawn from the Gikuyu/Kikuyu and inspired by the Mau Mau rebellion of the 1950's against British colonial rule, thousands of young Kenyans flock to the sect. It is claimed by the leadership that it has at least 2 million members around the country, many of whom have infiltrated government organizations, offices, factories and schools, albeit mostly at a low level. They have been involved in battles with the police and have raided police stations to free detained members. Instead of or as well as clubs, machetes and swords, they also use AK-47 assault rifles. The authorities are unwilling or unable to control the Mungiki and the authorities use the Mungiki as agents of political violence, in particular at election time, which has been seen most recently following the first elections of the new millennium and the elections of 27 December 2007.

9. Through its Gikuyu/Kikuyu members who move around the country for work and those who run or are connected to the country wide taxi business (Matatu), the Mungiki has both a presence and an information network, particularly in urban areas and around bus and other transport stations across the country, albeit that the information network is not one that necessarily works speedily.

10. Internal relocation may be available in Kenya to a woman who is at real risk of forced FGM in her home area if the evidence shows, (i) she is not reasonably likely to encounter anyone in the place of relocation who would be in a position of power and influence over her and who would use that power and influence to require her to undergo FGM, or would cause her presence in the place of relocation to become known to such a person or persons (e.g. the Mungiki, in particular where the appellant is a Gikuyu/Kikuyu woman, when the Mungiki may be expected to take more particular interest in her and in any Mungiki connections that she may have, so that she may, dependant upon her characteristics and history, then become of adverse interest, and persecution or other serious harm may ensue. Although the Mungiki may also target those of other ethnic origin, for example the Luo, for political reasons); and (ii) she can reasonably be expected to live in that place, having regard to the general circumstances prevailing in it and the personal

circumstances of the appellant (paragraph 3390 of HC 395). In the case of a woman from a rural area in Kenya, internal relocation to some other region or urban centre will not be available unless her circumstances are such that she will be able to survive economically (see *Januzi v Secretary of State for the Home Office and Others* [2006] UKHL 5).

11. In considering internal relocation it is important to bear in mind the religious and/or cultural context, particularly as to whether there is any family or sub-clan support available to the woman in the proposed area of relocation. In general it will be easier for a member of a particular tribe to relocate to an area where there are others from her tribe to provide shared culture and support, rather than relocating to an area populated by a different tribe. Much will depend upon the individual circumstances of the woman and the availability or otherwise of a support structure within the proposed area of return. See also 4 above. In considering the issue of relocation it is important that the situation of the family and extended family be examined, particularly as to cultural context, education, economic lifestyle and work experience.

Decision

243. The original Tribunal made a material error of law. The following decision is substituted.

The appeal is allowed on asylum grounds.

By reason of paragraph 339C (ii) of the Immigration Rules, the Appellant is not entitled to the grant of humanitarian protection.

The appeal is allowed on human rights grounds (Article 3).

The appeal is allowed on human rights grounds (Article 8).

Senior Immigration Judge Jarvis Date: 14 May 2008

ANNEXE A

Respondent

1.	Undated	*Map of Kenya*
2.	Circa 1974	*Map of distribution of ethnic groups in Kenya — from Map No. 501721, 1974, Perry -Castaneda Library Map Collection (page 79)*
3.	April 2003	*Country Assessment Documents for Kenya*
4.	December 2005	*Banking on Women — internet article, (date unclear but at least December 2005)*
5.	March 8 2006	*U.S. State Report Country Assessment Documents for Kenya*
6.	Circa 2007	*Internet articles from Catholic Relief Service, Kenya - 2007*
7.	January 2007	*Key Documents*
8.	6 March 2007	*USSDR on Kenya*
9.	4 April 2007	*FK (FGM — Risk and Relocation) Kenya CG [2007] UKA1T 00041*
10.	6 November 2007	BBC News: *'Keizi'a police accused over deaths'*
11.	3 September 2007	*Operational Guidance Note, Kenya*

Appellant

12.	Undated	*Appellant's Statement and Responses to Reasons for Refusal*
13.	Undated	*Beyond Religion*
14.	Undated	*Censur* - Various News Articles
15.	Undated	*Chronology*
16.	Undated	Human Rights Information Pack*: Female*

		Genital Mutilation — Amnesty International
17.	Undated	Human Rights Information Pack: *Stop Violence Against Women*
18.	Undated	Immigration and Nationality Directorate: *Human Rights Specific Groups: Guidelines*
19.	Undated	*Index*
20.	Undated	International Planned Parenthood Federation: *Statement on Female Genital Mutilation*
21.	Undated	*Kikuyu: Features of the Mungiki - The Politics of the Mungiki*
22.	Undated	News Article: *Police Lethargy*
23.	Undated	News Articles: *Selected Articles on the State of Religion on Africa*
24.	Undated	Net Message Board: *Religious Cults And Sects — Mungiki*
25.	Undated	Report from Amnesty International: *Kenya*
26.	Undated	Report*: Female Genital Mutilation*
27.	Undated	Report - *Metareligion: Mungiki Sect*
28.	Undated	Report - Religious Cults and Sects: *Mungiki Disciples claim it is a home-grown Religion*
29.	07 May 2000	News Article - Sunday Nation: *Secrets of Mungiki Movement*
30.	September 2000	Report - New Internationalist: *Kenya -Retro Vision: Rise of Ethnic Sect Creates Anxiety*
31.	23 October 2000	News article - Daily Nation: *What Makes Mungiki Tick*

32. 24 October 2000 — News article - The National (Nairobi): *Fury At Attacks Against Women*

33. 27 October 2000 — News article - The National (Nairobi): *The Mungiki Mystique, Just Shattered To Pieces*

34. 01 November 2000 — News article: *The People of the Mungiki And the Kikuyu Question*

35. 09 December 2000 — News article - Panafrican News Agency: *Mungiki Sect Members Torch Slum ViUage*

36. 14 December 2000 — News article - CNN: *Kenyan Women Lawyers Call for Law Against Female Circumcision*

37. 14 December 2000 — News article - The Associated Press: *Kenyans End Genital Mutilation*

38. 09 September 2001 — News article - Sunday National: *Why Mungiki's Change?*

39. 18 November 2001 — News article - East African Standard *Is Mungiki A Religious Sect or a Political Body?*

40. 08 March 2002 — Amnesty International: *Kenya Rape, The Invisible Crime*

41. 13 March 2002 — *Report — Genocide Watch News Monitor: Africa*

42. 25 April 2002 — News Article: IRIN News Org: *Kenya Rights Activists Decry Mungiki Circumcision Threat*

43. 03 August 2002 — News article: The East African Standard: *30 Naked Mungiki Men Arrested in City Swoop*

44. 19 December 2002 — *Letter from The Medical Foundation*

45. 19 December 2002 — *Letter from Medical Foundation*

46.	06 January 2003	*Letter from Ogunfeibo Solicitors*
47.	06 January 2003	*Letter from Anthony Ogunfeibo & Co to A*
48.	13 January 2003	*Letter from Varvara Zhyvets, Therapist Counsellor at Refugee Support Centre*
49.	13 January 2003	*Report of Dr Liz Herbert, Department of Genitourinary Medicine*
50.	13 January 2003	*Letter from Refugee Support Centre*
51.	24 January 2003	*Letter from Department of Genitourinary Medicine, Mayday University Hospital*
52.	11 February 2003	BBC News: *News article —Profile: Kenya's Secretive Mungiki Sect*
53.	13 February 2003	News article - American Anglican Council: *Shadowy Mungiki is Feared by Kenyan Churches and Government*
54.	27 August 2003	Letter from Kirklees - *Rape and Sexual Abuse Counselling Centre*
55.	24 December 2003	News article: The Nation (Nairobi)*:* *Stripping Women Barbaric*
56.	27 January 2004	*Letter from the Home Office*
57.	27 January 2004	*Letter from Home Office requesting Medical Foundation Report*
58.	12 February 2004	*Letter from Anthony Ogunfeibo & Co*
59.	24 April 2004	Newspapers article - The East African Standard (Nairobi): *Get Circumcised, Mungiki Sect Tells Women*
60.	27 April 2004	*Psychiatric Report of Dr BuUer*
61.	28 April 2004	*Letter from Kirklees Counselling Centre*
62.	28 April 2004	Report of Anne Wilkinson - *Kirklees Rape and Sexual Abuse*

63.	24 May2004	*Determination of D Chandler allowing the Article 3 appea*
64.	28 June 2004	*Application for Permission to Appeal to the IAT*
65.	14 October 2004	*IAT Decision extending time to appeal*
66.	21 January 2005	*IAT Decision overturning Art 3 decision of Adjudicator*
67.	07 February 2005	*Grounds of Application for permission to appeal to the Court of Appeal*
68.	29 March 2005	*IAT grant of permission to appeal*
69.	27 April 2005	*Psychiatric Report of Dr Buller*
70.	31 January 2006	*Judgement of Court of Appeal in VNM*
71.	17 November 2006	**Updated Evidence** *Psychiatric Report of Dr Buller*
72.	11 January 2007	**Updated Evidence** *Update Statement of the Appellant*
73.	19 January 2007	**Updated Evidence** *Letter from Kirklees Rape & Sexual Abuse Counselling Centre*
74.	22 January 2007	**Updated Evidence** *Letter from North East Community Mental Health Team*
75.	08 February 2007	*Expert Report of Ben Knighton*
76.	24 October 2007	*Updated Expert Report of Ben Knighton*
77.	3 January 2008	The Economist: *"Kenya: A very African coup"*
78.	3 January 2008	The Economist: *"Kenya's Elections: Twilight robbery, daylight murder"*
79.	23 January 2008	BBC News: *"Gang rape spirals in violent Kenya"*
80.	29 January 2008	BBC News: *"Kenyans "forcibly recruited to fight"*

81.	30th January 2008	BBC News: *"Targeted for marrying a Kikuyu"*
82.	31 January 2008	The Economist: *"Kenya: More mayhem than mediation"*
83.	5 February 2008	National Post (Canada): *"From Mau Mau to Mun 50 Years Later, Kenya is Still a Bloody Mess"*
84.	7 February 2008	The Economist: *'Kenya: Ethnic cleansing in Luoland"*
85.	11th February 2008	BBC News: *Kenyan militia strike back"*
86.	20 March 2008	*Letter from Switalski's Solicitors*
87.	29 April 2008	BBC News: Kenya banned sect members killed

ANNEXE B

List of Authorities

1.	Circa 1998	**Decisions of the Court of Appeal:** *Robinson (Anthonypillai Francis) v SSHD and AIT [1998] QB 929; [1mm AR 568, CA (internal relocation principles: claimant entitled to refugee status if internal relocation unduly harsh or unreasonable: pages 939-940)*
2.	Circa 2001	**Decisions of IAT/AIT:** *Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania * [UKIAT 00018 (19 July 2001); [2001] INLR 354 (standard of proof common as between article 3 ECHR and/or Refugee Convention claims: paras 35-39)*
3.	Circa 2002	**Decisions of the Administrative Court:** *Dhima V Immigration Appeal Tribunal [2002] EWHC 80 (Admin); [INLR 243 (applying sufficiency of protection test to article 3 ECHR cases paras 29-34)*
4.	Circa 2003	**Decisions of the Administrative Court:** *R (AC) V IAT [2003] EWHC Admin 389; [2003] INLR 507 (Relevance of human rights of affected persons when not directly party to proceedings)*
5.	Circa 2003	**Decisions of the Court of Appeal:** *Bagdanavicius et anor V SSHD 120031 EWCA Civ 1605; [2004] 1WLR 1207; [2004] INLR 163 (comparison of factors relevant on article 3 ECHR and/or Refugee Convention claims: para 55)*
6.	Circa 2003	**Other:** *Blake and Husain, Immigration, Asylum, and Human Rights Oxford, 2003, pp 94-97 (comparison of factors relevant on article 3 ECHR and/or Refugee Convention claims)*

7.	Circa 2004	**Decisions of the Court of Appeal:** *AE and FE v SSHD [EWCA Civ 1032; [2004] QB 531; [INLR 475 (internal relocation principles: comparison not with conditions in the United Kingdom but with those in the area of habitual residence: paras 23 and 64-67)*
8.	22 September 2004	JA (Mungiki – not a religion) Kenya [2004] UKIAT00266
9.	8 December 2004	**Decisions of the Court of Appeal:** *P & M v SSHD [2004] EWCA Civ 1640; [2005] INLR 167 (Women in Kenya facing FGM as social group for purposes of Refugee Convention: para 37)*
10.	Circa 2006	**Decisions of the House of Lords:** *SSHD v Fornah; K v SSHD [UKHL 46, [1 AC 412; [2006] 3 WLR 733; 120071 INLR I (Women facing FGM as social group for purposes of Refugee Convention: paras 26, 31, 108)*
11.	31 January 2006	**V**NM [2006] EWCA Civ 47
12.	15 February 2006	**Decisions of the House of Lords:** *Januzi v SSHD; Hamid, Gaafar, and Mohammed v SSHD [UKHL 5; [INLR 118 (Internal relocation: "reasonably normal life" test elucidated: paras 20 and 47)*
13.	Circa 2007	**Decisions of the Court of Appeal:** *AH (Sudan) [EWCA Civ 297 (correct approach to internal relocation following Januzi pam 33)*
14.	Circa 2007	**Decisions of the Court of Appeal:** *DK (Serbia) & ors v SSHD [2006] EWCA Civ 1747; [2007] 2 All ER 483 (Continuity of reconsideration process under 2002 Act: paras 20-22)*
15.	Circa 2007	**Decisions of the European Court of Human Rights:** *Salah Sheekh v The Netherlands (Application no. 1948/04) [2007] ECHR 36 (approach to internal relocation in article 3 ECHR cases: paras 138-144)*

16.	Circa 2007	**Decisions of IAT/AIT:** *FK (FGM)- risk and relocation) Kenya CG [2007] AIT 00041 (Kenya CG; Women in Kenya facing FGM are social group for purposes of Refugee Convention: para 63)*
17.	Circa 2007	**Decisions of IAT/AIT:** *IM (Sufficiency of protection) Malawi [2007] UKAIT 00071 (continuing validity of Bagdanavicius comparison of factors relevant on article 3 ECHR and/or Refugee Convention claims: paras 35-39)*
18.	26 February 2008	FK (Kenya) [2008] EWCA Civ 119