Asylum and Immigration Tribunal

FK (FGM – Risk and Relocation) Kenya CG [2007] UKAIT 00041

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 October 2006	**On 04 April 2007**

Before

SENIOR IMMIGRATION JUDGE KING
SENIOR IMMIGRATION JUDGE SOUTHERN
MRS J HOLT

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, of Refugee Legal Centre
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

(1) *Women in Kenya belonging to those ethnic groups (or sub-groups) where Female Genital Mutilation is practised are a particular social group for the purposes of the 1951 Geneva Convention. Uncircumcised women in Kenya are not as such at real risk of FGM. A woman will be at real risk in her own home area if she comes from an ethnic group (or sub-group) where FGM is practised and the credible evidence shows she is reasonably likely to be required by her parents or others in a position of power and influence over her to undergo FGM.*

(2) *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; (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 circumstances prevailing in it and to the personal circumstances of the appellant (paragraph 3390 of HC 395 (as amended)). Such circumstances will*

include being able to survive economically (see Januzi v Secretary of State for the Home department and Others [2006] UKHL 5).

(3) 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 sect generally is not found in areas occupied by those tribes whose ethnic groups (or sub-groups) are not Kikuyu or significantly so.

(4) This decision records updated evidence and provides new Country Guidance as to how issues of FGM and the Mungiki should be considered and approached in the light of such updated material.

DETERMINATION AND REASONS

1. The appellant is a citizen of Kenya. The dependant to her claim is her daughter, born on 28 January 1988. Her daughter herself has also given birth to a child, born 26 May 2004.

2. The appellant arrived in the United Kingdom with her daughter on 7 October 2002 and claimed asylum shortly thereafter. Asylum was refused and directions for her removal were given by the respondent in a decision dated 27 November 2002.

3. The appellant sought to appeal against that decision, the hearing of which appeal came before an Adjudicator, Mr B Watkins CMG, on 23 June 2003. The appeal on asylum grounds was dismissed as was also the appeal on human rights grounds.

4. The appellant sought leave to appeal against that decision to the Immigration Appeal Tribunal (as it then was) and permission to appeal was granted by a Vice President on 1 September 2003.

5. The matter came before the Asylum and Immigration Tribunal on 23 January 2006 by way of reconsideration. The Tribunal found that the decision of the Adjudicator was one which was materially flawed by reason of error of law. The findings of the Tribunal were as follows:-

> "Having found the appellant to be credible, so far as her experiences in Kenya were concerned, the Adjudicator proceeded to dismiss her appeal, without having regard to material aspects of that account. In particular, the Adjudicator failed to consider the implications of the account, against the appellant's claim to be in fear (together with her daughter) of being compelled to undergo FGM in Kenya. The Adjudicator failed to have any regard to the background evidence relating to FGM in Kenya. In purporting to find that only one incident, namely the murder of the appellant's husband, had been reported to the authorities, the Adjudicator failed to take account at paragraph 7(A2) of the appellant's statement of 10 June 2003. In purporting to deal with internal relocation at paragraph 8 of the determination, the Adjudicator failed to have regard to the appellant's statement that she had tried to relocate to Nairobi but that the Mungiki had traced her to that city.
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> On 23 January, the respondent (represented by Mr Blundell) and the appellant (represented by Mr Bandegani) were in agreement that the matter should proceed to a second-stage reconsideration, at which the Tribunal would be required to determine, on the basis of current evidence, whether the appellant would be at real risk on return to Kenya of having to undergo (or being compelled to let her daughter undergo) FGM and/or other serious harm at the hands

> of the Mungiki sect. That risk would be assessed on the basis that, as effectively found by the Adjudicator, the appellant's account of her experiences in Kenya was credible."

6. At the substantive reconsideration hearing a number of issues were highlighted for particular attention.

7. As to the account of the appellant it was not sought to go behind the general credibility findings which had been made by the Adjudicator. There was one aspect of the evidence which had not been dealt with specifically by the Adjudicator. That related to the circumstances in which the members of the sect had come to make enquiries about the appellant and her daughter in Nairobi as variously described in the accounts of the appellant. The Tribunal indicated that it would proceed on the basis that on one occasion in Nairobi members of the Mungiki sect had gone to a local church to ask questions relating to the appellant and to her daughter. How they had come to know about the whereabouts of the appellant and her daughter was not something which was the subject of any finding by the Adjudicator.

8. Mr Bandegani who represented the appellant, indicated that it was not his intention to call the appellant to give further evidence as to the substance of her claim.

9. It was not in issue that the appellant was a person who had come to the attention of the Mungiki sect and was thereby at some risk of FGM. It was not in issue, given the credibility of the appellant's account, that to return to her home village would expose her and her daughter to a well-founded fear of persecution at the hands of the Mungiki and/or expose her and her daughter to a real risk of serious harm, namely by having FGM imposed upon them and/or worse violence inflicted.

10. Given the acceptance of the substance of her fear it is necessary for us to consider therefore the judgment of the Court of Appeal in P and M v SSHD [2004] EWCA Civ 1640.

    Both P and M contended that there was a lack of state protection for women in Kenya at risk of violence and FGM and that such arose from the entrenched societal attitude towards Kenyan women generally.

    The case of P was essentially that she had been ill-treated and beaten by her husband whilst living in Nairobi. It was the finding of the Adjudicator, as upheld by the court, that there was no effective protection available for her should she return to her home area. The issue of internal relocation had not been raised before the Immigration Adjudicator and it was considered inappropriate for that to be raised as an issue before the Court of Appeal. The case of M stemmed from the fact that her father had joined the Mungiki sect. He had inflicted FGM upon the appellant's sister and she fled to avoid the same fate. The Adjudicator had concluded that state protection for M would be neither adequate nor effective and that there was no reasonable possibility of internal relocation in her case. The Court of Appeal having regard to the case of Tsagaan v SSHD [2004] EWCA Civ 1506 considered that the decision of the Adjudicator was 'plainly right' and should be restored. The Court recognised that there was a real danger of an overly technical approach being adopted to the application of the Refugee Convention.

11. it is perhaps helpful to set out the closing remarks of the Court of Appeal as set out in the Addendum.

"Addendum

50. In view of the reasoning set out above, we should make it clear that, particularly in view of Brooke LJ's reasons for giving leave to appeal, as we see it this case is more about the situations that *may* give rise to a claim for asylum or a right to a claim to protection under Article 3, than those situations that *do* give rise to such a claim. The decision does not mean that all women who are subject to cruelty and violence by their husband have an entitlement to asylum and protection under Article 3, only that P is so entitled. What is more, in her case, the issue of her ability to live safely in other parts of Kenya was never appropriately investigated, so it may be that if it had been, she would have not been entitled to asylum or the protection of Article 3.

51. In the case of M the position is similar. In her case her fear of FGM appears beyond doubt. If it is accepted that she could not be expected to avoid the risk of this being carried out against her will by residing in a different part of Kenya then her case, technicalities apart, was self evident. It is unfortunate indeed that the law has become so complicated that it has to be conceded that a very experienced IAT should have misdirected itself as to the law.

52. The real lesson of this case is the importance of appellate bodies not seeking to determine appeals to adjudicator's afresh."

We do not interpret the judgment in P & M as meaning that any woman in Kenya who can demonstrate a risk of having FGM performed upon her or being subjected to violence is entitled without more to be regarded as a refugee or fall within the protection afforded by the Qualification Directive. The court was concerned with cases which turned on their particular facts. Whether or not internal relocation is realistic or appropriate was seen as a matter which requires appropriate investigation.

12. It is our intention in this determination to consider the issue of internal relocation in two particular ways:- The first is by having regard to the personal situation and circumstances of the appellant as urged so to do by the principles set out by the Court of Appeal in P & M. The second is to seek to comment upon the general situation facing women in Kenya and to set out some guidelines which might assist a decision maker's approach to the question of internal relocation so as to avoid an overly technical approach to that matter.

13. The central issue in this appeal relates to the question of relocation in Nairobi or elsewhere within Kenya. The legal framework now falls to be considered in the light of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the amended Immigration Rules, Paragraph 339O of HC395 provides that:-

(i) The Secretary of State will not make:

(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return.

Such an issue raises three sub-issues, namely:-

(a) whether there exists a sufficiency of protection from the adverse attentions of the Mungiki;

(b) whether the relocation would itself expose the appellant to a real risk of FGM generally;

(c) whether relocation would be unreasonable or unduly harsh in all the circumstances.

The Appellant's Situation

14. We were presented with a large volume of objective evidence. The appellant submitted a bundle of documents of some 625 folios. A number of documents and authorities were submitted on behalf of the respondent dealing with a number of more recent news bulletins or articles.

15. The account of the appellant is set out in a number of documents including a SEF with attached statement dated 15 October 2002; an interview conducted on 11 November 2002, and a further statement dated 10 June 2003.

16. The appellant was born in Kiambu in Kenya on 26 June 1965. She had three children. Her husband had his own business running a printing firm. The family were practising Christians.

17. The appellant's father-in-law joined the religious sect known as the Mungiki. His initiation into the Mungiki took place in the middle of June 2002 in a rite which is described in detail by the appellant in her statement. The father-in-law came to the appellant's house dressed in his new costume and explained to her husband the nature of the religion. There was an argument, her husband refusing to change his religion. In early July 2002 the Mungiki came to the house led by the elder who had initiated the father-in-law. The appellant's husband refused to embrace their sect and he was badly beaten by a number of the Mungiki, so much so that he had subsequently to be taken to hospital. Thereafter pressure was exerted by the father-in-law upon her husband.

18. On 30 July 2002 the Mungiki returned to the house saying to the appellant's husband that as his father had joined them it was now for him as his eldest son to do the same. On refusal he was beaten and eventually stabbed in the heart. The appellant

reported the matter to the local police post who undertook the removal of her husband's body from the house. Her husband was buried on 7 August 2002.

19. On 20 August 2002 the Mungiki returned to the home to persuade the appellant to join and making enquiries as to the ages of her various children. Initially she refused their demands as a result of which her husband's car was burnt and the windows in the house were smashed. In order to avoid further trouble she told the men that she would join the religion and that her daughter would be circumcised when the school holidays came.

20. Subsequently her daughter was taken in preparation for her FGM but managed to escape and return to her home. The Mungiki had arrived at the family home and the appellant, her children and her sister-in-law managed to escape. From their hiding position they saw the Mungiki set fire to the home. The appellant left her two younger children with her sister-in-law and escaped with her elder daughter making their way to Nairobi.

21. A man gave them a lift to Nairobi where they found themselves in the middle of that city dressed only in their nightclothes. They walked and found a Catholic church and came under the protection of a priest, Father James. They had arrived at the church on Saturday and on the following Monday the priest told them that the Mungiki had visited him asking as to their whereabouts. The priest being frightened that the Mungiki would return arranged for them to depart from Nairobi. They embarked upon a journey via Zimbabwe to the United Kingdom.

22. The appellant feared that if she returned to Kenya she and her daughter would face death and persecution from those that killed her husband. She feared also that she and her daughter would be forced to undergo circumcision in order to save their lives.

23. The Adjudicator had made specific reference to the statement of the appellant dated 10 June 2003. The statement essentially was to highlight certain matters, those relevant for the purposes of this appeal being that set out in paragraph 8 of that statement, namely comments by the appellant as follows:

> "In paragraph 41, I noted that the Father told us about the Mungiki asking him about people he was believed to be sheltering. I believe that Mungiki suspected that we were with the father, because Mungiki in Nairobi must have seen my daughter and me in our nightdresses on the street and then going to the church. I believe that it was through this that word got back to the Mungiki who had attacked us as to where we were. The Father had been asked if he knew where a mother and daughter were, rather than having been asked for us by name."

The Expert Evidence

24. Dr B P Knighton was called to give oral evidence. He had lived and worked in Uganda and Kenya for a number of years working for the Anglican Church. He is an academic and a member of the African Studies Circle in the University of Oxford. He has a particular interest in East Africa. He lived and worked with the Kikuyu in the region of East of Mount Kenya from 1991-1998. He returns to Kenya on a regular basis. He had submitted a report to be found at pages 241 to 289 of the appellant's bundle. He adopted that report as part of his evidence and was asked questions by

Mr Tarlow on behalf of the respondent; and then by Mr Bandegani on behalf of the appellant.

25. It was accepted that the appellant is a member of the Kikuyu tribe. He stated that the names of the appellant were distinctive and would identify her as belonging to that particular clan. Dr Knighton preferred to use the term female genital cutting (FGC) rather than female genital mutilation. To avoid confusion however, we will continue to use the term FGM in this determination. He indicated that FGM was practised within the Kikuyu tribe, it being considered necessary for womanhood, morals, self respect and eligibility to marry. The Kikuyu number some six million, the basic social grouping is the "Mbari" or "sub clan". Sub clans hold to either Christian or traditionalist customs or a combination of the two. Some Sub clans profess their Christian faith and also practice FGM.

26. Dr Knighton said that there is internal controversy about the practice among the Kikuyu. Many church groups or churches are against the practice. There is much secrecy still surrounding the practice. The practice is condoned in the media. The more it is spoken of the more it goes underground.

27. At paragraph 6 of the report Dr Knighton cites the Kenya demographic and health survey which showed a decrease in FGM among Kikuyu women aged fifteen to forty between 1998 and 2003 from 42.5% to 34%. He also indicated that the results needed to be treated with caution as the survey sample was biased to urban areas. He also said that the surveys relied on interviews by young people who had been given only a few weeks training. He was of the opinion that women in rural areas were 60% more likely to have undergone FGM than those in urban areas. It is possible for women to be circumcised later in life, especially when moving into a family or clan which adheres to the custom. He indicated that it would be reasonable to expect there to be a much higher proportion of women over forty nine who had undergone the initiation. Before 1959 the FGC ceremonies were often public, open and communal. At present because FGM remains a controversial issue it is often not something to be publicised. He comments that the people on the survey may have been reluctant to have admitted to such initiation. It was difficult to put figures upon the number of persons undertaking the initiation. Given that the Kikuyu were regarded as one of the more educated clans, it is a measure of the persistence of the practice, that it has remained. The report of Dr Knighton would seem to suggest that the practice amongst the Kikuyu exists to the extent of a third or half of women of that clan. In three quarters of cases the mother takes the decision for their daughters to be cut. It is a transition to womanhood and eligibility for marriage. A major determinant is the custom of the sub-clan.

28. Dr Knighton recognised that the churches have spoken out against the practice as have a number of NGOs. He was somewhat dismissive as to the influence of such NGOs upon the customs and culture of the Kikuyu. The comment which he makes is that many of the NGOs are involved in particular projects and are concerned to attract media attention and support and less focused upon the local population. He recognised that the law sought to outlaw the practice but contrasted the application of law with custom. He contended that state law was a colonial creation for the most part and that customary law had greater influence. He contrasted the situation in Kenya with that in the United Kingdom. In the UK FGM has long been outlawed but

a recent newspaper article indicated that some three thousand initiation operations had been performed in the UK within the last year or so by elders coming from abroad. Dr Knighton used that example to contrast the effectiveness of law with the practicalities of custom. He indicated that in May 2006 sexual offences were codified in new legislation in Kenya but that did not extend to FGM. Dr Knighton contends in paragraph 8 of his report that there is little political will to enforce the criminalisation of FGM in the foreseeable future. There are a few court cases which hit the newspapers involving FGM, such arise only because of pressure from an NGO or from feminist interests. The cases do not generally reflect the will or the intention of the government. In terms of police he suggested there was still a degree of corruption and a reluctance to be involved with what are regarded as family and personal issues.

29. Two specific shelters exist in Kenya. The first was in Naroke, on the main road near to the Tanzanian border. It is in Masai country, which is dry and hot. It is designed for young girls giving them shelter from FGM. He contended that it will be difficult to maintain a family life there. In any event the Masai were a very traditional people and those living in or around Sabarot and Naroke practice FGM. Dr Knighton contended that for the appellant to live in that area she would either need to marry, otherwise she would need to move away. The other refuge is at Mount Elgon towards the Ugandan border near to Mbale and Soroti. It is a cold and wet area and also designed as a refuge for girls only. He contended that there would not be a sustainable future for the appellant in that region.

30. He stated that church communities could provide some temporary assistance and did so, particularly for children running away from FGM. Normally, however, the churches were unable to provide a sustainable family life but rather would put the children into a boarding school. Without some community base and support the appellant, would find it difficult to support herself and her family.

31. Our attention of was drawn to the US State Department Report 2005 dated 8 March 2006, particularly to the passage as set out at page 221 of the appellant's bundle. It is reported that of the forty two ethnic groups only four (the Luo, Luhya, Teso and Turkana) did not practice FGM at all. The Luo and Luhya lived near to Lake Victoria in the west of Kenya. The Luhya was agriculturally based with the main city being Musona. That was a multi ethnic town. There were plenty of Luo churches in the area as churches were an expression of ethnic identity. Dr Knighton contended, however, that the churches were not a means of long term hospitality. They were active and self sufficient and expected self sufficiency from those with whom they had contact. Dr Knighton contended that the appellant, as a Kikuyu, would find it difficult establishing herself in that area and finding work and accommodation. There would be little chance, he contended, of the appellant establishing herself in terms of finding a property or ownership. She was not a trader. The majority of Kikuyu women were farmers, farming coffee, tea, maize and beans. In the Kikuyu culture land was extremely important. Much of the land in Kenya was not fertile so the fertile land was very much in demand. One could only acquire land either through family or through marriage. Dr Knighton contended that the appellant would face difficulties in marriage. There is an effective taboo against women who have given birth to children particularly to sons. The appellant would have to exist upon her own wits by selling food or sewing and there would be plenty of competition in whatever area she

chose to go to. Dr Knighton's comments about the ability of the NGOs to provide protection are set out at paragraph 10 of his report. In summary, he was somewhat dismissive of their ability to provide any long term support for the appellant or her family.

32. The expert then turned his attention to the issue of the Mungiki. In paragraph 14 of the report he takes issue with the Tribunal in its comments in the judgment of JA (Mungiki, not a religion) Kenya [2004] UKIAT 00226. The Tribunal found little within the sect to illustrate any belief system. Dr Knighton argues that the Mungiki is a politico religious movement in succession to many others in Kenya over the last sixty years. He speaks of members being associated with gangs involved with vigilante work, in extortion or protection activities. It is a movement seeking to appeal to the hearts and minds of the Kikuyu youth. Unlike the mainstream Pentecostal churches with their commitment to modernity, western education and development, the Mungiki believe strongly that such trends or modern developments have let them down badly so should be opposed. The beliefs of the Mungiki are in some form an attempted continuity of the traditional socio religious traditions of the Kikuyu. It offers a form of morality seeking to combat the effect of modernity, offering an alternative of way of coping in an attempt to reconstruct Kikuyu tradition. Thereby it seeks to impose a new morality, and self discipline. Such is expressed by way of sexual and other social behaviour, defined by initiation, oath and FGM. Protection rackets are one form of seeking to impose control or order. It is a society requiring support and in turn offering protection.

33. Dr Knighton contended that notwithstanding the strong words being issued by the government against the Mungiki little in practical terms results from their words. He agreed that there are some thirty four million people living in Kenya, of whom a fifth would be Kikuyu. The potential adherence to the sect is very substantial. He contends that media pressure leads to many arrests at selected moments but for the most part, the police have not been mobilised either to prevent or stop meetings of the cult. Mass arrests have led to most if not all being set free. An analysis of the media reports records 2,881 arrests of members of the Mungiki across Kenya since 1999 only over eighty per cent of which have been in Nairobi. Of all the reported arrests in Kenya there have been ninety seven convictions reported of those three carried a life sentence; and some eighty nine were given light sentences. Nairobi is the location of most of the public order offences. Given the number of arrests in Nairobi and the resulting lack of convictions he contends that that is indicative as to the lack of real intention on the part of the authorities to do very much effectively about it. Most of the arrests were mass arrests for public order offences or for being a member of an illegal organisation. He submits that most of the arrests only came after media sensations and he gave various examples. Thus, although thousands may have been arrested very few indeed were ever dealt with before the criminal courts.

34. Dr Knighton was unable to furnish statistical evidence as to the numbers of the Mungiki or the number of defectors. He thought that the number was possibly half a million or more. On such a calculation the Mungiki would represent some 1.47% of the total Kikuyu population

35. He considered that the appellant would face difficulty returning to Nairobi given the proximity of Nairobi to her home village. The Kiambu district was immediately to the north east of Nairobi. There would be much travel between the countryside and the city. The Kikuyu were skilled in the art of gossip and rumour, called "Mdaku". Everybody would want to know where you were from and where you belonged to. It would not take long, submits Dr Knighton, for people to make enquiries about the appellant or to have news of her. The Mungiki were active in Nairobi, involved in many aspects of public life there, including mini-bus services and the various protection rackets and business activities. He submits that the activities of the government in making intermittent crackdowns served merely to drive the Mungiki underground and not away.

36. The Mungiki leader was an important leader and spiritual founder who had visions in 1989. The members of the sect looked for strong leadership within the kikuyu. The movement is deep rooted.

37. A number of newspaper articles were shown to the expert concerning the number of arrests and the activities of the government. There was, In particular, a newspaper article contained within the respondent's bundle of documents at page 31, dealing with the arrest of ninety suspected Mungiki followers in Nyeri. The article is dated 9 May 2006. Linked with that was another article from KBC Radio via BBC monitoring in Kenya dated March 26 2006, speaking of the government holding nine hundred and seventy members of the sect in a crackdown. Dr Knighton gave very little weight to those articles. As to the arrest of the nine hundred people, that report was not corroborated in any other press report. He would have expected to have seen that aspect on the local news or in other articles. The KBC was government owned and controlled radio network. The reason for that show of strength had been because there had been considerable controversy at the time concerning the action of the authorities in strip searching suspected members of the local community and in particular, the clumsy way of seeing whether women had undergone FGM and therefore were possible supporters of the Mungiki. It was a way, he contended, of the government trying to turn the spotlight away from its own behaviour. As to the other report, Nyeri was a government centre not designed to hold prisoners, certainly not ninety six of them. He doubted whether the police station at Kirinyaga was capable of holding very many prisoners. Again such matters seemed not to have been supported elsewhere.

38. Finally, Dr Knighton was asked about Mombassa. He agreed that it was the second city in Kenya, and was industrial, commercial and multi ethnic. The tribes which surrounded that town in the countryside were conservative, mainly a collection of Bantu tribes. They practice FGM. There had been ethnic problems in 1997 when Kikuyu shopkeepers had been chased away by the locals. Seeking to live within that city would be both unstable and unpredictable for the appellant.

39. As to relocation generally he stated that North Kenya was mostly arid and desert. The peoples nomadic and protective of their environment. The people would be fairly traditional in their outlook and there would be little protection for the appellant or her family.

40. In Malindi, the Lamu had a small settlement. They were Muslims. There would not be many strangers within their culture which was also conservative.

41. A summary of Dr Knighton's conclusions are set out in paragraph 17 of his report. In summary, he did not consider that the appellant could relocate anywhere in safety from the Mungiki. Even if she could be safe from them it is his contention that given her cultural links with Kikuyu, she would find it difficult to exist elsewhere in Kenya outside her particular clan or sub-clan.

The General Objective Evidence

42. We were not addressed on the wider issue of risk to women in Kenya generally but we have regard in particular the Country of Origin Research Report prepared by the Immigration Refugee Board of Canada dated 16 February 2005. This is to be found at pages 1 and 7 to 112 of the appellant's bundle of documents. It provides in our view a helpful overview as to the general situation of women and FGM in Kenya.

It reports that the Kenya Demographic and Health Survey (KDHS) revealed that:-

> "Approximately 32 per cent of Kenyan women between the ages of 15 and 49 had been circumcised (Kenya July 2004, 251). From 1998 to 2003, the KDHS recorded a seven per cent decline in these cases (ibid., 250). However, the survey showed that the prevalence of FGM varied according to certain factors, such as age, education and ethnicity (ibid., 250-251).
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> According to the survey, 20 per cent of women between the ages of 15 and 19 had been circumcised, compared with 48 per cent of women between the ages of 45 and 49; 36 per cent of women who lived in rural areas had been circumcised, compared with 21 per cent in urban centres; approximately 50 per cent of Muslim women had been circumcised, compared with 33 per cent of non-Muslim women (ibid., 250). Moreover, the KDHS noted a strong negative correlation between FGM and a woman's level of education: 58 per cent of women with no education had been circumcised, while only 21 per cent of women who had graduated from high school had been circumcised (ibid.).
>
> The following statistics show the percentage of women circumcised among the various ethnic groups.

Embu (43.6)	Kalenjin (48.1)	Kamba (26.5)
Kikuyu (34.0)	Kisii (95.9)	Luhya (0.7)
Luo (0.7)	Maasai (93.4)	Meru (42.4)
Mijikenda/Swahili (5.8)	Somali (97.0)	Taita/Taveta (62.1)
Turkana (12.2)	Kuria (95.9)	Others (17.6) (ibid., 51)

> **Note that Kisiis are also known as Abagusiis, Gisiis, Guziis, Kissiis.**
>
> The report went on to indicate that elders are responsible for making decisions regarding FGM, particularly determining the time and place for circumcision and the person who should perform it.

43. The report considered also the issue of state protection and availability. It cites journalistic sources to indicate that Kenya outlawed FGM among girls under the age of 18 and that the Children's Act 2004 Section 18 provides that "any conviction for [FGM] related offences carries a penalty of 12 months imprisonment or a fine of Kshs. 50,000 or both.

In 2001 the Ministry of Health circulated a policy directive making [FGM] illegal in all health facilities. In December 2003 the country signed the Masuto Protocol in which Article 5 stipulates that FGM should be prohibited and condemned. The government also implemented a National Plan of Action for the Elimination of FGM in Kenya. The plan aims to increase the number of communities supporting the elimination of FGM as well as the number of health facilities providing support services to victims.

Some sources are said to have noted that, in practice, the Children's Act is not being enforced or light sentences are being handed down. It is also said that Kenyan Parliamentarians have showed a reluctance to discuss FGM out of fear of losing votes.

A number of organisations and non-governmental organisations are specified in the report. Reference is also made to MYVO and its efforts to replace FGM with alternative rites of passage, which have been successful in various communities.

44. As for the Mungiki sect the Immigration and Refugee Board of Canada has prepared its report 'Responses to Information Requests' dated 23 February 2005. Such a report is to be found at pages 113–117 of the appellant's bundle of documents. It perhaps adds little to the evidence as already set out but provides a helpful overview and summary of the situation.

Submissions

45. The parties made their submissions. On behalf of the respondent Mr Tarlow relied upon the bundle of documents submitted on behalf of the respondent. He also adopted the refusal letter of 19 December 2002. He invited us to have regard to the statistical information which had been placed before us. Kenya had a population of somewhere in the region of thirty four million people. The Kikuyu was one of the largest if not the largest of the clans within Kenya, having many million members. Although generally the Kikuyu as a clan practised FGM, the statistical information was that not all Kikuyu women underwent that initiation at whatever level. The US State Department Report for 2006 quoted from the Government's August 2004 Demographic and Health Survey that some thirty two per cent of women had undergone FGM. In an area such as Eastern Nyanza and the Rift Valley there was a very high percentage, in others less so. Even putting a generous interpretation upon Dr Knighton's report some thirty two to fifty per cent of women had undergone FGM depending upon age. The appellant herself had lived in a community which did not practice FGM. There was no reason at all to suppose that she could not find another community with equally modern views.

46. He further submitted the appellant had sought the assistance of a Catholic community in Nairobi. There was no reason at all why she could not seek the assistance of another church group equally opposed to FGM. She would have no need for herself or for her children to seek a refuge but rather could establish herself as part of a community. She was resourceful and there is no reason to believe that she could not otherwise enjoy her lifestyle. Our attention was drawn also to a letter from the Foreign and Commonwealth Office dated 14 November 2005. It was a letter from the British High Commission in Nairobi to be found at page 42 of the respondent's bundle of documents. It indicated that there were many community

based organisations, non-governmental organisations, charity organisations and churches which run schemes and refuges for women. These deal with domestic violence, assist girls attempting to avoid FGM and early marriage and promote women's rights. A long list of such organisations was attached to the letter. The letter indicated that it was not easy to obtain paid employment and that unemployment rates were estimated to be between thirty and sixty per cent. In particular, the more well educated a woman may be, the better her opportunities of gaining employment. In the general context few young women live a life independent of their families in Kenya. Much will depend upon education and employment opportunities. It went on to say that in Kenya the CBOs, NGOs and self help groups did give assistance to the destitute and to those girls and women attempting to avoid FGM. Mr Tarlow invited us to find that Dr Knighton had been unduly dismissive of the role and functions of NGOs in that context.

47. He submitted that there was freedom of religion and there were a number of multi ethnic towns to which the appellant could go to establish a life for herself.

48. As to the Mungiki sect, he submitted that there was no reason why that sect would have any interest in the appellant beyond the immediate events in her home village. Even accepting the credibility of the account as given by the appellant, such did not answer the question as to how it was that the Mungiki came to enquire of the church authorities about the appellant and her daughter. It may well be as indeed the appellant indicated in her more recent statement, that seeing a woman and daughter in their nightclothes in Nairobi may have excited questions and comments. There is nothing to indicate that the appellant was being specifically targeted. Even if that were so, many years have now elapsed.

49. Mr Tarlow invited us to find that there was a sufficiency of protection available to the appellant against the activities of this particular group. Our attention was drawn to the various articles which are set out in the respondent's bundle at pages 25 to 32. There is an article from the Daily Nation in Kenya dated January 14 2006, speaking of the government having announced a fresh crackdown on the Mungiki sect, the police were targeting hideouts in a number of locations. In October 2005 the General Service Unit had raided the sect's headquarters in Kitengeoa and arrested eighteen suspects. An article from FM in Kenya dated 2 February 2006 spoke of the Mungiki sect leader, Maina Njenja, having been arrested in a raid on his home The event is then followed by the KBC Radio Report as to the arrest of nine hundred and seventy members of the outlawed Mungiki sect in Central Kenya. The date of that report being 26 March 2006. Thereafter follows the report of 9 May 2006 speaking of ninety suspected Mungiki followers having been arrested. He submits that there is clear evidence that the government is motivated to clamp down on that sect and has taken the appropriate action accordingly. There was no reason to believe that the authorities would not act on behalf of the appellant were they requested so to do.

50. On behalf of the appellant Mr Bendegani made his submissions. On the general issue of FGC we were invited to pay little regard to any statistical analysis. For the reasons outlined by Dr Knighton in his report, obtaining any accurate statistical data was problematic. What was clear was that the Kikuyu practised FGM and that such a practice is deep-rooted within the custom of Kenyan society. We were asked to give considerable weight to Dr Knighton's report and to his overall conclusions. FGM

would seem to be imposed when a girl is eight years or older. There would seem not to be any upper age limit. Much will depend upon sub-clan and the general context in which a woman conducts her life. Certainly if the appellant seeks to establish any life for herself and for her children she may well find herself in the position of being compelled either to have FGM for herself or to encourage her daughter to have the initiation. We were invited to consider the comments by the House of lords in the recent decision in K & Fornah [2006] UKHL 46 as to the institutional inferiority of women. Kenya is very much a society that discriminates against women and there is a marked reluctance by the authorities to be involved in family or community matters.

51. He submitted that the actions of the government towards expunging FGM were half-hearted and/or sporadic in nature and ineffective. Secrecy was very much at the heart of the Kikuyu culture and the colonial law imposed was less than effective to deal with customary law and practice. Our attention was drawn to the article by Gemma Richardson of 11 February 2005 "Ending Female Genital Mutilation". It is to be found at pages 122 to 125 of the appellant's bundle of documents. Women who abandon the practice of FGM have a lot to lose, their position in the community is affected, and they may find it more difficult to find a partner for marriage. Programmes for FGC eradication require massive resources, time and commitment. It was submitted by Mr Bandegani that such is not in existence at present in Kenya.

52. Our attention was drawn to an article from The Nation (Nairobi), December 3 2005, dealing with the new rite which has been introduced to avoid cutting. This article is to be found at pages 105 to 106 of the appellant's bundle. The article makes it clear that, notwithstanding the possibility of an alternative non-invasive rite such alternative rites have no validity in the minds of traditionalists or indeed of candidates.

53. We were invited to find, on the evidence of Dr Knighton, that the shelters would be inappropriate for the appellant given her age. There was nowhere for her to live in those areas and that essentially she would be forced either to live in Kikuyu areas and to succumb to FGM either herself or her children, should she wish to maintain community links with that area. Alternatively she might live in Mombassa or in Musona in which case she would find it difficult as a lone woman without family support to survive. We were invited to find that in those circumstances applying the principles as set out in Januzi v SSHD [2006] UKHL 5 that to expect her to do so would be unreasonable and/or unduly harsh.

54. Although the appellant may find some temporary assistance or shelter such would not suffice in the long term. In that connection our attention was drawn to pages 105, 108, 109, 220 and 221 of the appellant's bundle. Particular reports were highlighted. An article dated 3 February 2006 from the Chinese News Agency indicated that the Austrian Embassy in Nairobi and a Kenyan church intervened to rescue five hundred schoolgirls from undergoing forced circumcision in November and December 2004. According to Global Feminist News one hundred students between the age of ten and eighteen were forced to undergo circumcision in the West Pokot District in August 2004. On 7 February 2003 a BBC Report indicated that one hundred Kenya girls in hiding from their parents were attempting to escape forced FGM. In relation to the US State Department Report at page 221 it was said that in April 2005 seventeen girls in Marakwet District fled to avoid FGM and were given shelter in Eldoret. Three days later police forcibly removed the girls from the shelter

and then returned to their village. It was submitted there was no effective protection for young girls or women against the wishes of their community. Without male patronage it is submitted that the appellant is in an even weaker situation. Her capacity to earn a living without community support or marriage could be weakened. It is particularly so given the fact that her daughter is now a mother also in her own right.

55. As to the Mungiki Mr Bandegani submits that their influence is widespread throughout all of Kenya. They operate within the major cities particularly among the Kikuyu population. The appellant by her name and characteristics would be recognised as Kikuyu. It would be noted that she was seeking to exist independently of a community and family and that may well expose her to pressure to undergo FGM and the adverse attention of the Mungiki. The secret society's main purpose was to take action against those perceived to have western influence or of those who have sought to move away from traditional values. The appellant will be seen as coming under the western influence and clearly having moved away from her home area and family and to have contravened the traditional values of Kikuyu society. It will be very difficult for the appellant to fail to come to the attention of the sect particularly if she has her daughter and her grandchild with her.

56. Our attention was drawn to page 272 of the appellant's bundle and in particular to part of the report by Dr Knighton when he speaks about the numerous hit squads operating in urban centres by the Mungiki. Mr Bendagani submitted that such special groups enforcing the discipline would very much have the appellant in mind in that connection.

57. In summary, therefore it is submitted that relocation generally was not available to the appellant it being both unsafe and unduly harsh to expect her to live outside the Kikuyu community. The church community may provide a temporary protection but not a home. The appellant has no means of transport, no livelihood , she would find it difficult to find employment and would be vulnerable as a lone female to rape or attack. She is without patronage with a young daughter and a young baby very much alone.

58. The appellant also suffers from diabetes and requires insulin. Such also will require funding with a degree of community support. Our attention was drawn to pages 211 to 223 of the appellant's bundle, which deals with child rape and prostitution, poverty and destitution. A lot of children are on the streets it may well be that the appellant's daughter or indeed her child in turn would be destitute and forced to engage in prostitution or begging to survive.

Particular Social Group

59. The general credibility of the appellant's account is not in issue in this case. It is right, however, that we remind ourselves that the circumstances of the appellant should be placed within the overall context of the objective evidence as has been placed before us. We have taken account of those particular matters to which our attention was specifically drawn. We have attempted to take a holistic view as to the evidence which has been presented, particularly the expert evidence, in an attempt to resolve the issues which we have previously identified.

60. The burden and standard of proof is to the lower standard namely "a reasonable likelihood" or "a serious possibility". We consider whether there is a well-founded risk of persecution in respect of the 1951 Geneva Convention, or a real risk of serious harm being caused to the appellant and/or to those dependent upon her in relation to the issue of humanitarian protection and whether the appellant would face a breach of her protected human rights. We have regard to the issue of asylum, humanitarian protection and human rights as set out in the Protection (Qualification) Regulations 2006 and in the amended immigration rules (Cm6918).

61. We bear in mind in particular three decisions of the Tribunal. The first being that of JA (Mungiki – Not a Religion) Kenya [2004] UKIAT 00266, notified in September 2004; JM (Sufficiency of Protection – IFA – FGM) Kenya [2005] UKAIT 00054 notified in February 2005; and JK (FGM – Sufficiency of Protection) Kenya [2005] UKAIT 00080, notified in April 2005. We also have regard to Januzi [2006] UKHL 5 and K & Fornah [2006] UKHL 46.

62. It is to be noted that the claim of the appellant is essentially two fold: the first aspect is that she fears that if returned to Kenya she will be compelled to undergo FGM both to herself and/or in respect of her children. Such fear arises out of her membership of the Kikuyu tribe and the need to conform to such expectations for the purposes of being accepted within the community. This we term the general ground. The second ground is more focused, namely that she will be targeted by the Mungiki and thereby suffer serious harm whether by violence or by FGM. Her daughter and child also may face similar treatment. In this particular appeal it is accepted by the respondent that the appellant falls within the definition of particular social group (PSG), for the purposes of the 1951 Geneva Convention so as to give rise to the possibility that she will be recognised as a refugee, if what she fears is accepted as being well founded. Clearly on the facts as found by the Immigration Judge the appellant falls within the narrow definition of PSG as formulated.

63. We consider that the evidence as presented before us strongly supports the view, in the light of the proper legal criteria now clarified by K & 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. It is not in issue that the infliction of FGM is capable of amounting to serious harm, a risk which if established would lead to the issue of grant of humanitarian protection. We find that the imposition of FGM could amount to a breach of the protected rights of the appellant in respect of Article 3 of the ECHR.

64. The House of Lords considered the particular social group issue in K & Fornah. We do not propose to repeat the arguments so well expressed by their Lordships in that particular case. The scope of the particular social group has been variously defined. At paragraph 80 of the judgment it was defined as follows:-

> "For these reasons, I am satisfied that the appellant belongs to the group of uninitiated intact women who face persecution by enforced mutilation. If I am wrong in choosing that more limited group, then I would, of course, accept that the appellant falls within the larger social group of women and girls who face enforced mutilation."

The slightly wider definition is set out in paragraph 114 of the judgment, namely:-

> "For these reasons, the particular social group might best be defined as Sierra Leonean women belonging to those ethnic groups where FGM is practised: then it is quite clear that the reason for the persecution is the membership of that group. But it matters not whether the group is stated more widely, as all Sierra Leonean women, or more narrowly, as intact Sierra Leonean Women from those ethnic groups. For all of them, the group has an existence independent of the persecution".

It was made clear in the course of the judgment in K & Fornah, particularly in paragraph 13 thereof, that to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable in one country but not in another.

65. In the particular circumstances of this case it was not an issue that the appellant faced a real risk of FGM being imposed upon her by the Mungiki were she to have remained in her home area. The essential issue in this appeal is whether the appellant, her daughter and her grandchild could safely and reasonably relocate to another area of Kenya so as to avoid the risk of FGM being imposed upon them. It will be necessary therefore for us to consider the objective evidence relating to the matter and to apply it to the personal circumstances of the appellant and her dependants.

A) Relocation – A Kikuyu Woman Remaining within Kirkuyu Culture and Territories

66. The objective evidence which was placed before us indicates that something in the region of thirty two per cent of Kikuyu women undergo FGM for reasons articulated by Dr Knighton in his report. We note the comments that are made in the report as to the difficulties in gleaning accurate statistics on this matter. Much would depend upon the sample of women approached, their ages, the areas in which they live. It follows, even on Dr Knighton's approach, that many millions of young girls or young women are not the subject of FGM. We have no doubt that there would be many areas within the Kikuyu territory in which the inhabitants do not seek to practice or impose FGM.

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.

68. The background evidence considered as a whole indicates that with better education and a changing society more and more women are seeking to avoid FGM. Much reliance was placed by Mr Bendegani on the article from 'The Nation' of 3 December 2005 concerning the new rite not involving cutting, it seemed to suggest it was not really something that was greatly wanted. It is perhaps relevant in that connection to have regard to what was said by the Tribunal in JM (Sufficiency of Protection – IFA – FGM) Kenya in 2005. The Tribunal in that case considered a number of documents and matters, paragraph 16 of that decision is particularly worthy of note. It reads as follows:-

> "Miss Sigley submitted there would be a sufficiency of protection for the appellant. She referred to the Secretary of State's bundle and the US State Department Report covering events in Kenya in 2003 and published on 25 February 2004. The law prohibited FGM for girls under eighteen and prohibited forced FGM on women of any age. The fact that 38% of women had undergone FGM demonstrated that a significant proportion had not. The practice was more widespread in some provinces than in others. A report from the German Development Corporation entitled 'Promotion of Initiatives to end FGM and Country Fact Sheet – Kenya GTZ' gave statistics for the prevalence rates among various ethnic groups. FGM prevalence rates in Kenya were declining in that material. The prevalence rate among the Kikuyu was 43%. The report showed that the Kenya Ministry of Health was coordinating activities in order to launch the national plan to abolish FGM. The government were working with NGOs and gave the project effective political and administrative support . 'By means of networking with local authorities it was possible to save girls from the threat of circumcision'. The achievements were listed on page 78 of the bundle – the prevalence rate of FGM in Koibatek district, for example, had declined to 2.2%. The report demonstrated the positive impact where the project had been undertaken. Societal attitudes had changed One of the most successful education programmes aimed at eradicating FGM in Kenya involved an alternative rite of passage in which girls were taken through all the formalities attending FGM but without undergoing the actual cut – see page 80 of the report prepared by the German Development Organisation. Some five thousand girls had participated. Those who had been circumcised were now condemning FGM in impressive numbers."

69. We have of course recognised the force of what Dr Knighton had to say about the pressure of society needed in many quarters to enforce traditional values. Equally it is clear to us from reading the objective material before us that positive steps are being taken both by NGOs and by the government, to educate and to encourage communities to take alternative actions to avoid FGM. Such matters are of course to be taken in conjunction with the work of the churches and the local communities to which reference has already been made. The decrease in FGM among Kikuyu women aged between fifteen to forty nine is acknowledged by Dr Knighton in his report. Such indicating a decrease between 1998 and 2003 of 42.5% to 34%. Of course statistics have to be treated with great caution and there may indeed be a

level of unreporting. We find, however, nothing to cause us to depart from the overall conclusions of the Tribunal as set out in JM on that particular aspect.

B) Relocation – Risk from Mungiki

70. Whether the Mungiki present a cultural or religious movement perhaps matters little in the context in which we come to consider the issue. It is clear from the objective evidence that it is a significant organisation in general and within the Kikuyu tribe in particular. It is involved with vigilante work, extortion and protection activities. Evidence is given that it was very much involved in the urban areas with minibuses and transport. It has some degree of political influence.

71. Dr Knighton does not attempt to give any figures as to the number of Mungiki who may be in existence. We have not been pointed to any particular aspect of the evidence in that regard. Such would in any event represent but a very small percentage indeed of the Kikuyu population as a whole.

72. Some limited assistance is given by the Tribunal decision of JA (Mungiki – Not a Religion) Kenya [2004] UKIAT 00266. At paragraph 9 of that particular decision the Tribunal cited paragraph 6.72 of the CIPU Report of April 2003 which also reflected that contained in the April 2004 report. That particular paragraph referred to the Mungiki as:-

> "A small, controversial, cultural and political movement based in part on Kikuyu ethnic traditions, which espouses political views and cultural practices which are controversial in mainstream Kenya society. The number of Mungiki members is unknown, but the group draws a significant following from the unemployed and other marginalised segments of society."

73. We note that similar comments were made in the US Department of State Report of 31 March 2003 set out at pages 47 to 49 of the appellant's bundle of documents. An extract from the Kenya Humanitarian Update of February 2003 is to be found at page 51 of the appellant's bundle. It speaks of the total of 957 Mungiki suspects having been arrested and charged in court. It speaks of the fact that in the previous two months the police had handled 1,124 Mungiki related cases. Most of the arrests were in Nairobi, the Rift Valley and Central Provinces. The government had allowed the sect followers an amnesty until 13 February but only 167 adherents had surrendered to the police. Those arrested were charged with murder and with other offences.

74. A BBC News item of 11 February 2003 provided a brief profile of the Mungiki sect speaking of two days of clashes with police in Nairobi leaving two policemen dead and seventy of its members in police custody. The clashes seemingly were sparked by a dispute over the control of the private minibus business in some parts of Nairobi. This followed a similar incident two weeks before when thirty people were killed in similar clashes in the Rift Valley Province. The article went on to say that police say that more than fifty people died in 2002 in clashes involving the sect and owners of private minibuses, known as matatu, in Nairobi alone. Its leader Maian Njenga claims that he had a vision from God commanding him to reunite the Kikuyu and fight foreign ideologies. The article records that he was now in hiding together with his co-leader Ndura Waruinge.

75. We note also the US State Department Report of 8 March 2006 as set out at pages 208 onwards in the appellant's bundle of documents. There is mention of the Mungiki in that report as follows:-

> "The Mungiki, a banned cultural and political movement and criminal protection racket based in part on Kikuyu traditions, was less organised and was implicated in fewer violent crimes than in the past due to a police crackdown. On February 10 and March 1 a total of thirty seven Mungiki members were released for lack of evidence in their murder charges. On May 9, the High Court acquitted for lack of evidence eleven Mungiki members who had been arrested in 2004 on various charges including the killings of a police officer and Mungiki defectors.
>
> By the years end police arrested approximately twenty four suspected Mungiki members in connection with an upsurge in transportation sector crimes."

76. The report went on as follows:-

> "There was a large internal security apparatus that included the Police Criminal Investigation Department (CID), the National Security Intelligence Service (NSIS), the National Police, the Administration Police and the Paramilitary General Services Unit. The CID investigates criminal activity, and the NSIS collects intelligence and monitors persons considered subversive. The security forces are under the authority of the Ministry of State for Provincial Administration and National Security in the Office of the President."

77. There is little clear evidence before us as to the areas in which the Mungiki inhabit. Clearly they would seem to be involved in the urban centres particular in the protection and minibus rackets. No doubt they are in other areas, seeking adherents from the Kikuyu. That is not to say of course that they are everywhere. The ethos of the sect is to enforce traditional values including FGM. Clearly their ideas would not be welcome in areas which do not support that particular view. It is significant, as we so find, that the Mungiki would seem to be active in the Rift Valley, an area which is very strongly in favour of FGM according to the statistics which have been placed before us. For many years the appellant lived in a community which did not embrace the ideology of the Mungiki. It is far from clear as to whether the Mungiki have remained in Kiambu or have since left. Even taking the analysis of the situation as set out by Dr Knighton, in his report at page 268 of the appellant's bundle, over eighty per cent of the arrests of Mungiki members would seem to have taken place in Nairobi. He speaks of his analysis of a media report showing some 2,881 arrests of Mungiki members across Kenya since 1999. For that period seemingly only six have been arrested in Kiambu. Those six too were seemingly involved in an attack of residents of Karia Village in the Kaimbu District. There was another incident when two people were injured by a group of club wielding louts who took charge of the town of Matatu Terminus. Significantly those incidents seem to be in 2002. There would seem to be little evidence, as can be gleaned from Dr Knighton's report of, any arrests subsequently in that area.

78. Dr Knighton interprets the lack of arrests as indicating a lack of opposition to Mungiki in that area by the police. An alternative view of the figures and one that we prefer, is that there is less activity. There seems to be considerable activity of the Mungiki in Nairobi as reflected by the large number of arrests. As Dr Knighton indicated, these were mass arrests for public order offences or for being a member of an illegal organisation. Once again the sources for that information would seem to be fairly ancient going back to the period 2000 to 2004, generally speaking.

79. More up to date information is provided by the respondent in the bundle of documents provided. The article from the Daily Nation of Kenya on 14 January 2006 speaks of the fresh crackdown on the sect hideouts in some eleven towns. It is also believed there are hideouts in Muranga, Maragwa, Thika and Nyandarun Districts. Mr Knighton essentially is of the view that such operations are cosmetic rather than reality. For our part, having looked at the evidence as a whole, we do not concur with that opinion. We note in particular from the article 'FM Kenya' of 2 February 2006 that the Mungiki sect leader Meina Njenga has been arrested by the authorities. Such action was unlikely to have been taken lightly given the circumstances of the situations that exist in Kenya. Although Dr Knighton was sceptical as to the arrest of nine hundred and seventy members of the outlawed Mungiki clan, he did not seek to doubt the arrest of its leader.

80. Mr Bandegani produced two further documents at the hearing both extracts from 'The Daily Nation'. The one for May 2006 speaks of five people on a Mungiki links charge freed; and the one in July 2006, "The sect has returned to every corner of the country and notably to the slums of Nairobi and to all Matatu" (public commuter vehicle routes). We bear in mind that these of course are comments by journalists. Such perhaps adds little to the overall picture which emerges from the objective evidence, only that there was great activity within Nairobi itself in the urban areas and those in which the control of transport would reflect a lucrative source of income for the sect.

81. As Dr Knighton highlighted in his report, the overwhelming number of arrests would seem to have been as a result of violence, of the implementation of protection rackets and fights in connection with the minibus businesses and with general disorder in the street. No example has been adduced before us of communities being targeted by the Mungiki, particularly to undergo FGM. If whole communities came under such pressure with such violence, it is perhaps surprising that nothing in the media has been published.

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.

(C) <u>Relocation</u> – <u>A Kikuyu Woman moving into a non-Kikuyu Area</u>

83. The objective evidence was to the effect that there were some four tribes who did not practice FGM but they were located in a defined area within Western Kenya. In particular the Luo and Luyia lived in the region of Lake Victoria the capital being Musoma. Were the appellant to relocate to such an area, she would be free from any societal pressure as to FGM. Indeed, it being a non-Kikuyu area there would be little contact with the Mungiki inside of Musoma. In addition, the evidence was that Musoma and Mombassa are multi ethnic towns.

84. We have regard to the US Department of State Report of 8 March 2006. As to internally displaced persons generally, we note that the government provided assistance to IDPs and co-ordinated support services of NGOs, particularly the Kenya Red Cross. We see no reason why, if the government is committed to providing assistance to internally displaced persons and refugees it would not provide some assistance to its own particular citizens. Women make up approximately seventy five per cent of the agricultural workforce and are active in urban small businesses. There is also free universal primary education and the government is seeking to enhance access to free primary education. Primary school enrolment was some 7.4 million in 2004. There is no reason to believe therefore that education will not be available to the appellant's grandson were he to accompany the appellant and his mother to Kenya.

85. We bear in mind of course that undue speculation should be avoided. It is important that upon any relocation the conditions should not be unreasonable or unduly harsh. We turn therefore to the reasoning of the House of Lords in their consideration of the case of Januzi. The reasonableness test of internal relocation was considered at length by Lord Bingham of Cornhill in his judgment. At paragraphs 20-21 Lord Bingham stated as follows:-

> "20. … It is, however, important, given the immense significance of the decisions they make, that decision-makers should have some guidance on the approach to reasonableness and undue harshness in this context. Valuable guidance is found in the UNHCR Guidelines on International Protection of 23 July 2003. In paragraph 7 II(a) the reasonableness analysis is approached by asking 'Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?' and the comment is made: 'If not, it would not be reasonable to expect the person to move there'. In development of this analysis the guidelines address respect for human rights in paragraph 28:
>
> '*Respect for human rights*
>
> Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human rights in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.'
>
> They [UNHCR] then address economic survival in paragraphs 29-30:
>
> '*Economic survival*
>
> The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of simple standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable,

unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level. If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. For example, in many parts of Africa, Asia and elsewhere, common ethnic, tribal, religious and/or cultural factors enable access to land, resources and protection. In such situations, it would not be reasonable to expect someone who does not belong to the dominant group, to take up residence there. A person should also not be required to relocate to areas, such as the slums in an urban area, where they would be required to live in conditions of severe hardship.'

These guidelines are, I think, helpful, concentrating attention as they do on the standards prevailing generally in the country of nationality. Helpful also is a passage of socio-economic factors in Storey, *op cit*, p 516 (footnotes omitted):

"Bearing in mind the frequency with which decision-makers suspect certain asylum seekers to be simply economic migrants, it is useful to examine the relevance to IFA claims of socio-economic factors. Again, terminology differs widely, but there seems to be broad agreement that if life for the individual claimant in an IFA would involve economic annihilation, utter destitution or existence below a bare subsistence level (Existenzminimum) or deny 'decent means of subsistence' that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health, available or realisable assets, and so forth). Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from relatives, friends or even governmental or non-governmental sources, cannot be excluded".

86. The Tribunal in HGMO (Relocation to Khartoum) Sudan CG [2006] UKIAT 00062 sought to extract several propositions from the opinion of their Lordships in Januzi.

"First, it is essential when considering internal relocation to have regard to both considerations of: (1) safety, in the sense of an absence of persecution; and (2) reasonableness, in the sense of whether conditions are unduly harsh (*Januzi*, paragraphs 7, 8, 47 and 48).

Secondly, whilst it may be relevant to deciding a particular case to have regard to whether a person sought to avail himself of internal relocation prior to departure, the test of whether someone faces a real risk under the Refugee Convention and under Article 3 essentially concerns whether refoulement or return of a person would give rise to current risk: see for example Lord Bingham's approval at paragraph 20 of analyses made "in the context of return" and Lord Hope's reference in paragraph 48 to "the dangers of return".

Thirdly, there is no presumption that internal relocation is impossible simply because the persecutors in a person's home area are agents of the state. Nevertheless, evidence of state involvement, whether that involvement is direct or indirect, is relevant (paragraphs 21, 48 and 49).

Fourthly, the issue of reasonableness or whether conditions are unduly harsh is a rigorous one (Lord Carswell, paragraph 67); and it is wrong to decide this, is urged by Hathaway/New Zealand approach, by reference to whether those conditions meet the requirements of international human rights law in full. The issue is whether "conditions in that country generally as regards the most basic human rights that are universally recognised – the right to life and the right not to be subjected to cruel or inhuman treatment – are so bad that, it would be unduly harsh to expect a person to seek a place of relocation" (Lord Hope, paragraph 54). At most all that can be expected is that basic human rights standards, in particular non-derogable rights, are not breached.

> Fifthly, it is of particular importance in the context of whether internal relocation is reasonable in the sense of unduly harsh that matters are looked at cumulatively, taking account of "all relevant circumstances": the importance of this approach is manifest from paragraphs 20-21 and 50 of their Lordships' opinions. "

87. It is to be recognised that there may be a distinction between an individual living in an area where her clan or a sub-clan have a presence and that where they do not. Clearly, religious and/or cultural considerations are important, not only to the relative comfort of an individual and of her family but also as to the potentiality for support. We note, however, that in the Kikuyu tribal areas and the multi-cultural multi-ethnic urban centres a Kikuyu woman would not be entirely divorced from her cultural roots. It would be reasonable to expect there to be some possibility of assistance being given to her through that medium as well as through the NGOs and other caring agencies or churches. Little by way of objective evidence has been placed before us to indicate that a Kikuyu woman would not be tolerated in a non-Kikuyu area or be without such support as would enable her or her family to standards of human basic rights.

88. Dr Knighton comments in paragraph 16 of his report that, "It is one's own extended family or sub-clan which is the guarantor of security and the only recourse of the homeless widow, since the state provides no social security". We find such a comment to be unduly wide. The generalised statement by Dr Knighton seems not to factor in the question of the ability to work so as to maintain oneself by one's own efforts or the help of others. It would be a surprising result indeed if a potential claimant for asylum or for other protection would be able to avoid any possibility of relocation simply by giving no assistance or information as to his or her family situation in the country of origin.

(D) <u>The Situation of the Appellant</u>

89. The starting point for our consideration is the personal circumstances of the appellant and of her family. Little is said about her parents but she conducted married life in the village of Kianbu with her husband and three children. It was a Christian household and quite clearly it was a family which did not practice FGM. They lived without incident in the village and without pressure to undergo any form of FGM for many years. It was only when the Mungiki converted her father-in-law in June 2002 that any difficulties are said to have arisen. At that time the appellant was thirty seven years of age, one daughter twelve years old, another fourteen years old. Very little is said about the wider family context or indeed of the community in which she lived. Before the arrival of the Mungiki FGM seemed not to have been an issue for the appellant or the family. The other children now live with the appellant's sister in Kenya, once again little is said about their situation and circumstances.

90. Dr Knighton in his report adds very little to the overall family profile other than indicating that the appellant had distinctive Kikuyu names. According to Dr Knighton Kaimbu District was largely rural and "notoriously Kikuyu". As he made clear in his report it is often the membership of the sub-clan which determines whether or not FGM was practised. No evidence has been given that the appellant and her husband were not otherwise than living an ordinary and community life within their village.

There has been no suggestion that they were ostracised or distinct from their neighbours in any significant way.

91. Dr Knighton makes the following comment in paragraph 3 of his report,

> "Clearly the appellant is in a 'social group' of a Mbari, or sub-clan, which is still devoted, or renewed in its devotion, to the custom of female genital cutting (FGC), long considered necessary by Kikuyu both for womanhood, morals, self respect and eligibility for marriage".

Such a comment does not, in our view, however address the practicalities that the appellant was married and has produced children but felt under no compulsion or requirement to undergo FGM. Little enquiry would seem to have been made of the appellant as to the community in which she resided or indeed to identify with any clarity any particular sub-clan of which she was a member. We find therefore such generalised comments to be without particular focus and unhelpful in our enquiries; and undermining of the weight which we can attribute to the report as a whole.

92. The appellant's family lived in a rural area, indeed in the heartland of President Kenyatta's elite, seemingly without any difficulty or compulsion in relation to FGM, until of course the Mungiki arrived.

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.

94. We of course acknowledge that, were the appellant to move away from her village to relocate to another area within the Kikuyu tribal areas there would be considerable disadvantages. She would lose the interest in the land which she and her family perhaps had. Once again that is not an issue which has been dealt with any clarity as to whether or not it was her husband's land or whether it was land which she inherited from her parents. She will be without the support of her husband and it may well be, given the mores of the culture, that having given birth to a child she would be less likely to secure a marriage. That may also apply to her daughter now aged eighteen with her child, however she being younger may fare better, thereby establishing a family unit of some sort. It is to be noted that the appellant has demonstrated initiative in moving from Kenya into Zimbabwe and on to the United Kingdom. She has had to learn to adapt to a new culture in the United Kingdom and bring up her child in that culture. There is nothing to indicate that the appellant would be unable to cope with re-establishing a lifestyle for herself and her family in Kenya. As we have indicated before, there is no reason to suppose that the church community would not be helpful and supportive to the establishment of an adequate lifestyle for the appellant, particularly as she has a young daughter and a young grandchild. Mr Knighton in his report seems to postulate the matter on the basis of the worst possible scenario. We find that that is not something that we would agree with. In our view the evidence indicates that the caring Christian community in which

the appellant grew up and in which she married could again, be replicated elsewhere. We find that there are a number of agencies that would help the appellant to develop her life and establish herself. We do not find that to expect the appellant to relocate to a community not dissimilar from that of her own would be, in the circumstances, unsafe, unreasonable or unduly harsh. There is an additional factor of course and that is the appellant's sister and the appellant's other children. It is not clear where they are or what circumstances they are facing. Once located they, themselves, may be also an additional limb of support.

95. We return to where we started in relation to this aspect, namely to the family profile of the appellant. It is far from clear how extensive or otherwise is the sub-clan of the appellant. It would be reasonably likely, given the appellant did not practice FGM, that the sub-clan of which she is a member does not either. No doubt the appellant's sub-clan would also be an additional element of support to her in any relocation, if present in that new area.

96. The position adopted and adhered to by Dr Knighton was that without a family network and clan support an individual would be unable to live even on a basic level of economic subsistence other than by resorting to prostitution or exposing herself or her family to exploitation. For our part we find that conclusion to be heavily overstated. We found that the report of Dr Knighton tends to concentrate upon generalities rather than focusing upon the particular situation and circumstance of the appellant. It is helpful in furnishing background information about the general situation in Kenya relating to FGM and to the Mungiki, but less helpful when it comes to evaluating this information. For example Dr Knighton commented that "the church cannot provide sanctuary and neither the government nor NGOs can provide a livelihood or a place to live. There are few parts where she could settle without being destitute, because of the importance of the family network". We find such a comment to go well beyond the evidence he relies upon and as lacking particular reference. Dr Knighton goes on to talk about the fact that the appellant is not free to exercise legal rights in Kenya nor free to live a lawful life with all her children without any real fear of persecution, revenge or intimidation. We find little basis in substance for such wide and emotive expressions. In many ways we find the report to be particularly partisan in its approach and lacking in objectivity.

97. As we have already indicated, being without a husband, without a home and without settled lands and having to move from her own particular community, will pose difficulties for the appellant as they would for anyone seeking to move elsewhere from a long established presence in a particular part of the country. That having been said the appellant is someone who has shown herself to be resourceful in that she has removed herself from a village in Kenya and managed to travel internationally and establish a life for herself and her children in a strange country, namely the United Kingdom. Little detail has been given as to family profile or as to the occupations of her parents or of her extended family. She spoke of her husband running a printing firm and employing two people. There is a paucity of information as to her background experience whether in farming or agriculture or in a more urban setting. She is, however, of mature years with experience of managing a household and a family. The preponderance of the evidence before us does not indicate that she would be unable to work to provide for herself and her dependants. We find that there would be some support available to her. Her Christian faith would give her

access to a church community. She has already had experience of the assistance which such a community was able to give her financially through the good offices of the priest. There would also be NGOs able and, we so find, willing to provide a measure of support. There is no indication from the objective evidence that has been placed before us that there is any active animosity as between the tribes, in particular as between the Luo and the Kikuyu. There is nothing to suggest that there are ethnic groups that exist otherwise than in harmony in the main cities and towns. The appellant's daughter is of an age to work to assist with the finances of the household.

98. Dr Knighton in his comments before us indicated the majority of Kikuyu women were farmers living off the land. It would have been helpful had he clarified precisely the experience of the appellant. It may be that she was indeed used to farming and agriculture; equally it may be that she assisted her husband in his business. In fairness to the appellant we bear in mind the high incidence of unemployment and balance that with the perception that she is somebody who has initiative and drive as evidenced by her immigration history to date. We do not accept the proposition advanced by Dr Knighton that the factor of marriage and land ownership and occupation are the determining factors in an ability to maintain a reasonable and safe lifestyle in Kenya.

99. There has been a paucity of information, as we have already commented, about the family situation and circumstances of the appellant as to her lifestyle and expectations whilst living in Kenya. There is almost a total absence of information about her parents and their occupations, whether or not she has an extended family and if so where and their occupations. The claim of the appellant has been presented on a very narrow basis based very much upon the appellant's personal experiences, without in any sense placing that within the wider context of life in Kenya.

100. Mr Bandegani submits, essentially, that the appellant would be at risk from the Mungiki wherever she went in Kenya. Either she would be sought after by the Mungiki "intelligence units", because of the events in her home village or she would be perceived as being non-traditional because of her single status and that of her dependants. She would be isolated and therefore the object of their attention.

101. We find little support for that generalised statement in the detail of the evidence which has been presented to us. There is no reason to suppose that the appellant was, or remains, of any particular interest to the sect on account of the activities which she has described in Kiambu in the summer of 2002. Violence and extortion of the vulnerable would seem to be part of the general mode of operation by the sect. There is nothing to indicate in the circumstances if the appellant or her father which would cause those members of the Mungiki involved to have any reason to remember them.

102. Mr Bandegani stresses the ability of the sect to trace the appellant to the church in Nairobi. We do not find that the evidence necessarily supports that interpretation. The appellant and her daughter fled the village at night arriving in Nairobi literally in their pyjamas walking around until they found a church. It is not stated in the statement of the appellant dated 15 October 2002 or in the more recent statement of 10 June 2003 that the enquiries of the priest by the sect put a name to the appellant

or to her daughter. The appellant attributes the interest in them to be occasioned by the possibility that they were sighted going into the church dressed as they were in their night things. In the statement of 10 June 2003 at paragraph 8 the appellant said as follows:-

> "In paragraph 41, I noted that the father told us about the Mungiki asking him about people he was believed to be sheltering. I believe that the Mungiki suspected that we were with the Father, because Mungiki in Nairobi must have seen my daughter and me in our nightdresses on the street and then going to the church. I believe that it was through this that word got back to the Mungiki who had attacked us as to where we were. The Father had been asked if he knew where a mother and daughter were rather than having been asked for us by name."

It is clear from the objective evidence that the Mungiki sect are very active in Nairobi particularly in the minibus and transportation business. The appellant and her daughter were dropped at the bus station in Nairobi and it is reasonable to expect that there would have been a Mungiki presence in or around that location. Such is far removed, however, from the suggestion that without such a sighting the Mungiki would have been able to or wished to have traced the appellant in Nairobi.

103. As we have indicated before, we find that there are areas in Kenya occupied by the Kikuyu where FGM is not practiced or welcomed. The Mungiki sect would not be welcomed either. The significance of the account as given by the appellant of her experiences in Kaimbu was precisely because the sect gained a foothold with the conversion of her father-in-law. There is nothing to indicate that he had been reluctant to be converted. Those who had been reluctant had been herself and her husband. There is no evidence as to the response of the wider village community to the Mungiki or as to the current situation in that area or village.

104. There is no reason to suppose that the appellant necessarily would stand out were she to live among such communities. The objective evidence would seem to indicate that the Mungiki as a sect expect those initiated into the sect to conform to traditional standards including FGM. There is nothing advanced before us to indicate that they seek systematically to impose FGM upon non-initiates or upon a community basis. In the circumstances we do not find there to be a real or significant risk to the appellant or her family arising from the activities of the Mungiki sect. We find that there are many areas in Kenya where the Mungiki have no interest or influence or not significantly.

105. In all the circumstances we find that the appellant may return to live elsewhere in Kenya. To do so would not expose her or her dependants to a real risk of being the subject of FGM forced upon them either by the community generally or by the Mungiki in particular. We do not find that any such relocation would be unreasonable or unduly harsh in all the circumstances. We do not find there to be a well-founded fear of persecution for a Convention reason nor do we find a risk of serious harm so as to qualify for humanitarian protection. We do not find that her protected human rights are infringed.

106. We were not addressed at any length in relation to Article 8.

107. It is right that we bear in mind also the appellant's health. We note the correspondence in relation to that matter to be found at pages 21 to 43 of the appellant's bundle of documents. We note in particular the letter from the Diabetes Specialist Nurse, Dartford and Gravesham, relating to a visit on 2 November 2004. it would seem that the appellant had been started on insulin. There is very little medical evidence before us dealing with that aspect. She attended the annual diabetic clinic on 1 April 2005 and no complications are noted.

108. The other matter would seem to be intermenstrual bleeding. An ultrasound scan has confirmed material suggestive of a fibroid to the left of the uterus and fundus. We note this from the medical note of Dr Moriarty of 27 June 2005. There is very little up to date information concerning the appellant. From the paucity of medical information available it would seem that the diabetes is controlled by medication. It manifests no peculiarities other than that insulin is needed. It is far from clear as to what progress if any has been made in relation to the fibroids.

109. We were not addressed in any detail as to the health of the appellant or to its effect upon her return. Nothing was placed before us to give any indication that treatment would not be available to the appellant in Kenya. Certainly nothing was advanced before us by way of argument that Article 3 of ECHR was engaged by reason thereof. It is right of course that we note the health of the appellant as one of the factors to be considered in the overall question to be determined, namely whether or not relocation is possible and if so whether it is in the circumstances unreasonable or unduly harsh to expect the appellant so to relocate.

110. We have no doubt that the appellant will be able to find a community not dissimilar from her own community even if not the same sub-clan which at the very least would share her tribal characteristics, her Christian faith and would not be a community which encouraged or practised FGM. In such a community we can see no reason why the appellant would be unable to establish a life for herself and her dependants and be able to survive economically. See Januzi v SSHD and Others [2006] UKHL 5.

111. Applying the guidelines in Januzi as we do we find no reason to suppose that the appellant would be reduced to the situation of economic annihilation or utter destitution or existence below a bare subsistence level were she to return to another non-Kikuyu area or to a non-Kikuyu area or to an urban city. We find no reason to doubt that a measure of community support would be available to her, together with assistance from various agencies to aid her and her children in their resettlement.

Wider Considerations of risk from FGM and Relocation Generally

112. It seems to us that the principles employed in considering the specific case of this appellant can be employed in every situation in which FGM is in issue. In assessing the risk to a particular claimant and the possibility of relocation it will be necessary to consider the following factors:-

a) The particular clan or sub clan of the claimant and whether in general such practices FGM and the degree to which it is practiced or enforced.

b) If so to consider the claimant's particular family, extended family and community. It is clear from the objective evidence that the degree to which FGM is practiced varies from clan to clan and from area to area within Kenya. It is also clear that within a particular clan area there may be a particular sub-clan or community which does not foster or encourage FGM. The objective evidence speaks of the influence of elders and church leaders to influence their respective communities. Thus the attitude of such influential community figures is an important factor to be borne in mind.

c) If a claimant does live within a community which practices FGM, the particular risk to her that it may be enforced must be considered. It will be necessary to consider in that context the ability of the family to protect her or the ability of the state authorities to offer protection. Given the nature of the objective evidence as has been placed before us it is unlikely that effective protection in such circumstances could be provided by state bodies.

d) In determining whether a claimant can be expected to relocate to another area or community within her clan or sub-clan's area it will be necessary to consider the family profile of the appellant including her education, her skills and family responsibilities. To such should be applied the principles as set out in Januzi, paragraphs 20-21, and in HGMO. It will be necessary for the decision maker to focus upon the issue of fundamental human rights, community support and economic survival to determine whether such a relocation would be unreasonable or unduly harsh in all the circumstances.

e) In determining whether a claimant can be expected to relocate to another area in Kenya, outside her own clan territory, similar considerations will need to be applied as in (d). It is to be borne in mind that the larger cities are by and large multi-ethnic and multi-cultural and there are clear areas in Kenya in which FGM is not practiced. Although it was suggested by Dr Knighton that it would be impossible for a woman of one clan to live in the territory or community of another clan, we could find no objective evidence to support such a bold assertion. There is little in the objective material drawn to our attention to indicate any significant hostility being exhibited as between the clans in Kenya. Clearly the claimant will be a new arrival and initial outsider in such regions. The issue of her ability to live and work in a given area will need to be addressed as an important factor. There is nothing to indicate significant hostility or inter-clan conflict in the cities, or in the region surrounding Lake Victoria occupied in the main by the Luo and Luhya.

113. The Tribunal's conclusions may be summarised as follows:

(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, (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.

114. The primary concern of the Tribunal in this determination has been to reconsider the appeals of the appellant. However, general guidance is given as to the approach to be adopted in determining "Particular Social Group" in the light of the decision in K and Fornah. Similarly, guidance is given, in the light of the decision in Januzi, as to those circumstances and situations in which internal relocation would be reasonably open to those women in Kenya seeking to avoid FGM.

115. For the reasons which we have set out above we do not find that the appellant (or her family) has a well-founded fear of persecution or faces a real risk of having FGM inflicted upon her (or them) upon return to Kenya. We find that internal relocation is reasonably open to the appellant (and her family) in all the circumstances. We do not find that the appellant's protected human rights will be breached by such a return. We have borne in mind the issue of humanitarian protection but do not find that it has any application in the particular circumstances of this appeal and in the light of such facts as we have found.

116. The original decision of the Tribunal shall stand, namely that the asylum appeal is dismissed. The appeal on human rights grounds is also dismissed.

Signed Date

Senior Immigration Judge King, TD

Index of Documents

Map Of Kenya

BBC News Article (04/03/05)

UNHCR Guidelines and Position Papers (07/05/02)

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IRIN News Article (07/02/03)

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