



IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DE LA PROTECTION DES RÉFUGIÉS)

IN PRIVATE
HUIS CLOS
TA6-06827

2007 CanLII 69429 (I.R.B.)

CLAIMANT(S)

XXXXX XXXXX

DEMANDEUR(S)

DATE(S) OF HEARING

3 January 2007

DATE(S) DE L'AUDIENCE

DATE OF DECISION

7 February 2007

DATE DE LA DÉCISION

CORAM

M. Clive Joakim

CORAM

FOR THE CLAIMANT(S)

**Bolanle Olusina Ogunleye
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

XXXXX XXXXX XXXXX

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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XXXXX XXXXX is a citizen of Kenya and claims protection under the Convention ground of membership in a particular social group. Her claim is also being assessed under the provisions of sections 97(1)(a) and 97(1)(b) of the Immigration and Refugee Protection Act (IRPA).

Allegations

The claimant is a minor, being a child of just under seven years of age. Her designated representative is her mother, XXXXX XXXXX XXXXX, who herself is a failed refugee claimant.

The claimant arrived in Canada unaccompanied. Her mother had her sent to Canada as she feared her own father, the claimant's grandfather, would insist on circumcising the child.

Determination

I find that the claimant is not a Convention refugee as she does not have a well-founded fear of persecution. Additionally, there is nothing in her profile to suggest that, on a balance of probabilities she faces a risk to her life or other cruel and unusual treatment or punishment nor do substantial grounds exist to believe that she faces a danger of torture if returned to Kenya.

Analysis

The evidentiary issues are unique in this case since the claimant is the child of her designated representative (DR). The claimant at 6½ years of age is unable to appreciate the proceedings which affect her and so the role of the DR becomes critical in the claim. The situation the claimant finds herself in is in no small way connected to the actions of her mother. Thus, it was her mother who left her in the care of friends and relatives when she came to Canada in XXXXX 2005 to make her claim and it was her mother who sent for her to join her in Canada in May 2006.

The question is whether the claimant faces a serious possibility of female genital mutilation (FGM) in Kenya. This is the only basis for her claim. In my view I find that she does not for the prime reason that it was her mother who decided to leave her in Kenya. In retrospect, and because of the mother's failed claim, it is clear that she was under no pressure to leave Kenya when she did. Although she claimed a fear of persecution on the basis of being forced into an arranged marriage¹ that allegation was found by the panel that heard her claim to be not credible.² Her other major allegation, that she was tortured and raped by policemen, was also found on a balance of

¹ Exhibit R/A-3, PIF, XXXXX XXXXX XXXXX.

² Exhibit R/A-4, Member's Reasons, TA5-10938, 1 May 2006.

probabilities to not be true. She appealed the Refugee Division's negative decision to the Federal Court but was denied leave.

Since the claimant's mother was under no threat of persecution and left Kenya presumably for immigration or economic reasons, she took a conscious decision to leave her daughter in the care of her sister and subsequently her father. In her PIF, the claimant's mother refers directly (paragraph 30)³ to the circumstances which led to her daughter being kept by her father and raises no concern about FGM being contemplated for the claimant.

I asked the claimant's mother if she herself had been circumcised and she said she had and that this occurred when she was six years of age. Similarly, she alleges that her two sisters had also been circumcised at that age. Given this, it is all the more remarkable that she would leave her daughter vulnerable to the same fate and depart for Canada when there was no pressure on her to do so. I do not believe that this child, the claimant, was ever under any threat of FGM if her mother did not wish this for her. I find on a balance of probabilities that the claimant was not in any danger of being circumcised in Kenya.

³ Exhibit R/A-3, PIF, XXXXX XXXXX XXXXX, narrative paragraph 30.

The Objective Evidence

Counsel drew my attention to the U.S. Department of State Report on FGM⁴ in Kenya and noted that the practice is ongoing today. The thrust of this evidence is that FGM is on the decline and that efforts are being made in various directions to curtail the practice. This is a dated report (2001) and refers to there being “no laws making FGM/FGC illegal in Kenya”. In fact, more recent evidence (February 2005) shows that Kenya outlawed FGM among girls under the age of 18. Known as the Children’s Act,⁵ the law stipulates that any conviction carries a penalty of 12 months imprisonment or a fine of 50,000 shillings (approximately US \$670) or both. The Ministry of Health circulated a policy directive making FGM illegal in all health facilities.⁶ Information from 2004 indicates that the structures to fully implement the provisions of the Act were not all in place and some sources noted that the Act is not being enforced. The Kenyan government has also implemented a National Plan of Action for the Elimination of FGM in Kenya which aims to increase the number of communities supporting the elimination of FGM.⁷ I find that the State is making serious efforts at protecting persons such as the claimant. Although not perfect there is a legislative will to correct the problem and with some effort on her part and assistance from others she can avail herself of the protection

⁴ Exhibit R/A-1, item 5.4, Kenya: Report on Female Genital Mutilation (FGM), 1 June 2001.

⁵ Exhibit R/A-1, item 5.6, KEN 43321.E, dated 16 February 2005.

⁶ Ibid.

⁷ Ibid.

offered. The claimant, through her DR, has not rebutted the presumption of State Protection.

Although I do not impute untrustworthiness to the claimant, her mother has a failed claim primarily because of untrustworthiness. For this reason, I am unable to give the claimant the benefit of the doubt. Her mother has articulated her presumed fear of persecution and for all of the reasons I have referred to, I find her untrustworthy in this claim as well. The letter⁸ from her siblings are not sufficient to overcome the main deficiency in the actions of the DR in leaving the claimant in Kenya when there was no need to.

I have considered the Chairperson's Guidelines on Child Refugee Claimants.⁹ Because of the claimant's young age and because she was represented by her mother I chose not to question her. Counsel took the same approach. In this sense too I considered the claimant to be "accompanied" according to the guidelines (Guidelines 3). The fact that the DR is a parent of the claimant is also in accordance with the guidelines.

⁸ Exhibits C-4, C-5.

⁹ Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, September 30, 1996.

The Chairperson has decreed that: “These Guidelines do not lower the standard by which a child can be found to be a Convention refugee. The same burden of proof that is applied to claims presented by adults is applied to claims made by children. They must establish they have a well-founded fear of persecution in their country of origin”.

Although there is persuasive evidence that young girls continue to be forced to undergo FGM, in this particular case, I find it unreasonable to believe that the claimant was ever in such danger or would be if she returned to Kenya. She was in the home of her grandfather soon after her mother left in XXXXX 2005 until she left for Canada at the end of May 2006. Medical evidence¹⁰ indicates that she has not been circumcised. Other evidence already assessed indicates a willingness on the part of her mother to leave her in Kenya.

There is not a serious possibility that the claimant will be persecuted or face serious harm if she returns to Kenya. She need not return alone since her mother’s claim has failed. Even if she returns alone, there is no persuasive evidence that any relatives in Kenya will harm her.

¹⁰ Exhibit C-3.

The Refugee Protection Division determines that XXXXX XXXXX is not a Convention refugee or a person in need of protection and therefore rejects her claim.

“M. Clive Joakim”

M. Clive Joakim

DATED at Toronto, Ontario, this 7th day of February, 2007.

REFUGEE PROTECTION DIVISION / MINOR / PARTICULAR SOCIAL GROUP
/ GENDER / GENITAL MUTILATION / DESIGNATED REPRESENTATIVE /
MOTHER / FACTS / INCONSISTENCY / DOCUMENTARY EVIDENCE /
STATE PROTECTION / CHILDREN / NEGATIVE / KENYA