Case No.'s 2004/0059 and 2004/0969

Neutral Citation Number: [2004] EWCA Civ 1640
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL
HCX60885-2002

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 8 December 2004

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE CLARKE
and
LORD JUSTICE RIX

- -

Between :

'P' and 'M'	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr. Manjit S. Gill QC and **Mr Isaac Maka** (instructed by Sultan Lloyd Solicitors) for the appellant '**P'**
Mr. Rick Scannell (instructed by Paragon Law) for the appellant '**M'**
Mr. Steven Kovats (instructed by the Treasury Solicitor) for the **Respondent**

- -

Judgment
As Approved by the Court

Lord Chief Justice:

This is the judgment of the Court:

Introduction

1. We heard these two appeals together. We did so because they raised similar issues. In both appeals the Appellant appeals against a decision of the Immigration Appeal Tribunal ("IAT"). In both cases the IAT reversed a decision given by an Adjudicator who had allowed the Appellants' appeal against the Secretary of State's refusal to grant asylum. The appeal to this Court by P is on asylum and human rights grounds. The appeal by M is on asylum grounds alone.

2. The appeals are with the leave of Brooke LJ. He gave leave on the grounds that they raised issues of general public importance and that the Court of Appeal needed to give authoritative guidance on the points raised.

3. The essence of both Appeals is that the Appellants had a decision in their favour by an Adjudicator, which was correct as a matter of law and supported by the evidence that had been presented to the Adjudicators, and that the appeals of the Secretary of State should not have been allowed by the IAT. The respective decisions of the Adjudicators should therefore be restored.

4. P had a decision from an adjudicator that:

   (a) she was entitled to asylum in this country because she had a well-founded fear of persecution if she were to be returned to Kenya because of the violence that both she and her children had suffered over the years at the hands of her husband; and

   (b) for her to be returned to Kenya would contravene section 6 of the Human Rights Act 1998 ("HRA") because her return would contravene Articles 3 and 8 of the ECHR.

5. M also had a decision in her favour from an Adjudicator that she was entitled to asylum in this country. It was based upon her fear that she would be genitally mutilated by her father, who is a member of a violent religious sect that practices genital mutilation, if she were to be returned to Kenya

6. Both P and M contend that there is a lack of state protection of women in Kenya that amounts to discrimination that is due to entrenched societal attitudes towards Kenyan woman. In both cases it is contended that the Appellant had the necessary well-founded fear of persecution for reasons of membership of a particular social group within the meaning of Article 1(A) of the 1951 Refugee Convention relating to the Status of Refugees ("the Refugee Convention").

7. The issue of whether the Appellants belong to a "particular social group", namely Kenyan woman, for the purpose of Article 1(A) of the Refugee Convention, was initially central to both appeals. However, shortly before the hearing of the appeals it was conceded by the Secretary of State that the respective decisions of the IAT, that the Appellants did not belong to a "particular social group" for the purposes of Article 1(A), were flawed. In addition, in P's appeal, it is conceded

that the approach of the IAT as to "sufficiency of protection" was also unsustainable.

8. Although the Secretary of State has made these concessions, he contends that the decision of the IAT in the case of P can be upheld. This is because (a) the conduct relied on does not amount to torture and (b) she could safely return to live with her children in a different part of Kenya. The Secretary of State also contends that, even if the determinations of the IAT in both cases are quashed, the correct order for this Court to make is that the cases should be remitted to the IAT for a fresh hearing. This would be on the grounds that the Adjudicators' decisions were also flawed and that this court should not deprive the Secretary of State of his right to have an appeal properly heard by an IAT.

The Statutory Rights to Appeal

9. Before proceeding to consider the facts and arguments on the individual appeals, it is important to identify the respective roles of the IAT in relation to a decision of an Adjudicator and of this Court in relation to a decision of the IAT. The statutory provisions make it clear that the IAT is essentially an appellate body. At the relevant time, it had the power to allow an appeal because of an error of fact by an Adjudicator in addition to its power to do so in the case of an Adjudicator making an error of law. (In respect of all decisions made after 31 March 2003 and appeals determined by Adjudicators after 8 June 2003, appeals now lie only on points of law: the Nationality, Immigration and Asylum Act 2002 s.101; Nationality, Immigration and Asylum Act 2002 (Commencement No. 4) Order 2003 (SI 2003 No. 754); Nationality, Immigration and Asylum Act 2002 (Commencement No. 4) (Amendment) (No. 2) Order 2003 (SI 2003 No. 1339).

10. Paragraph 22 of Schedule 4 of the Immigration and Asylum Act 1999 ("the 1999 Act") provides:

> "(1) … any party to an appeal … to an adjudicator may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal.
>
> (2) The Tribunal may affirm the determination or make any other determination which the adjudicator could have made."

It is to be noted that the 1999 Act does not expressly state whether an appeal from an Adjudicator may lie on points of fact. The language of paragraph 22 is in general terms. However, the Immigration and Asylum Appeals (Procedure) Rules 2000 (now superseded by the Immigration and Asylum Appeals Procedure Rules 2003) deal with appeals to Adjudicators and to the IAT. Rule 18(4) provides:

> **"**An application for leave to appeal shall be made by serving upon the Tribunal the appropriate prescribed form, which shall –
>
> (c) identify the alleged errors of fact or law in the adjudicator's determination which would have made a material difference to the outcome, together with all the grounds relied on for the appeal"

And it is common ground that the appeal can be on the facts.

11. Paragraph 23 of Schedule 4 of the 1999 Act (as in force at the relevant time) established that there should be an appeal from the IAT to the Court of Appeal. It is in the following terms:

> "If the Immigration Appeal Tribunal has made a final determination of an appeal … any party to the appeal may bring a further appeal to the (Court of Appeal) on a question of law material to that determination"

The Subesh Case

12. In *Subesh and others v Secretary of State for the Home Department* [2004] EWCA Civ 56; [2004] Imm. A.R. 112 the Court of Appeal gave guidance as to the proper approach to be taken by the IAT when hearing appeals as to facts. Mr. Kovats, who appears on behalf of the Secretary of State, has very helpfully analysed that case. We gratefully adopt his analysis of the approach adopted by the Court in that case which is as follows:

    a) "The first instance decision is taken to be correct until the contrary is shown" (paragraph 44);

    b) The appellant before the IAT, if he is to succeed, "must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. … The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category" (paragraph 44, see also paragraphs 46 and 53);

    c) This approach is not a function of jurisdiction but of the principle of finality of litigation (paragraphs 25, 26, 40 and 48);

    d) This approach "is not confined to appeals on disputed issues of fact which the judge below has resolved by reference to oral testimony" (paragraph 42);

    e) It is a separate point to note that, pragmatically, the IAT (like any appeal court) will give due weight to the advantage that the Court below can be presumed to have obtained from relevant oral testimony (paragraph 41) (see also paragraphs 37 and 46); and

    f) The judgment in *Subesh* should not be read like a statute (paragraph 49).

13. Laws LJ stressed that the immigration appeals process is not merely a re-run, second time around, of the first instance trial. This is because the law recognises an important public interest in the finality of litigation. The would-be appellant does not approach the appeal court as if there had been no first instance decision, as if, so to speak, he and his opponent are meeting on virgin territory.

14. While being prepared to give full effect to the judgment in *Subesh* as to any appeal on issues of fact, Mr. Kovats submits that the position is different in relation to appeals on issues of law. He contends that if the Adjudicator has misdirected himself as to the law, then the IAT is under none of the inhibitions identified in *Subesh*. We accept that this represents the correct position with one caveat: the fact that an error of law can be identified does not mean that the decision is necessarily flawed. Even if the IAT identifies an error of law at first instance, the IAT should not allow an appeal unless it is satisfied that the error of law has affected the outcome of the decision.

15. Laws LJ, in his judgment, also referred to the decision of this Court in *Oleed v Secretary of State for the Home Department* [2002] EWCA Civ 1906; [2003] Imm. A.R. 499. In that case, the Adjudicator had allowed the Appellant's appeal, as here. There had then been an appeal to the IAT but the IAT's decision was flawed, and this Court, by a majority, thought it right to dismiss the appeal from the Adjudicator's decision rather then send the matter back to be re-heard by the IAT. As Schiemann LJ pointed out, "there was nothing wrong with the Adjudicator's determination, there was therefore no reason to appeal it and it would be wrong for the Home Secretary, on the back of an appeal which has been dismissed, to seek to re-examine the threat to the refugee with reference to a date later than the adjudicator's determination." This is precisely the result for which Mr. Gill QC and Mr. Scannell contend on behalf of P and M respectively.

16. Having made these preliminary observations, we turn to consider the decisions of both Adjudicators and the IAT in the present appeals. In doing so, it is useful to have in mind four separate questions, identified by Mr. Kovats, that have to be answered in dealing with a claim for asylum based on Article 1(A) of the Refugee Convention and the decision of *R. v Immigration Appeal Tribunal Ex p. Shah and Islam* [1999] 2 A.C. 629 ("*Shah & Islam*"). The questions to be considered are: "First, what is the particular social group in the instant case? Secondly, what is the persecution feared? Thirdly, is fear of such persecution for reasons of membership of the particular social group? Fourthly, is the fear well founded?"

P's Appeal

Background

17. P is a Kenyan National. She is 42 years of age and a Sikh of South Asian background. She has one daughter and one son. Before coming to this country, she resided in Nairobi with her husband. She arrived in this country on 10 June 2001. She made a claim for asylum on 14 June 2001. The application was refused by the Home Office in a letter of 26 September 2001.

Hearing and Evidence before the Adjudicator

18. Her appeal came before an Adjudicator, Mrs. Ros Goldfarb, who, following an oral hearing on 27 January 2003, gave a determination which was promulgated on 4 February 2003, allowing the appeal. The Secretary of State was not represented at the hearing, but P was represented and gave evidence as did her daughter, aged 18 at the time. Her daughter spoke of her mother being beaten many times and said that when she tried to intervene she was beaten as well. P gave evidence of

numerous beatings, that the husband had a gun because he was a police reservist and that he had friends within the senior ranks of the Kenyan police. She said that he had threatened her with the gun on at least one occasion and that she and her children were told that at least one of them would die. On another occasion he had tried to smother her with a pillow. He had also threatened to rape her and her daughter. Although the police eventually did intervene and confiscate the gun because he had been seen using it in public, P felt unable to report the situation to the police herself, because domestic violence was such an accepted part of the "patriarchal society in Kenya" that the police took no action on the part of women complainants, and this inaction was only compounded by her husband's friendship with senior ranking officers.

19. The Adjudicator also had a note from the Aga Khan hospital in Nairobi which indicated that P was unable to obtain admission to a hospital because this was refused by her husband. Other corroborative evidence was a letter from a doctor who had treated P for injuries from previous assaults by her husband, and from her Uncle, who managed to obtain her passport and those of her children from the husband's residence with considerable difficulty.

20. In addition, included among the evidence that was available to the Adjudicator was the refusal letter of the Secretary of State, which contains a considerable amount of information on the status of women in Kenya. There were also letters from the Centre for Rehabilitation and Education of Abused Women of Nairobi to whom P had gone for help. The letters said she was badly traumatised and feared that, if legal action were taken or divorce proceedings commenced against her husband, she would be beaten to death. They further said that wife-beating is part of a "normal way of life" in Kenya and that the police are generally uninterested in domestic violence: "it is not until a life is lost or the injuries are so severe as to threaten a life that the police take action."

Reasoning and Decision of the Adjudicator

21. The Adjudicator gave a detailed and carefully reasoned decision. She recognised that P's husband was not a state agent and so his actions could not be considered as persecution unless they were "knowingly tolerated by the authorities or if the authorities refuse or prove unable to offer effective protection". She said she required cogent evidence that the state was not able to provide the necessary protection. She also made reference to the leading cases on this subject. Critically, the Adjudicator came to the conclusion that she accepted:

    (a) that the background evidence "shows that the police would not have helped" (paragraph 41);

    (b) that P has suffered as "she is a member of a particular social group, women, who are disadvantaged in Kenyan society because of their position in society" (paragraph 42);

    (c) "the central core of the Appellant's account, I consider that she has suffered ill-treatment to amount to torture through the constant violence shown to her by her husband, including the threats made to her and her children in the gun incident and I consider there is real likelihood she

would suffer such ill-treatment were she to be returned to Kenya" (paragraph 43); and

(d) "that there is a real likelihood or a real risk that the Appellant would suffer ill-treatment which would amount to more than a minimal level of severity were she to be returned to Kenya" (paragraph 46).

22. The Adjudicator also found that the Appellant's right to private life, which includes her being able to maintain her moral integrity, would be breached and that her removal would be disproportionate in all the circumstances (paragraph 46).

Hearing and Evidence before the IAT

23. Before the IAT, the Secretary of State was represented by a presenting officer. P was also represented. No oral evidence was given but the documents put before the IAT set out the factual background in some detail.

Reasoning and Decision of the IAT

24. According to the IAT's determination, the Secretary of State's grounds of appeal were based on three main grounds: first, the "social group" argument, as to which it is now accepted that the IAT's decision is defective; secondly, that while violence against women in Kenya remains a problem, there is "not a complete lack of protection;" and thirdly, the high threshold required for Article 3 to be engaged had not been met.

25. In their determination, the IAT deal separately with the question of asylum and human rights. As to asylum, the IAT contrast the position in Kenya with that in Pakistan. They do so, presumably, to distinguish the case of *Shah & Islam*. They come to the conclusion that the position in Kenya is nothing like as bad as that in Pakistan, although they accept that women "are to an extent disadvantaged" in Kenya.

26. The IAT then go on to deal with the question of want of protection and refer to two examples of failures by the Kenyan police to take action until there was considerable public pressure for them to do so. In one case, the police did not take action until after the woman in question had been killed. In the other case, the wife had been mistreated by pouring sulphuric acid on her face and body before the police took action. The IAT consider that because the police had eventually taken action, the cases indicated that "Kenyan society does not condone that type of conduct". This, however, misses the point made by P; that the police have, in reality, to be compelled to intervene. However, it is clear the IAT were of the view that any lack of protection for women in Kenya was insufficient to justify P's reliance on her husband's conduct in support of her asylum claim. Consistent with their general approach, but without any supportive reasoning that is specific to this point, they decided that "women do not form a social group in Kenya".

27. As to P's claim based on the Human Rights Act 1998 ("HRA") and the European Convention of Human Rights ("ECHR"), the IAT conclude that the conduct on which she sought to rely did "not achieve the high threshold required" by Articles

3 and 8. The IAT are of the view that P's wealthy background means that she could avoid ill-treatment by her husband if she so wished, by residing in a part of Kenya other than Nairobi (where she lived with her husband).

28. The IAT summarise their conclusions in these terms:

    i) "In summary, the treatment does not cross the threshold to engage Article 3; even if it did, the respondent has not established that she would be unable to obtain protection from the Kenyan authorities and, finally, the respondent has not established that it would be unduly harsh to expect her to relocate elsewhere in Kenya.

    ii) As to Article 8 of the ECHR, it is now well established as a result of *Ullah* [2002] EWCA Civ 1856 and, more recently, *Razgar* [2003] EWCA Civ 840, that Article 8 does not have extra territorial effect when looking at risks in the receiving country in relation to a person who has been removed from the United Kingdom."

Task and Role of the IAT

29. Mr. Kovats in his submission sets out what he says are the obligations of a tribunal when determining an appeal in these terms: it must (i) direct itself in the relevant law; (ii) find the relevant facts; and (iii) apply the law to those facts. He accepts that the *Subesh* case affects the second and third tasks to which he refers.

30. However, we would question whether this is a satisfactory way of setting out the task of the IAT. What he describes is precisely the task of an adjudicator or any other tribunal of first instance. By contrast, the general relationship of the IAT to a decision of an adjudicator is similar to that of the Court of Appeal in relation to a decision of a judge at first instance. The Court of Appeal will accept the facts found by the lower court, unless it is shown that the evidence does not support the findings made, or the findings are clearly wrong. As Mr. Gill QC submits on behalf of P, the IAT departed from the proper approach set out in *Subesh*. The IAT were making the necessary primary findings of facts for themselves and, in effect, deciding the matter anew. They were taking over the role of the Adjudicator. Furthermore, they were doing so without having the advantage of hearing the oral evidence of P and her daughter.

31. Thus, there was no sufficient justification here for the IAT to take a different view of the facts from that taken by the Adjudicator. The approach adopted by the IAT resulted in them *preferring* a different view to that taken by the Adjudicator as to the extent of the mistreatment to which P had been subjected. This, in turn, affected the other conclusions to which they came. The issues cannot be divided into water-tight containers. The position is particularly clear in relation to the conclusion (which the Secretary of State concedes is flawed) that the conduct here did not amount to persecution. As Mr. Kovats accepts, domestic violence, if coupled with a lack of state protection that is discriminatory, is capable of constituting persecution if it is sufficiently serious on the facts of the particular case. The Adjudicator had come to the conclusion that the persecution was, on the basis of the facts that she found, sufficiently serious, and that it was coupled with a discriminatory lack of state protection because of the unwillingness of the police

to take any action. This was a conclusion to which the Adjudicator was perfectly entitled to reach on the evidence which she accepted. The position is the same in relation to whether the conduct complained of by P was sufficiently serious to constitute an infringement of Article 3. Whether conduct does or does not reach the high standard of ill-treatment required to fall within Article 3 is very much a judgment of fact and degree.

32. Accordingly, before the IAT embarked on the task of re-determining the questions of whether the conduct towards P amounted to persecution, and whether it was of sufficient gravity to contravene P's rights, they should have identified some error on the part of the Adjudicator. If they had attempted to do so, the most they could legitimately have said, without having the benefit of hearing the witnesses' oral testimony, was that it would have taken a different view of the evidence.

33. The approach of the IAT is also of significance with regard to the issue of internal relocation. This issue had not been relied upon by the Secretary of State prior to its appeal to the IAT. Mr. Kovats submits that the Adjudicator was, despite the fact that it was not raised before her, bound to determine this issue explicitly of her own initiative. In our view this is to place an unnecessary and inappropriate burden upon the Adjudicator and the Appellant who appears before her. In the absence of evidence that suggests that there is an alternative location to which the Appellant could go where she would not be at risk from her husband, adjudicators cannot be expected to investigate such issues for themselves on their own initiative when they have not been raised by the Secretary of State. The Adjudicator's statement here as to what she would expect to happen to P if she were returned to Kenya, was adequate in the absence of the issue being dealt with explicitly.

34. Given that the issue was not raised before the Adjudicator, the question then arises as to whether the Secretary of State should be permitted to raise the issue on appeal. In our view, unless some explanation is put forward by the Secretary of State as to why the issue was not raised earlier, the IAT should be slow to allow such an issue to be raised on appeal. Further, if the IAT do allow such an issue to be raised on appeal, the appellant must be permitted to give oral evidence on the issue. In this case it is not suggested that the Appellant was given this opportunity, but equally there is no suggestion that she made an application to give oral evidence and her application was refused. So, to that extent, she is not entirely free from fault. Nonetheless, it was unjust to decide this issue against P without hearing her evidence since, as Mr. Gill QC submits, there was considerable medical evidence before the Adjudicator which supported the Adjudicator's conclusion that there was a "real likelihood she would suffer ill-treatment" if she were to return to Kenya.

35. In saying what we have said so far, we have not ignored the fact that it is an important part of the role of the IAT to give guideline decisions which thereafter should be borne in mind by Adjudicators who have to determine similar issues. This guiding role is valuable in helping achieve consistency in decisions as to the conditions prevailing in countries from which asylum seekers are seeking to come to this country. There is nothing in the IAT's decision in this appeal to suggest that they were purporting to set out any such guideline approach. Certainly, before any such guidelines can properly be made, there must be clear evidence to

support a decision that is intended to influence the decisions of adjudicators generally. That evidence was not available to the IAT.

36. Before leaving these issues, we would emphasise that it is important that the IAT confines itself to its proper reviewing role, because there is justified concern at the length of the appeal process. This has contributed to Parliament changing the process in a way that will restrict the rights of the parties to appeal. If all concerned had acted more responsibly, an appeal may not have been considered necessary in this case. Usually the blame is placed upon the immigrant or asylum seekers' advisers. In this case the failure of the Secretary of State to be represented undoubtedly contributed to what has happened.

Our Decision

37. In the light of those comments, the four issues identified by Mr. Kovats set out earlier in this judgment can be answered shortly. First, on the evidence available, there was no reason why the Adjudicator should not have come to the conclusion that women in Kenya are a particular social group. If the position was not made clear by the decision in *Shah & Islam*, it is made clear by the decision of the Australian High Court in *Applicant S v MIMA* [2004] 8 CA 25, that we would apply also in this jurisdiction. The Adjudicator's decision was correct on her findings of fact as to the position of women in Kenyan society. Secondly, the Adjudicator properly identified what constituted persecution. Thirdly, she concluded that the persecution she feared was due to P's membership of that social group. It was also because of her membership of that social group that she would not receive adequate protection from the police, who on behalf of the State had the responsibility of providing protection for her. Fourthly and finally, the Adjudicator was entitled to find that P's fear of persecution was well-founded.

38. Consistent with what we have said already, on the facts found by the Adjudicator, we would also uphold the decision of the Adjudicator as to Article 3. For P to be returned to Kenya at the present time would create a foreseeable real risk of her receiving serious ill-treatment within the meaning of Article 3 of the ECHR. As to Article 8, the IAT relied on the decision *of R. (on the application of Ullah) v Special Adjudicator* [2003] 1 WLR 770. The decision in that case was subject to an appeal to the House of Lords ([2004] 2 A.C. 323). In the House of Lords, it was accepted that Article 8 could also be infringed but for this to be established would require an exceptionally strong case. The actual threatened treatment would have to amount to a flagrant denial or gross violation of the relevant right.

39. The Adjudicator did not apply such a test. Without a decision by the Adjudicator based on the House of Lords decision in *Ullah*, we would not wish to indicate whether, in our opinion, the conduct passed the required threshold of gravity, although, as it met the Article 3 standard, we would expect it to do so. We therefore leave open the position as to whether P should be able to rely upon Article 8. This, from her point of view, should not matter except in the most unlikely circumstances that there is a situation where she is no longer entitled to rely on Article 3 and the Secretary of State proposes to remove her from this jurisdiction. The decision of the Adjudicator, except as to Article 8 should be restored.

M's Appeal

Background

40. The case of this Appellant is even stronger than that of P. She is a Kenyan national born on 27 October 1986. She arrived in the United Kingdom on 22 September 2002 and claimed asylum on 1 October 2002. The facts on which she relies stem from her father joining the Mungiki sect in around May 2000. The family were Anglicans but on joining that sect the father's behaviour became much more aggressive. According to M, in July 2002, the father, with about 20 other members of the sect, forcibly performed female circumcision upon her mother, and unfortunately as a result of those injuries her mother died. The father then remarried a member of the sect who insisted that M and her sister, Jane, should be circumcised. Both refused. In the week that her mother's funeral arrangements were being made, 5 members of the sect were involved in raping M and violently assaulting her sister. Her father subsequently forcibly circumcised her sister and told M that she would be next. She managed to escape, however, and joined her Uncle who, with the help of the members of his church, collected sufficient money to pay for M's ticket to come to this country.

Decision of the Adjudicator

41. Before the Adjudicator, the representative of the Secretary of State and counsel appearing on behalf of M helpfully agreed to narrow the main issues on the appeal. It was agreed that M's credibility was challenged only as to the events after the attack made upon her with a view to carrying out female genital mutilation ("FGM"). The Adjudicator concluded that M remained at risk from her father and the Mungiki up to the time of her flight from Kenya, and that she had a genuine and well-founded fear of them. In addition, notwithstanding an IAT decision to the contrary, (the *Muchomba* decision [2002] UKIAT 01348) the Adjudicator came to the conclusion that women in Kenya did form a social group, particularly Kikuyu women under the age of 65, of whom M is a member, who have immutable characteristics of age and sex which exist independently of persecution and can be identified by reference to their being compelled to undergo FGM, particularly if they are members of or related to members of the Mungiki sect. In addition, she concluded that state protection for M would be neither adequate nor effective.

42. Finally, the Adjudicator came to the conclusion that there was no reasonable possibility of internal relocation in this case. The Adjudicator therefore concluded that M had discharged the burden of proof of having to show that her removal to Kenya would result in a real risk of persecution for reasons of her membership of a particular social group. For similar reasons, he also concluded that her Article 3 rights would be at real risk of contravention is she were sent back to Kenya.

Decision of the IAT

43. The IAT, on the appeal of the Secretary of State, concluded that the Adjudicator had been right not to follow the previous IAT decision. However, a further IAT decision was relevant, namely their decision in the case of *Adhiambo* [2002] UKIAT 03536. Having considered other decisions of the IAT, the tribunal came

to the conclusion that they were not satisfied that the social group identified by the Adjudicator could properly be regarded as "a particular social group" within the meaning of the Refugee Convention. The IAT accordingly allowed the appeal in respect of the asylum decision of the Adjudicator. As to the human rights decision, both counsel for M and the representative of the Secretary of State agreed that the decision of the Adjudicator was in error so the appeal on that point succeeded as well.

Submissions on behalf of the Secretary of State

44. In his equally helpful submissions on behalf of the Secretary of State in this case, Mr. Kovats explained the reasons why it was conceded that the IAT had been wrong in their approach by relying on the decisions to which they referred. As in the case of P, he identified the four separate questions. In relation to those four questions, he referred in particular to the speech of Lord Hope in *Shah & Islam* (pages 639-640, 645, 648, 659 and 663). He pointed out that whereas a particular social group cannot be defined by reference to the fear of persecution because this would be circular reasoning, the acts of the persecuting agent may help to identify, and in some cases to create, a particular social group.

45. Mr. Kovats then went on to say that the persecution that the Appellant fears in this case, namely forcible FGM, could amount to persecution if coupled with discriminatory lack of state protection. He added that if the state's failure to provide protection is because the victim is a member of the particular social group identified, then the persecution will be for reasons of membership of that social group, at least where the individual responsible for the persecution knows that the persecution will be tolerated because the state will not protect his particular victim. The fact that some members of the social group are able to avoid persecution does not preclude other members of the group from establishing that their fears of persecution are for reasons of their membership of the group. Finally, he conceded that the IAT had failed to consider whether, on the totality of the evidence available, women constituted a social group in Kenyan, and whether the ability of members of the Mungiki sect to subject its female members, or female relatives of its members, to FGM, arose from discriminatory treatment of women by the Kenyan authorities.

46. Accordingly, it was accepted by the Secretary of State that the IAT had never considered M's claim for asylum correctly and their decision should therefore be quashed.

Our Decision on Remittal

47. Turning to the issue as to whether the case should be remitted to the IAT or the Adjudicator, Mr. Kovats relied on the decision of this Court in *Tsagaan v Secretary of State for the Home Department* [2004] EWCA Civ 1506. When Mr. Kovats made his submissions to us, the transcript of the judgment in that case was not yet available. However, it is now available and, having considered the transcript, it appears to us that the decision in that case is very much based upon the facts that were before that Court. In particular, neither Kennedy LJ nor May LJ indicated any dissent from the approach in *Oleed:* That decision was regarded by counsel appearing for the Secretary of State in *Tsagaan* as dealing with a

different situation because "there was nothing wrong with the decision of the adjudicator and hence no reason for the Secretary of State to have appealed from that decision" (paragraph 18).

48. The test to be found in *Tsagaan* is provided by May LJ who indicated that if a decision of an Adjudicator was "plainly right" it should be restored (paragraph 25). Here we are satisfied that the decision of the Adjudicator was plainly right. There is a real danger of an overly technical approach being adopted to the application of the Refugee Convention. Having regard to M's story, there is every prospect if her account is correct, that if she were returned to Kenya, she would be subjected by her father to FGM. Two members of her family have been subjected to FGM. There was no intervention by the police. There was ample evidence to show that the practice is widespread. There is no evidence of any attempt by the police or anybody else on behalf of the state seeking to intervene in a case of this sort. The Adjudicator in his decision referred to the action which had been taken by the Kenyan Government, including Presidential decrees, but the reports to which the Adjudicator also refers make it clear that, if anything, the practice is on the increase rather than decrease. In addition, there is the general view of the police that violence against women is regarded as a family matter and not a crime.

49. In these circumstances, it is our view that M's appeal has to be allowed and the decision of the Adjudicator restored. This case did not require and should not have engaged such a sophisticated analysis of the technical requirements of the Refugee Convention. We would have thought that if the story of M was true, she was clearly entitled to asylum. The Adjudicator thought it was, and the IAT should not have intervened. The decision of the Adjudicator should be restored

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 adjudicators afresh.