OPERATIONAL GUIDANCE NOTE

Kenya

CONTENTS

1. Introduction

1.1 This document provides UK Border Agency case owners with guidance on the nature and handling of the most common types of claims received from nationals/residents of Kenya, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave. Case owners must refer to the relevant Asylum Instructions for further details of the policy on these areas.

1.2 Case owners must not base decisions on the country of origin information in this guidance; it is included to provide context only and does not purport to be comprehensive. The conclusions in this guidance are based on the totality of the available evidence, not just the brief extracts contained herein, and case owners must likewise take into account all available evidence. It is therefore essential that this guidance is read in conjunction with the relevant COI Service country of origin information and any other relevant information.

COI Service information is published on Horizon and on the internet at:

http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/

1.3 With effect from 27 July 2007 Kenya is a country listed in section 94 of the Nationality, Immigration and Asylum Act 2002 in respect of men only and the prima face evidence is that the current underlying situation in the country remains the same or similar to that considered when the country was first designated. Asylum and human rights claims must be considered on their individual merits. However, if, following consideration, a claim from a man who is entitled to reside in Kenya is

refused case owners must certify the claim as clearly unfounded unless satisfied that it is not. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail. Kenya is not listed in section 94 in respect of women. If, following consideration, a claim from a woman is refused, caseworkers may, however, certify the claim as clearly unfounded on a case-by-case basis if they are satisfied that it is. The information set out below contains relevant country information, the most common types of claim and guidance from the courts, including guidance on whether cases are likely to be clearly unfounded. Where a person is being considered for deportation, case owners must consider any elements of Article 8 of the ECHR in line with the provisions of Part 13 of the Immigration Rules.

2. Country assessment

2.1 Case owners should refer to the relevant COI Service country of origin information material. An overview of the country situation including headline facts and figures about the population, capital city, currency as well as geography, recent history and current politics can also be found in the relevant FCO country profile at:

http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/

2.2 An overview of the human rights situation in certain countries can also be found in the FCO Annual Report on Human Rights which examines developments in countries where human rights issues are of greatest concern:

http://fcohrdreport.com/wp-content/uploads/2011/02/Cm-8339.pdf

2.3 Actors of protection

2.3.1 Case owners must refer to section 7 of the Asylum Instruction - Considering the asylum claim and assessing credibility. To qualify for asylum, an individual must have a fear of persecution for a Convention reason and be able to demonstrate that their fear of persecution is well founded and that they are unable, or unwilling because of their fear, to seek protection in their country of origin or habitual residence. Case owners must take into account whether or not the applicant has sought the protection of the authorities or the organisation controlling all or a substantial part of the State, any outcome of doing so or the reason for not doing so. Effective protection is generally provided when the authorities (or other organisation controlling all or a substantial part of the State) take reasonable steps to prevent the persecution or suffering of serious harm by for example, operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

2.3.2 Kenya has a large internal security apparatus which includes the Kenyan National Police Service (KNPS), its Criminal Investigation Department and the Anti-terrorism Police Unit. The Kenya Administration Police (KAP) has a strong rural presence throughout the country, and provides security for the civilian provincial administration structure; it also provides border security. The General Services Unit (GSU) is responsible for dealing with uprisings and guarding high-security facilities. The National Security Intelligence Service (NSIS) collects intelligence. The KNPS, KAP and GSU are under the authority of the Ministry of State for Provincial

Administration and Internal Security. The NSIS is under the direct authority of the president.[1]

2.3.3 The Kenyan Police Service comprises about 35,000 personnel, and its structure is based upon the old British colonial system. It includes a civilian wing, based in administrative centres and divided into separate operational units including a Criminal Investigation Department (CID), the National Security Intelligence Service, an air wing and a Port Police. An Anti-Corruption Unit reports to the CID. The Police General Service Unit (GSU) is an autonomous paramilitary force dealing with internal security issues. The police are widely considered to be ineffective and corrupt; various observers have reported extra-judicial killings, human rights violations and an atmosphere of impunity.[2]

2.3.4 The UN Special Rapporteur visited Kenya in 2009 for a fact-finding mission on extra-judicial, summary or arbitrary executions. His subsequent report, published in May 2009, documented a catalogue of unlawful killings, torture and other human rights violations by the police and other security personnel, particularly during the post-election violence of 2007/8. He concluded that police in Kenya frequently execute individuals, and enjoy a climate of impunity.[3] Many human rights defenders who gave testimonies to the Special Rapporteur during his visit were subsequently harassed by the security forces and two human rights activists who had been particularly active with the fact-finding mission were murdered shortly after the mission ended.[4]

2.3.5 The UN Special Rapporteur made a number of observations on the factors contributing to police abuses and impunity; these included a dysfunctional criminal justice system which actively incentivizes police to deal with crime by killing suspects, a lack of internal and external police accountability mechanisms, witness intimidation, and a lack of police training, discipline and professionalism.[5] In 2011, the government took some steps to curb police abuse. In June a panel drawn from the Public Service Commission, Police Reform Implementation Committee, Kenya Anti-Corruption Commission (KACC) and NSIS conducted an integrity test of 2000 senior police officials on issues related to corruption, mental fitness, and implementation of the constitution. The test was based on criteria established by the KACC and NSIS. The results were not publicised, and it was unclear whether any action was taken to remove unfit officers.[6]

2.3.6 The law provides criminal penalties for official corruption; however the government does not implement these laws effectively, and officials often engage in corrupt practices with impunity. The World Bank's 2010 Worldwide Governance Indicators indicated that corruption is a severe problem.[7] From late 2010 to 2011, an escalation in the number of alleged extrajudicial killings perpetrated by the police has been reported, and police impunity remains a serious problem.[8] During 2011, there were several reports that the government or its agents committed arbitrary

[1] USSD Human Rights Report: Kenya 2011 section 1d
[2] COI Report chap. 8.02: Kenya December 2011
referring to Jane's Sentinel Country Risk Assessment, Kenya, 1 September 2011
[3] UNHCR Refworld: Report of the Special Rapporteur, Executions, Kenya 26 May 2009
[4] UNHCR Refworld: Report of the Special Rapporteur, Executions, Kenya 26 May 2009
[5] UNHCR Refworld: Report of the Special Rapporteur, Executions, Kenya 26 May 2009
[6] USSD Human Rights Report: Kenya 2011 section 1d
[7] USSD Human Rights Report: Kenya 2011 section 4
[8] UNHCR Refworld: Report of the Special Rapporteur, Executions, Kenya 26 May 2009

and unlawful killings. The government took only limited action in holding accountable security forces suspected of unlawfully killing citizens.[9]

2.4 Internal relocation.

2.4.1 Case owners must refer to the Asylum Instruction on Internal Relocation and in the case of a female applicant, the AI on Gender Issues in the Asylum Claim, for guidance on the circumstances in which internal relocation would be a 'reasonable' option, so as to apply the test set out in paragraph 339O of the Immigration Rules. It is important to note that internal relocation can be relevant in both cases of state and non-state agents of persecution, but in the main it is likely to be most relevant in the context of acts of persecution by localised non-state agents. If there is a part of the country of return where the person would not have a well founded fear of being persecuted and the person can reasonably be expected to stay there, then they will not be eligible for a grant of asylum. Similarly, if there is a part of the country of return where the person would not face a real risk of suffering serious harm and they can reasonably be expected to stay there, then they will not be eligible for humanitarian protection. Both the general circumstances prevailing in that part of the country and the personal circumstances of the person concerned including any gender issues should be taken into account. Case owners must refer to the Gender Issues in the asylum claim where this is applicable. The fact that there may be technical obstacles to return, such as re-documentation problems, does not prevent internal relocation from being applied.

2.4.2 Very careful consideration must be given to whether internal relocation would be an effective way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents. If an applicant who faces a real risk of ill-treatment/persecution in their home area would be able to relocate to a part of the country where they would not be at real risk, whether from state or non-state actors, and it would not be unreasonable to expect them to do so, then asylum or humanitarian protection should be refused.

2.4.3 The law provides for freedom of movement and the government generally respects this right in practice. The Constitution states that every person has the right to freedom of movement and the right to leave Kenya, and that every citizen has the right to enter, remain in and live anywhere in Kenya.[10] There are no legal constraints on women's freedom of movement, although some women are prevented from travelling by their husbands.[11]

2.4.4 Interference with the right to freedom of movement is generally limited to residents of the refugee camps at Kakuma and Dadaab. Thousands of refugees are confined to camps in Kenya, denied freedom of movement or choice of residence.[12] Kenya has an informal encampment policy for the majority of refugees in Kenya, restricting their movement to the confines of refugee camps. This policy has not been justified or formalised legally, and violates international human rights law and the rights of refugees to move freely in their country of refuge unless particular conditions are met. The Refugees Act of 2006 (Kenya) brought about the introduction of procedures allowing a small number of refugees (less than 3% in 2009) to move outside the camps with 'movement passes'. These are unlawful according to

[9] USSD Human Rights Report: Kenya 2011 section 1a
[10] USSD Human Rights Report: Kenya 2011 section 2d
[11] Social Institutions & Gender Index: Gender Equality in Kenya 2011
[12] COI Report chap. 27.09: Kenya December 2011
Human Rights Watch: Welcome to Kenya June 17 2010

international law, and are further complicated by a 'security vetting committee' which screens all refugees' applications to move outside the camp. Those refugees found outside the camps without such passes are arrested, fined and sometimes imprisoned for months at a time. Some face abuses by prison guards, and some refugees are turned back or arrested at police checkpoints, even when travelling with movement passes.[13]

2.4.5 Very careful consideration must be given to whether internal relocation would be an effective way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents. If an applicant who faces a real risk of ill-treatment/persecution in their home area would be able to relocate to a part of the country where they would not be at real risk, whether from state or non-state actors, and it would not be unduly harsh to expect them to do so, then asylum or humanitarian protection should be refused.

2.5 Caselaw

Supreme Court RT (Zimbabwe) & others *v* Secretary of State for the Home Department [2012] UKSC 38 (25 July 2012)

The Supreme Court ruled that the rationale of the decision in HJ (Iran) applies to cases concerning imputed political opinion. Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom not to hold and not to express opinions. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. Consequently an individual cannot be expected to modify their political beliefs, deny their opinion (or lack thereof) or feign support for a regime in order to avoid persecution.

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

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

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

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

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

[13] Human Rights Watch Welcome to Kenya June 17 2010

5. In general:

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

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

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

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

JA (Mungiki – not a religion) Kenya [2004] UKIAT 00266

The Tribunal found (at para 14) that given the apparent absence of any belief system, the Mungiki are not a religious group, rather they appear to be more properly described as a vigilante group or gang. The Tribunal were not satisfied that any adverse attention from the Mungiki could properly be described as being for a Convention reason. It was not argued that being a person who has left the Mungiki would amount to being part of a particular social group.

3. Main categories of claims

3.1 This Section sets out the main types of asylum claim, humanitarian protection claim and discretionary leave claim on human rights grounds (whether explicit or implied) made by those entitled to reside in Kenya. Where appropriate it provides guidance on whether or not an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/ punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below. All Asylum Instructions can be accessed via the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/

3.2 Each claim should be assessed to determine whether there are reasonable grounds for believing that the applicant would, if returned, face persecution for a Convention reason - i.e. due to their race, religion, nationality, membership of a particular social group or political opinion. The approach set out in Karanakaran should be followed when deciding how much weight to be given to the material provided in support of the claim (see the Asylum Instruction 'Considering the asylum claim and assessing credibility').

3.3 For any asylum cases which involve children either as dependents or as the main applicants, case owners must have due regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. The UK Border Agency instruction 'Every Child Matters; Change for Children' sets out the key principles to take into account in all Agency activities.

3.4 If the applicant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the applicant does not qualify for asylum, or Humanitarian Protection, consideration must be given to any claim as to whether he/she qualifies for leave to remain on the basis of their family or private life. Case owners must also consider if the applicant qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.

Consideration of Articles 15(a) and (b) of the Directive/Articles 2 and 3 ECHR

3.4.1 An assessment of protection needs under Article 15(c) of the Directive should only be required if an applicant does not qualify for refugee protection, and is ineligible for subsidiary protection under Articles 15(a) and (b) of the Directive (which broadly reflect Articles 2 and 3 of the ECHR). Case owners are reminded that an applicant who fears a return to a situation of generalised violence may be entitled to a grant of asylum where a connection is made to a Refugee Convention reason or to a grant of Humanitarian Protection because the Article 3 threshold has been met.

Other severe humanitarian conditions and general levels of violence meeting the Article 3 threshold.

3.4.2 There may come a point at which the general conditions in the country – for example, absence of water, food or basic shelter – are unacceptable to the point that return in itself could, in extreme cases, constitute inhuman and degrading treatment. Decision makers need to consider how conditions in the country and locality of return, as evidenced in the available country of origin information, would impact upon the individual if they were returned. Factors to be taken into account would include age, gender, health, effects on children, other family circumstances, and available support structures. It should be noted that if the State is withholding these resources it could constitute persecution for a Convention reason and a breach of Article 3 of the ECHR.

3.4.3 As a result of the Sufi & Elmi v UK judgment in the European Court of Human Rights (ECtHR), where a humanitarian crisis is predominantly due to the direct and indirect actions of the parties to a conflict, regard should be had to an applicant's ability to provide for his or her most basic needs, such as food, hygiene and shelter and his or her vulnerability to ill-treatment. Applicants meeting either of these tests

would qualify for Humanitarian Protection.

3.5 Credibility

3.5.1 This guidance is not designed to cover issues of credibility. Case owners will need to consider credibility issues based on all the information available to them. For guidance on credibility see 'Section 4 – Making the Decision in the Asylum Instruction 'Considering the asylum claim and assessing credibility'. Case owners must also ensure that each asylum application has been checked against previous UK visa applications. Where an asylum application has been biometrically matched to a previous visa application, details should already be in the UK Border Agency file. In all other cases, the case owner should satisfy themselves through CRS database checks that there is no match to a non-biometric visa. Asylum applications matches to visas should be investigated prior to the asylum interview, including obtaining the Visa Application Form (VAF) from the visa post that processed the application.

3.6 Female genital mutilation (FGM)

3.6.1 Many female applicants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of family or community members, due to the fear of being forced to undergo FGM by family or community members, or of being forced to take part in performing FGM. Such applicants are likely to belong to the Kikuyu ethnic group, or to other tribal/ethnic groups for whom FGM has been a traditional cultural practice. They may also claim to fear the proscribed Mungiki sect which has historically enforced this practice.

3.6.2 **Treatment.** Female genital mutilation (FGM) is widely practised in Kenya. The actual incidence of FGM is variable, depending on ethnicity and region. Although the law prohibits FGM for children, it is particularly prevalent in rural areas, and is usually performed at an early age.[14] According to UNICEF, one third of women between the ages of 15 and 49 had undergone FGM, and in June 2009 an obstetrician estimated that 32% of women had suffered from the procedure.[15] FGM frequently leads to birth complications resulting in the death of the baby, the mother or both. The practice of severe forms of FGM contributes to maternal mortality: an estimated 4,500 women die every year due to pregnancy-related complications, many of which are due to FGM.[16]

3.6.3 The incidence of FGM amongst the ethnic groups is shown in a report by the Population Council, Overview of FGM/C in North-Eastern Kenya and the Religious Oriented Approach, published 26 February 2009:

- Universal among the Somali, Abagusii, Kuria, Maasai and Samburu (over 90%)
- Highly prevalent among the Taita Taveta (62%), Kalenjin (48%), Embu (44%) and Meru (42%)

[14] Equality Now Office, Kenya: Protecting Girls from FGM 2011
[15] USSD Human Rights Report: Kenya 2011 section 6
[16] COI Report chap. 22.04: Kenya December 2011
UNICEF: Report of field visit to Kenya by members of the Bureau of the Executive Board, 2009
WHO Factsheet: Female Genital Mutilation February 2012

- Practiced to a lesser extent among Kikuyu (34%) and Kamba (27%)
- Not practiced among some ethnic groups, notably Luo, Luhya, Teso and Turkana.[17]

3.6.4 According to the Kenya Demographic Health Survey of 2009 and published in June 2010, 27% of women nationally have been circumcised, although figures are higher in specific regions. For example, only 1% of women in Western Province have been circumcised, but the figure is 98% in North Eastern Province. Approximately 31% of women in rural areas have been circumcised, but this drops to approximately 17% in urban areas. The proportion of Muslim women who are circumcised is double that of Christian women.[18] Legal reforms have helped to protect female children, but criminalising the practice has also had an adverse effect, in that medical complications related to the practice are frequently not brought to the attention of health services for fear of prosecution. There are no health benefits for girls or women as a result of the imposition of FGM, but there is a heavy negative impact on physical and mental health and wellbeing.[19]

3.6.5 There is some evidence that the overall incidence of FGM is slowly declining in Kenya, although it remains more prevalent within particular ethnic groups. Some reports indicate that the incidence has lessened in younger women and girls, mainly due to increased awareness of legislation and health implications.[20] To a lesser extent, the incidence is beginning to decline slowly within the Somali community in Kenya, who have traditionally practised FGM almost universally.[21]

3.6.6 The Government of Kenya has taken a clear position on the abandonment of FGM and other harmful tribal practices. It is illegal to carry out FGM on females aged 18 or younger, although no similar protection currently exists for women over the age of 18. Article 14 of the Children Act (2001) states that: "No person shall subject a child to female circumcision, child marriage or other cultural rites, customs, or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical and psychological development". The penalty for subjecting a child to FGM is 12 months imprisonment, or a fine of 50,000 Kenyan Shillings, or both. Kenya has signed the 2005 Maputo Protocol, which explicitly forbids FGM.[22]

3.6.7 A further piece of legislation came into effect in 2010 (The Prohibition of Female Genital Mutilation Bill), seeking to close loopholes in earlier legislation. The new law (for example) removed the requirement for the police to obtain a warrant to enter premises where they suspect FGM is being carried out.[23] Lina Jebii Kilimo, a Kenyan MP and FGM activist, stated that although legislation is helpful, laws are not sufficient to end the practice. She said that the traditional cultural practice is deeply rooted, with some adherents willing to die for it, and extensive educational campaigns would be necessary in addition to legislative changes.[24] This view is supported by a recent Freedom House report, which stated that despite recent legislative changes, FGM is still widely practised, and educational campaigns

[17] Population Council: FGM Survey 26 February 2009
[18] Kenya Demographic Health Survey Chapter 16 Gender-Based Violence 2009 Kenya Health Survey
[19] WHO Factsheet: Female Genital Mutilation February 2012
[20] Population Reference Bureau: FGM Update:2010
[21] FGM and the Somali Community: FGM 2010
[22] UNICEF: Dynamics of social change: Towards the abandonment of FGM 2010
[23] Women's Views on News: 2 June 2011: Female Genital Mutilation continues despite legislation
[24] IRIN News: Legislation Failing to curb FGM/C 2 June 2011

among rural women are likely to be more important than legal strictures in ending FGM.[25]

3.6.8 More churches and NGOs are providing shelter to girls who flee their homes to avoid FGM, and many communities and NGOs have introduced 'no cut' initiation rites for girls as an alternative to FGM.[26] In some areas, e.g. West Pokot and Narok 'safe havens' for girls have been set up by various charitable NGOs. In other, Muslim, areas 'Religious Dialogue Conferences have been initiated to combat the myth that FGM is a requirement of Islam, particularly in Garissa and Mombasa.[27] The situation is improving slowly, despite resistance and resentment, but 'alternative rites-of-passage' are gradually persuading tribal elders and others who fear that girls will not learn to be women without such initiation ceremonies. [28] The government has also promoted the use of alternative rites in addition to developing education campaigns in its attempts to end FGM. In June 2009, the Minister of Gender, Children and Social Development supported the development of Kenya's policy for abandoning the practice of FGM. The government launched the National Plan of Action for Accelerating the Abandonment of FGM in Kenya (2008 – 2012). However, there are concerns that the practice is being driven underground.[29]

3.6.9 The available evidence suggests that the ability of the authorities to protect women from the imposition of FGM is limited, albeit slowly increasing along with governmental willingness. The number of churches, NGOs and other organisations actively working to protect women and girls from FGM and to end the practice is also steadily increasing. However, the accessibility of such protection is variable, geographically and in terms of the circumstances of individual women. It is easier for women to access protection in areas where FGM is less culturally prevalent, and in large urban areas. For women and girls in rural areas, particularly in parts of Kenya where FGM remains a culturally desirable practice, the accessibility of protection is likely to be more difficult. Women who are particularly disadvantaged by poverty or illiteracy may be unaware that such protection exists, or prevented from accessing it by circumstantial practicalities.[30]

3.6.10 To date, there have been relatively few prosecutions of FGM practitioners in Kenya, however, the combined approach of criminalisation of FGM, increasing awareness of the adverse health implications of the practice, and promotion of alternative rite of passage ceremonies, together with Government willingness to prohibit the practice, are having a steady impact on the numbers of women and girls being subjected to FGM. The evidence shows that the overall incidence of FGM in Kenya has declined from 38% in 1998, to 32% in 2003, and 27% in 2009.[31] This suggests that the measures above are having some success. This is supported by the NGO 'World Vision', whose spokesperson stated that the incidences of both FGM and early marriage are decreasing.[32] There is also evidence that the incidence of FGM is lower amongst girls who have received secondary education.[33]

---

[25] Freedom House: Countries at the Crossroads - Kenya 2012
[26] COI Report chap. 22.23-25: Kenya December 2011
USSD Human Rights Report: Kenya 2011 section 6
World Organisation Against Torture: Violence against women and children in Kenya 3 December 2008
[27] FIDA Kenya Study on FGM Kenya 2009
[28] The Guardian, April 29 2011: Female Genital Mutilation in Pokot
[29] Kenya Demographic Health Survey Chapter 16 Gender-Based Violence 2009 Kenya Health Survey
IRIN News: Legislation Failing to curb FGM/C 2 June 2011
[30] FIDA Kenya Study on FGM Kenya 2009
[31] COI Report chap. 22.19: Kenya December 2011
IRIN News: Legislation Failing to curb FGM/C 2 June 2011
[32] COI Report chap. 22.26: Kenya December 2011

3.6.11 There are particular concerns for applicants whose FGM claim includes fear of the Mungiki.[34] The Mungiki have been criticised for encouraging, demanding and enforcing FGM practices upon girls and women in its communities, on the grounds that it is a traditional African practice.[35] The Mungiki are known to force their female family members to undergo FGM. There is no evidence to suggest either that the condition of being married is any protection to women, or that single women are at greater risk. FGM may also be forced upon the wives of Mungiki defectors. Anti-FGM legislation provides protection to children and girls below the age of 18; it does not address the protection needs of adult women. However, there are community centres, particularly in the southern areas of the Rift Valley, that now provide sanctuary to young women and girls who have escaped forced FGM.[36]

See also: **Actors of protection (section 2.3 above)**

Internal relocation (section 2.4 above)

Caselaw (section 2.5 above)

3.6.11 Conclusion. Though an average of 27% of Kenyan women have undergone FGM, with a prevalence rate of between 80%-90% in some rural districts, the practice is illegal for girls below the age of eighteen. The authorities actively take measures to prevent FGM, although there have been few prosecutions. Accordingly those in fear of being forced to seek FGM for their child should be able to seek the protection of the state. Those in fear of undergoing FGM may, in general, seek the protection of the state authorities.

3.6.12 Case owners must consider the guidance set out in VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049 and the latest available country information. Internal relocation may be available in Kenya to a woman who is at real risk of forced FGM in her home area if the evidence shows: (i) she is not reasonably likely to encounter anyone in the place of relocation who would be in a position of power and influence over her and who would use that power and influence to require her to undergo FGM, or would cause her presence in the place of relocation to become known to such a person or persons (e.g. the Mungiki); and (ii) that the relocation is reasonable and not unduly harsh taking into account all the relevant factors including the religious and cultural context, the position of women within Kenyan society and the need for kinship links in the place of relocation in order to sustain such movement successfully.

3.7 The Mungiki

3.7.1 Some applicants may claim that they cannot return to Kenya, because they fear the Mungiki sect. They may claim to fear reprisal action because they have defected from the Mungiki. Other applicants may claim that their home area was dominated by the Mungiki, and that they fear the actions of local Mungiki cells.

IRIN News: Killing the cut but keeping tradition alive 31 August 2009
[33] Women's Global Education Project: WGEP Kenya
[34] Australian Refugee Review Tribunal: Country Advice Kenya 13 January 2012
[35] Landinfo Report 2010: Mungiki: Abusers or Abused?
[36] Australian Government Refugee Review Tribunal Country Advice Kenya July 2010

3.7.2 **Treatment**: The Mungiki sect is the largest of several organized armed criminal groups in Kenya. They operate primarily in the slums of Nairobi, in Central Province and in the Rift Valley. Their chief mode of operation is extortion and violence. Gross human rights violations against citizens, adversaries and defecting members have been attributed to them.[37] Mungiki members are primarily from the Kikuyu tribal group. They represent themselves as protectors of Kikuyu culture and claim to be a traditional religious group.[38] The Kikuyu are the largest ethnic group, comprising approximately 6.6. million; other ethnic groups include the Luhya (5.3 million) the Kalenjin (5 million) the Luo (4 million) the Kamba (3.9 million) Kenyan Somalis (2.3 million) Kisii (2.2 million) and the Mijikenda (1.9 million). [39]

3.7.3 The Mungiki are said to reject "Western" values and belief systems. Instead, they support the return to traditional tribal customs and beliefs, including female circumcision. They are involved in a number of violent criminal activities, including extortion and execution-style killings.[40] The Mungiki, and other organised criminal gangs that operate in a similar way, are a serious threat to the daily lives of many average Kenyans. Extortion of businesses is commonplace, particularly in large cities and towns, and many kidnappings for ransom have been reported.[41]

3.7.4 The Mungiki have claimed connections to the nation's political elite, although the group is not formally connected to the state. The Kenyan police have been accused by several observers of complicity with the Mungiki and of allowing the sect to 'operate with impunity'. The evidence supports this view, despite the lethal crackdowns perpetrated by the police in recent years and notwithstanding some police attempts to halt extortion by Mungiki members.[42] Violent clashes between Matatu operators, police and suspected Mungiki members occur regularly.[43] In June 2010 the President of Kenya assented to the Witness Protection (Amendment) Act, which paved the way for the establishment of an independent and autonomous Witness Protection Agency.[44]

3.7.5 Following the murder of Oscar Kamau King'ara and Paul Oulu of OFFLACK (Oscar Foundation Free Legal Aid Clinic Kenya), the Government accused OFFLACK of being a front for the Mungiki, and criticised their role in providing information on extra-judicial killings of Mungiki members to the UN Special Rapporteur. In 2008, OFFLACK had reported that police were linked to the continued disappearance and deaths of suspected Mungiki members. Police threatened and intimidated witnesses to the killings, and four witnesses went into exile. The prime minister requested international assistance to investigate these murders, but the minister for foreign affairs subsequently rejected such assistance, and no credible investigation had been carried out by mid 2010.[45]

3.7.6 The police have responded with great brutality to Mungiki criminality. In June 2009, the UN Special Rapporteur, following his earlier visit to Kenya, condemned the Mungiki and urged the government to deal with their criminality as a priority. He

---

[37] Landinfo Report Kenya 2010: Mungiki: Abusers or Abused?
[38] Think.Africa.Press: The ICC, Kenyatta & Mungiki 25 October 2011
[39] USSD Human Rights Report: Kenya 2011 section 6
[40] Australian Government Refugee Review Tribunal: Country Advice Kenya KEN38528 14 April 2011
[41] USSD International Religious Freedom Report: Kenya: 2011 Report
[42] COI Report chap. 9.13-15: Kenya December 2011
Australian Government Refugee Review Tribunal: Country Advice Kenya KEN38528 14 April 2011
[43] Daily Nation, 28/9/2011: http://www.nation.co.ke/News/regional/Two+hurt+in+matatu+Mungiki+clash/-/1070/1244834/-/15jmwdbz/-/index.html
[44] COI Report chap. 8.15-16: Kenya December 2011
UNHCR.Refworld: National Report for Human Rights Council resolution 5/1 22 February 2010
[45] Australian Government Refugee Review Tribunal: Country Advice Kenya KEN38528 14 April 2011

also reported that police efforts to crush the Mungiki were too extreme, and actively undermined the rule of law.[46] Notwithstanding reports that some police officers have operated in collusion with Mungiki members, the government have taken steps to deal with criminal gangs, including Mungiki. The government has enacted a new law to deal with organised crime and criminal groups. The law provides for stiff penalties for involvement in organised crime. The coming into force of this law coincided with the resumption of a nationwide 'crackdown' on the Mungiki.[47]

3.7.7 There is conflicting evidence regarding the safety on return of applicants claiming to be defectors from the Mungiki. The Independent Medico-Legal Unit (IMLU) has stated that Mungiki members who desert the organisation are at serious risk of being killed, or at least severely harassed. They reported that many police officers are involved in Mungiki business, and if there is risk of their connections being exposed, they choose to eliminate the deserter. IMLU stated that most attacks on protected Mungiki members are perpetrated by the police themselves, although the Mungiki do carry out revenge attacks. IMLU have provided shelter to ex-Mungiki members at secret locations. In contrast, the Kenyan National Commission on Human Rights (KNCHR) has said that defected Mungiki members will be left alone providing they do not threaten the movement's interests.[48]

See also: **Actors of protection (section 2.3 above)**

Internal relocation (section 2.4 above)

Caselaw (section 2.5 above)

3.7.8 **Conclusion**: The evidence suggests that there may be a risk of harm to some ex-Mungiki members from within the organisation. However, the Government has shown a clear intent to deal with the Mungiki, passing legislation in response to criminal gangs. The police and security forces have shown a sustained and brutal level of force when dealing with Mungiki and other gangs. Ex-members have also been able to obtain protection from IMLU and other NGOs operating in Kenya. In general applicants in this category will be able to obtain adequate protection, either from the authorities or from NGOs such as IMLU although applicants with a previously high profile within the Mungiki are likely to be at greater risk.

3.7.9 Case owners should take into consideration the particular circumstances of the applicant, including the extent of the threat, and whether it would be unduly harsh to expect the applicant to relocate. If, on the circumstances of an individual case it is found that internal relocation is unduly harsh, it may be appropriate to grant refugee status.

3.7.10 Case owners should note that members of the Mungiki have been responsible for serious human rights abuses. If it is accepted that an applicant was actively involved in such actions, case owners should consider whether any of the exclusion clauses are applicable.

3.8 Prison conditions

3.8.1 Applicants may claim that they cannot return to Kenya due to the fact that there is a

[46] Landinfo Report Jan 2010 Mungiki: Abusers or Abused?
[47] COI Report chap. 9.16: Kenya December 2011
Kenya Report: Restoring Integrity February 2010
[48] Landinfo Report Jan 2010 Mungiki: Abusers or Abused?

serious risk that they will be imprisoned on return and that prison conditions in Kenya are so poor as to amount to torture or inhuman treatment or punishment.

3.8.2 The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of ECHR and warrant a grant of Humanitarian Protection. If imprisonment would be for a Refugee Convention reason or in cases where for a Convention reason a prison sentence is extended above the norm, the asylum claim should be considered first before going on to consider whether prison conditions breach Article 3 if the asylum claim is refused.

3.8.3 Prison and detention centre conditions continued to be harsh and life-threatening during 2011.[49] The Kenya National Commission on Human Rights (KNCHR) conducted an assessment of prisons during 2009 and concluded that torture, degrading and inhuman treatment, insanitary conditions and extreme overcrowding were endemic in Kenyan prisons. The assessment also documented assaults and beatings of prisoners by prison staff at Nairobi Remand and Meru Women's Prisons, and also at Kisumu Women's Prison. The Commissioner of Prisons reported that prisons were filled to 200% capacity during 2010. By October 2011, the Legal Resource Foundation (LRF) reported a total prison population of 50,608, which included 2,672 women and 46,936 men. The 89 prisons in Kenya have a designed capacity of 22,000 inmates.[50]

3.8.4 Prison personnel stated that the rape of male and female prisoners, mainly by fellow inmates, continued in 2011. Other reports stated that it is common for prison officials to rape female inmates. Many prisoners die annually from infectious diseases spread by overcrowding, lack of sanitation and inadequate medical treatment. During 2011, reportedly 187 prisoners died while incarcerated. Prisoners are frequently kept in solitary confinement for much longer than the legal maximum of 90 days. Prisoners and detainees at some prisons are often denied the right to contact relatives or lawyers, and family members wanting to visit prisoners face numerous physical and bureaucratic obstacles, each requiring a bribe to overcome.[51]

3.8.5 Minors are generally separated from the adult population, except during the initial detention period at police stations, where adults and minors of both sexes are often held in a single cell. According to reports, prisons do not have facilities, lessons, beds or special food for children, and they do not have access to medical care.[52]

3.8.6 Prisoners generally receive three meals per day in prison, but portions are reportedly inadequate, and half rations are frequently given as punishment. Water shortages are a frequent problem, although the government did build one well and improved two water treatment plants during 2010. Medical care for those with tuberculosis or HIV/AIDS is poor, and such prisoners are not provided with food supplements to enable them to digest specialist medication.[53] However, during 2010, prisoners were generally able to make complaints to the courts and have the ability to send paralegal-written letters to the court without appearing personally. Some magistrates and judges made visits to prisons, providing further opportunities to report grievances. The KNCHR have a mandate to visit prisons and investigate allegations of inhumane conditions. The Commissioner of Prisons reported that

[49] USSD Human Rights Report: Kenya 2011 section 1c
[50] USSD Human Rights Report: Kenya 2011 section 1c
[51] USSD Human Rights Report: Kenya 2011 section 1c
[52] USSD Human Rights Report: Kenya 2011 section 1c
[53] USSD Human Rights Report: Kenya 2011 section 1c

human rights training took place in prisons during 2010, and there are reportedly intelligence officers working in prisons to report on conditions and any abuse.[54]

3.8.7 **Conclusion**. Prison conditions in Kenya are harsh and sometimes life-threatening, with overcrowding, poor sanitation, healthcare and generally unhealthy conditions being particular problems. In addition to these adverse conditions there are numerous reports that officials act with impunity and regularly abuse prisoners, physically and sexually. Information does not suggest that particular groups of inmates are at greater risk of such mistreatment than others, but rather that ill-treatment is generalised throughout the prison population. There is no evidence that the mistreatment is of such a systematic nature as to make removal a breach of Article 3 on these grounds.

3.8.8 Where applicants can demonstrate a real risk of imprisonment on return to Kenya, a grant of Humanitarian Protection may be appropriate in some cases. However, the individual factors of each case should be considered to determine whether detention will cause a particular individual in his particular circumstances to suffer treatment contrary to Article 3. Relevant factors include the likely length of detention, the likely type of detention facility, and the individual's age, gender and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate. Only where it clearly cannot be argued that an individual will face treatment which reaches the Article 3 threshold, should a claim of this kind be certified.

4. Discretionary Leave

4.1 Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See Asylum Instruction on Discretionary Leave)

4.2 With particular reference to Kenya the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should not imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instruction on Discretionary Leave.

4.3 Minors claiming in their own right

4.3.1 Minors claiming in their own right who have not been granted asylum or HP can only be returned where (a) they have family to return to; or (b) there are adequate reception and care arrangements. Case owners should refer to the Agency's guidance on Family Tracing following the Court of Appeal's conclusions in the case of KA (Afghanistan) & Others [2012] EWCA civ1014. In this case the Court found that Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 imposes a duty on the Secretary of State to endeavour to trace the families of Unaccompanied Asylum Seeking Children (UASCs).

4.3.2 At present there is insufficient information to be satisfied that there are adequate reception, support and care arrangements in place for minors with no

[54] USSD Human Rights Report: Kenya 2011 section 1c

family in Kenya. Those who cannot be returned should, if they do not qualify for leave on any more favourable grounds, be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions

4.4 Medical treatment

4.4.1 Individuals whose asylum claims have been refused and who seek to remain on the grounds that they require medical treatment which is either unavailable or difficult to access in their countries of origin, will not be removed to those countries if this would be inconsistent with our obligations under the ECHR. Case owners should give due consideration to the individual factors of each case and refer to the latest available country of origin information concerning the availability of medical treatment in the country concerned. If the information is not readily available, an information request should be submitted to the COI Service (COIS).

4.4.2 The threshold set by Article 3 ECHR is a high one. It is not simply a question of whether the treatment required is unavailable or not easily accessible in the country of origin. According to the House of Lords' judgment in the case of N (FC) v SSHD [2005] UKHL31, it is "whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity". That judgment was upheld in May 2008 by the European Court of Human Rights.

4.4.3 That standard continues to be followed in the Upper Tribunal (UT) where, in the case of GS and EO (Article 3 – health cases) India [2012] UKUT 00397(IAC) the UT held that a dramatic shortening of life expectancy by the withdrawal of medical treatment as a result of removal cannot amount to the highly exceptional case that engages the Article 3 duty. But the UT also accepted that there are recognised departures from the high threshold approach in cases concerning children, discriminatory denial of treatment, the absence of resources through civil war or similar human agency.

4.4.4 The improvement or stabilisation in an applicant's medical condition resulting from treatment in the UK and the prospect of serious or fatal relapse on expulsion will therefore not in itself render expulsion inhuman treatment contrary to Article 3 ECHR. All cases must be considered individually, in the light of the conditions in the country of origin, but an applicant will normally need to show exceptional circumstances that prevent return, namely that there are compelling humanitarian considerations, such as the applicant being in the final stages of a terminal illness without prospect of medical care or family support on return.

4.4.5 Where a case owner considers that the circumstances of the individual applicant and the situation in the country would make removal contrary to Article 3 or 8, a grant of Discretionary Leave to remain will be appropriate. Such cases should always be referred to a Senior Caseworker for consideration prior to a grant of Discretionary Leave. Case owners must refer to the Asylum Instruction on Discretionary Leave for the appropriate period of leave to grant.

5. Returns

5.1 There is no policy which precludes the enforced return to Kenya of failed asylum

seekers who have no legal basis of stay in the United Kingdom.

5.2 Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should however be considered in line with the Immigration Rules.

5.3 Any medical conditions put forward by the person as a reason not to remove them and which have not previously been considered, must be fully investigated against the background of the latest available country of origin information and the specific facts of the case. A decision should then be made as to whether removal remains the correct course of action, in accordance with chapter 53.8 of the Enforcement Instructions and Guidance.

5.4 Kenyan nationals may return voluntarily to any region of Kenya at any time in one of three ways: (a) leaving the UK by themselves, where the applicant makes their own arrangements to leave the UK; (b) leaving the UK through the voluntary departure procedure, arranged through the UK Immigration service; or (c) leaving the UK under one of the Assisted Voluntary Return (AVR) schemes.

5.5 The AVR scheme is implemented on behalf of the UK Border Agency by Refugee Action which will provide advice and help with obtaining any travel documents and booking flights, as well as organising reintegration assistance in Kenya. The programme was established in 1999, and is open to those awaiting an asylum decision or the outcome of an appeal, as well as failed asylum seekers. Kenyan nationals wishing to avail themselves of this opportunity for assisted return to Kenya should be put in contact with Refugee Action Details can be found on Refugee Action's web site at: www.choices-avr.org.uk.

Country Specific Litigation Team
Operational Policy & Rules Unit
Strategy & Intelligence Group
UK Border Agency

3 January 2013