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JM (Sufficiency of protection - IFA - FGM) Kenya [2005] UKIAT 00050

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 24 September 2004

Date Determination notified:

22nd February 2005.....

Before:

Mr G Warr (Vice President)
Miss K Eshun
Miss R Emblin, JP

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
For the appellant : Mr E Fripp, Counsel, instructed by South West Law
For the respondent : Miss S Sigley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Kenya, appeals the determination of an Adjudicator (Miss A.E. Baker) who dismissed her appeal against the decision of the Secretary of State to refuse her application for asylum.

2. The case was set down in order that the Tribunal could give guidance on the effect of the practice of female genital mutilation (FGM) in Kenya, and in particular on the question whether someone sought by the Mungiki would have a sufficiency of protection from the sect and related issues such as the possibility of internal relocation. By a respondent's notice the Secretary of State sought to argue that the Adjudicator had erred by failing to identify the Convention reason applicable to the appellant. Reliance was placed on RM (Sufficiency of protection – IFA – FGM) Kenya CG [2004] UKIAT 00022.

3. At the hearing before us Mr Fripp indicated he did not resist the respondent being allowed to argue the social group point, although it was acknowledged by Miss Sigley that the respondent's notice was out of time. We gave leave accordingly.

4. The appellant was born in Kenya in 1978. The appellant's claim was summarised by the Secretary of State in paragraph 2 of the letter giving reasons for refusing her application dated 31 January 2003 as follows:

> 'You claim that you are unable to return to Kenya as your family have converted to the Mungiki sect and are trying to forcibly circumcise you, make you convert to their religion and make you marry an old man. You claim that due to your refusal you were beaten and ill-treated by your family. You claim that you once reported them to the police in 1997 but claim that they were unwilling to help unless you paid a bribe. You claim that they returned you to your family who kept you under guard. You claim that you successfully fled from your family in 1998 but that you were traced and forced to return by your family as people from your congregation had visited you. You claim that the mistreatment continued when you returned. You claim that you were used as a slave, beaten and were raped by your brother's friends. You claim to never have reported this to the authorities. However you claim that you managed to escape from there and moved to Nairobi in July 2000 where you claim you lived until you left Kenya in December 2002. You claim that your family never caught up with you in this period.'

5. The Secretary of State did not consider that the appellant's claim engaged the Convention – she was not a member of a social group. Furthermore, it was the Secretary of State's opinion that the Kenyan authorities would afford her effective protection. Action had been taken to curb the activities of the Mungiki sect. FGM was not widespread in all areas of Kenya and the numbers of girls undergoing FGM were falling. The Kenyan court system could protect the appellant. The appellant had only claimed to have attempted to seek redress on one occasion Kenya and that was in 1997. She had not exhausted the means of redress and protection available to her in Kenya. Furthermore, the internal relocation option was reasonably available to her.

6. Unfortunately, when the matter came before the Adjudicator in June 2003, the Secretary of State did not field a representative. The Adjudicator records on two occasions in her determination – in paragraph 4 and paragraph 12 – that the appellant's credibility was not challenged in any sense by the refusal letter, either by inference or in fact. That is of course true – the Secretary of State did not state that he disbelieved the appellant's account. However, it is also fair to say that there is not any suggestion in the refusal letter that he accepted it. The Secretary of State is saying, in effect, 'I hear what you say' rather than 'I accept what you say'. Had the Secretary of State sent a representative to the hearing before the Adjudicator, he would not have been prevented from cross-examining the appellant and testing her account. No concessions had been made in the refusal letter. The Adjudicator's approach, however, is not the subject of any challenge. She accepted and was entitled to accept the account given by the appellant. If the Secretary of State wishes to take a more active part in the appellate system he knows what he must do. We proceed on the basis that the appellant's account was accepted in its entirety.

7. The Adjudicator considered the medical evidence before her but was not satisfied that the appellant suffered from any mental disorder or illness which would require treatment in Kenya or indeed in the United Kingdom. Medical services were indeed available in Kenya should they be required and it was not established that she would not be able to access such medical treatment should she require it – see paragraph 12 of the determination. The Adjudicator's determination concludes as follows:

> '13. The appellant challenges the Secretary of State's conclusions that she could seek effective protection from the state, in the light of her history and in the light of the background evidence itself. Accepting her account of having remained with a lady from the church, but in hiding, and thus able to avoid the continuing attentions of her family, accepting that her family would remain interested in obtaining her whereabouts and again kidnapping her as the had done in the past more than once, I conclude that were the appellant to return to Kenya, aged 25, notwithstanding the trauma she has undoubtedly suffered there, she could live within a church community, as she did previously, but not in hiding and that, from the background evidence, the church and the state, acting in concert are more than capable of

protecting her from the unwanted attentions of her family, should she then be identified by her family as to her whereabouts.

14. My reasons for this conclusion and my reasons for not accepting the views expressed by the experts provided concerning the safety of the appellant in Kenya, the ability of the state to protect her are to be found in the background evidence :

(i) The Mungiki are referred to in the US State Department Report under "Freedom of Religion" as having been joined by some members of the "Tent of the Living God". I note that the government allows traditional indigenous religious organisations to register although many choose not to do so. The police forcibly disrupted several meetings of the Mungiki religious and political group during the year. In May 2000, President Moi had been quoted widely in the press calling for action against the Mungiki religious and political groups. When police forcibly disrupted the group's meetings during that year they injured several persons. Police had used tear gas and batons to forcibly disperse a march by Mungiki members and numerous people were injured. The government also arrested numerous Mungiki members during 2001.

(ii) On the issue of female circumcision, the Report notes under "women" that President Moi issued two Presidential decrees banning FGM and the government prohibits government controlled hospitals and clinics from practising it. According to the statistics compiled by a group of NGOs in Marakwet, only 169 girls were subject to FGM in 1999, compared with 12,000 girls during the same amount in the previous for years. The reports conclude that women do experience a wide range of discriminating practices, limiting their political and economic rights and effectively relegating them as second class citizens and that FGM is practised

commonly on girls by certain ethnic groups, particularly in rural areas.

(iii) I find that although female circumcision is widely practised had the appellant sought the protection of the authorities in respect of the activities of the Mungiki sect and the threats and attacks made on her by them she could have and would have obtained effective protection. Had she found protection not available locally she could and would have been able to access in Nairobi effective protection from the state when living with the lady from the church.

(iv) The activities of the Mungiki sect are frowned upon and disliked very much by the government. Even had she not been able to obtain effective protection in the area in which she then lived, had she then moved to another area or were she now to do so, were she to be in fear of her family and the Mungiki sect, I find that she would find effective support. This would also be additionally supported by her commitment to the church and its activities in Kenya and the additional protection afforded to her by her church links and faith.

15. For the above reasons I dismiss her asylum appeal. With regard to the human rights grounds of appeal, I consider both whether her Article 3 rights would be infringed such that that Article would be breached and also whether to return her would be disproportionate under Article 8, infringing her private and family life, physical and moral integrity. On the background evidence, despite the tragic history of the appellant, support is available in Kenya. There are medical facilities available should they become necessary for the treatment of depression or other mental illness.'

Accordingly the Adjudicator dismissed both the appellant's asylum and human rights appeals.

8. Mr Fripp adopted as the basis for his submissions his helpful skeleton argument, in paragraph 5 of which he summarised the grounds of appeal. It was submitted that the Adjudicator's approach to the objective evidence was unfair and rendered her conclusions perverse. Her finding as to sufficiency of protection was unsustainable, particularly given her factual findings. The appellant's experiences in the past indicated that she had not previously had access to a sufficiency of protection. The argument that the Adjudicator had failed to take into account all the material and failed to give proper reasons for her decision was developed and reference was made to Horvath [2001] 1AC 489 on the sufficiency of protection issue. Reference was also made in this context to the case of Noune [2001] INLR 526 and Bagdanaviciene [2003] EWCA Civ 1605. Mr Fripp also referred to the case of Gomez – the persecutor might have mixed motives for persecuting an individual. The motives of the family for persecuting the appellant might include an element of political opinion. The Mungiki sect had elements of a political opinion.

9. Miss Sigley referred to her skeleton argument and developed her submissions and took us through the objective material. She submitted that the Adjudicator's determination was not wrong in law given the objective and expert material before her. She pointed out that there was protection available for the appellant. She had in the past enjoyed the protection of the church. She referred to paragraph 22 of the appellant's statement. She had been protected by the church until someone accidentally let slip her whereabouts. Absent that, her family would not have found out where she was. It was to be noted that the appellant had not merely received shelter and accommodation and protection from the church in Kenya, she had also received counselling – see the report of the psychiatrist Dr Lillywhite at age 21 of the appellant's bundle. Again, turning to the appellant's bundle, Miss Sigley submitted that the report of the Immigration and Refugee Board of Canada published on 16 December 2002, at page 26 of the appellant's bundle, spoke of the culture of circumcising women being entrenched among most women and young girls living in rural Kenya where many people still highly value female circumcision 'despite efforts by the government, churches and civic groups to stamp out the practice'.

10. Miss Sigley submitted that the appellant would not be traced on return. She had been away for some years and had not seen her family for four years. They would not be aware of her return and would not be able to trace her. She had lived unnoticed by them between June 2000 and 2002. Kenya was a large country with a population of 30 million. The Mungiki were not prevalent throughout Kenya. They would not have any resources or the ability to trace the appellant.

11. The evidence about the size of the Mungiki was conflicting. The Amnesty International material described the Mungiki as being a small sect – see the letter of 27 May 2003 at page 5 of the appellant's bundle. The sect was believed to draw most of its membership from marginalised segments of society. It remained a very secret group according to the report and 'it is difficult to know exactly what they stand for and how they are organised'.

12. The Canadian Report, however, put their membership at four million whereas the expert Dr Aguilar stated that they had been described as a terror gang which apparently had 300,000 followers – see page 16 of the appellant's bundle.

13. Dr Nelson in his report darted 14 June 2003 stated

> 'The fact that this woman's brothers tracked her down in Nairobi once is symptomatic that Kenya is not a very big country and the number of cities where such a single woman could hope to live and support herself would be small in number.'

14. Miss Sigley submitted that it followed that there would be cities where the appellant could live. It was odd that Kenya was described as not being a very big country. The expert had gone on to say that it would be 'inevitable that her brothers would track her down again'. This was a bold assertion to make given that she had stayed in Nairobi and had not been tracked down for a considerable period of time before her departure.

15. The expert has also described the appellant as being obviously poorly educated. This was again surprising given the fact that the appellant had had a full education and had passed all her exams – see page 19 of the appellant's bundle where Dr Lillywhite describes the appellant's education. The appellant was described as being very bright at school. Miss Sigley submitted that the appellant's employment prospects would be good in the circumstances.

16. Miss Sigley submitted there would be a sufficiency of protection for the appellant. She referred to the Secretary of State's bundle and the US State Department Report covering events in Kenya in 2003 and published on 25 February 2004. The law prohibited FGM for girls under eighteen and prohibited forced FGM on women of any age. The fact that 38% of women had undergone FGM demonstrated that a significant proportion had not. The practice was more widespread in some provinces than in others. A report from the German Development Corporation entitled 'Promotion of Initiatives to end FGM and Country Fact Sheet – Kenya GTZ' gave statistics for the prevalence rates among various ethnic groups. FGM prevalence rates in Kenya were declining on that material. The

prevalence rate among the Kikuyu was 43%. The report showed that the Kenyan Ministry of Health was coordinating activities in order to launch the national plan to abolish FGM. The government were working with the NGOs and gave the project effective political and administrative support. 'By means of networking with local authorities it was possible to save girls from the threat of circumcision'. The achievements were listed on page 78 of the bundle – the prevalence rate of FGM in Koibatek district, for example, had declined to 2.2%. The report demonstrated the positive impact where the project had been undertaken. Societal attitudes had changed. One of the most successful education programmes aimed at eradicating FGM in Kenya involved an alternative right of passage in which girls were taken through all the formalities attending FGM but without undergoing the actual cut – see page 80 of the report prepared by the German Development Organisation. Some five thousand girls had participated. Those who had been circumcised were now condemning FGM in impressive numbers.

17. Safe havens were available for women in Kenya – see a Reuters Report dated 9 April 2002. The Centre for Rehabilitation and Education of Abused Women – a non-governmental organisation founded in 1999 by a group of women lawyers – ran a refuge for survivors of acts of violence although it was hampered by lack of funding – see the document at page 94 of which a translation has been provided.

18. The Amnesty International Report at page T of the appellant's bundle referred to safe houses where girls could obtain shelter and education. The reference to the fact that there were a very few refuges for women in Kenya and those that existed tend to cater for young girls and not mature women such as the appellant should be seen in the context of her personal history. She was not a young girl at the time she received assistance.

19. It was also possible for an individual to have recourse to legal proceedings. Reference was made to a BBC online report at page 85 of the respondent's bundle. A Kenyan lawyer had employed injunctions protecting individuals from undergoing FGM. He had won nineteen protection orders in total. The government's aim was to reduce the number of girls and women undergoing FGM by 40% by 2019. The Canadian Report at page 26 of the bundle referred to an article in the East African Standard reporting that government officials had ordered a crackdown on Mungiki members in parts of Kiambu district, and a similar report appeared at page 127 of the bundle – a report dated 25 April 2002. The government had the ability and the willingness to protect the appellant. If necessary she could relocate. The appellant had referred to the fact that the police had asked for a bribe in 1997/1998. This was before FGM was outlawed in Kenya. Although there was police corruption in Kenya – see the Canadian Refugee Board report dated 23

April 2002 at page 32 of the appellant's bundle – an anti-corruption police unit had been established by the government in early 2002 and three British experts had been enlisted to assist in the initiative. Although the practice still existed, bribery had declined – see a news report dated 24 January 2003 at page 126 of the appellant's bundle. The police acted against the Mungiki and the Adjudicator's decision and been correct. There was a sufficiency of protection. Alternatively internal relocation was available.

20. On the social group issue, it was not demonstrated that the authorities sanctioned or tolerated the practice. The objective material did not support this. There was discrimination against women, as appeared from the US State Department Report but the situation was not the same as in Pakistan. Reference was made to the decision of the Tribunal in RM which we have cited above.

21. Mr Fripp argued that the case of RM was not a human rights case. There had been no expert evidence in that case. The Mungiki was a politically relevant group. It might be that there was a societal change of attitude towards the practice. The case of RM did not address the political opinion aspect. Reference was also made to the case of JW (Fear, sufficiency of protection – Mungiki) Kenya CG [2002] UKIAT 03402. In that case the appellant had never willingly been a member of the Mungiki. The police had intervened to disrupt Mungiki meetings using teargas and batons. However, they would not intervene to help the appellant in her situation. The Amnesty letter should be read as a whole. The situation was complex. The Amnesty material was balanced. It deserved to be given due weight. The police were not interested in protecting women – they were only interested in dealing with the Mungiki when they created trouble. The appellant would be traced on return. Internal relocation would be unduly harsh. Reference was made to AE and FE [2003] ImmAR 609. There had been a material error in law in the Adjudicator's conclusions. This had been accepted by Miss Sigley – the Adjudicator had not dealt with a social group issue.

22. Miss Sigley submitted that the error made by the Adjudicator was not material to her conclusions. On the question of opinion, no opinion was imputed to the appellant by her father. The Mungiki were simply anxious to revive lapsed customs, of which FGM was one. The Adjudicator's decision should be upheld.

23. At the conclusion of the submissions we reserved our determination. We are very grateful to both the representatives for having so succinctly dealt with their arguments on the basis of their written material and for presenting their arguments so clearly.

24. The Adjudicator is criticised for failing to have regard to the objective and expert material in her determination. We do not find this contention made out. The Adjudicator summarises the material before her in paragraph 5 of the determination, referring to the opinion of the experts and the medical material. She also refers to the objective reports in summary.

25. In paragraph 14 of the determination, which we have reproduced above, the Adjudicator makes it quite clear what the reasons were for not accepting the views expressed by the experts. We have been taken very carefully through the objective material in the large bundle lodged by the appellant together with the material relied on by the respondent. Mr Fripp invites us to place weight on the Amnesty International document dated 27 May 2003. He submits that it is a fair and balanced assessment. It is plain from that document that not only is the Mungiki sect banned in Kenya, with some of its alleged leaders being reported in hiding, but also that the Kenyan government recently ordered a police crackdown on the movement and – to use the words of the Amnesty Report – 'police and security forces are not known for their leniency towards this sect'. When the Mungiki issued threats possibly to circumcise women in 2002 the Kikuyu district police raided the places where the families ceremonies were supposed to take place and held a public meeting to declare that no-one would be allowed to scare and threaten the population.

26. We have referred during the course of summarising Miss Sigley's submissions to extracts from the background material and it appears plain to us that there is no official tolerance of the Mungiki. On the contrary, the Mungiki sect is harried – see, for example, the case of JW to which we have made reference. It is recorded in that case that on two occasions Mungiki meetings were dispersed by the police using teargas and weapons.

27. Not only is there police action against the Mungiki, the practice of FGM is declining – the Amnesty International report states this, and it is borne out by the other material to which we have made reference. Moreover, the Kenyan authorities advocated its abandonment and support the efforts of non-governmental organisations to have the rite replaced by alternative rites of passage. Again, the Amnesty International Report is supported by other material before us. While the report states that 'It is therefore not impossible that the practice [of FGM] would be imposed on a twenty-five year old woman as in the case of [the appellant]', it is acknowledged that forcibly imposing FGM on an adult woman could still be prosecuted under criminal law. We note the view of Amnesty about it not being impossible for FGM to be imposed. We do not find, however, on the totality of the material, that there is a real risk of this happening.

28. Miss Sigley has drawn our attention to material suggesting that recourse to the courts is both available and effective. She points to changes in societal attitudes towards FGM. Apart from the matters to which we made reference during the course of summarising her submissions, the document at page 79 of her bundle entitled 'Increased Public Awareness of FGM' dated 11 February 2003 refers to the use of slang among young men revealing a change in attitude: an uncircumcised girl has come to be referred to as the Kiswahili equivalent for young or new, while a circumcised one is described as second-hand or used. One high profile case involved two girls taking their father to court to avert forcible circumcision and winning the case – see page 81 of the respondent's bundle.

29. Mr Fripp acknowledges the governmental attitudes but submits that the situation is unchanged on the ground. We do not believe that the evidence supports this submission. First of all, there is evidence of decline of the practice reflected in the Amnesty International letter. There is a change in societal attitudes – the evidence of the use of legal procedures and the take-up of the alternative rite of passage following years of research assisted by a US-based programme for appropriate technology in health. The programme officer at the Kenyan National Focal Point for FGM – a body which coordinates nationwide activities against the practice – stated indeed 'We think a lot is happening on the ground' – see a news report dated 10 March 2004 at page 82 of the respondent's bundle. This report refers to the alternative rite although it makes clear there are pockets of resistance to the alternative in areas where FGM is deeply rooted. The officer stated this was a major challenge but they were working with the Ministry of Education to include messages about FGM in the school curriculum so children can learn about their rights early enough. It refers to the practice being outlawed under the Children's Act, enacted in 2002, although that Act appeared to leave the question of sentencing to the discretion of magistrates.

30. Miss Sigley submits that it is unclear precisely what the extent of the membership of the Mungiki is in Kenya – the material before us is not entirely consistent. However, it is clear that the authorities in Kenya are by no means tolerant of the Mungiki or their practices. Despite the practice of FGM being deeply ingrained, efforts are being made with some success to reduce the practice or to provide acceptable alternatives.

31. The appellant on return to Kenya could live in one of the major cities as she did before. We do not consider that the report by Dr Nelson establishes that the appellant would not be safe in Nairobi, for example. Kenya is not a small country. It has a large population. As Miss Sigley points out, the appellant has been away from Kenya and away from her family for a number of years. It would not be clear how they would know

of her arrival in the country, for example. It appears that her whereabouts was divulged to the family by accident on the occasion when they tracked her down. Accordingly we do not feel that it is demonstrated that her family would discover where she was. The appellant was previously sheltered by the church and looked after and provided with counselling on the evidence before us. Although it is said that there are very few refuges for women in Kenya, Miss Sigley points out that the appellant did have shelter in Nairobi and she was not then a young girl.

32. It is pointed out that the request for police assistance in 1997/1998 was made prior to the ban on the practice of FGM. It is clear that the appellant could seek assistance, for example by using legal procedures. There are a number of non-governmental organisations – see the German report at page 75 of the bundle. The Kenyan Ministry of Health coordinates the activities in order to launch the national plan to abolish FGM. It appears to us that the authorities are making a concerted effort to deal with the practice and that the efforts translate into changes on the ground, contrary to Mr Fripp's submissions. Societal attitudes are slowly but surely changing.

33. We find that the Adjudicator's approach to the background material before her was perfectly correct. It is not necessary for an Adjudicator to refer to each and every item before her. We have to say we are not particularly impressed by Dr Nelson's report – we do not know what material was in front of him. The reference to the appellant being 'obviously poorly educated' is quite plainly wrong. She was a bright young girl who had been fully educated and passed her exams entirely successfully. She was able to live in Nairobi without coming to the attention of her family for a considerable period of time. On the occasion that she was traced it was through a slip. There has been considerable progress in Kenya and we find that there is a sufficiency of protection given the material that has been placed before us. The state is both willing and able to afford protection. The practice of FGM is in decline though in certain areas there are pockets of resistance. Dr Nelson states that the number of cities where a single woman could hope to live and support herself would be small in number. That may be but we see no reason why the appellant could not return to Nairobi, and we bear in mind that the expert misdirected himself on the appellant's educational attainments. We do not find it established on the evidence that it would be 'inevitable that her brothers would track her down again'. The Adjudicator found that she would not need to live in hiding. That finding was open to her on the evidence before her. Her finding that there was effective protection for the appellant was open to her also, as was her finding that she could relocate internally should that be necessary.

34. We find that the appellant would not be at risk on return. She would not be at risk because it is not established that she would be located by her family. She would be sheltered and as an educated individual would be able to seek employment. She would have the support of the church. There is moreover a sufficiency of protection available for her. It would not be unreasonable for her to relocate should that become necessary.

35. The Tribunal in the case of RM dealt with the question of social group. Nothing that we have heard persuades that the appellant can bring herself within a group. Mr Fripp sought to argue that an opinion would be ascribed to the appellant. The Mungiki were a political organisation and the father's motivation would include imputing an opinion to the appellant. We do not believe this is a realistic way of looking at it. The appellant's father wants to get his hands on her to force her to undergo FGM and marriage. There is no question of any opinion being imputed to the appellant. We do not see any religious aspect to the matter either – the appellant is not being persecuted because she is a Christian or for any religious reason. She is persecuted because she resists FGM and forced marriage. We adopt the conclusions of the Tribunal in the case of RM – see, for example, paragraph 16:

> 'The Tribunal are not satisfied that this evidence indicate that within society in Kenya there is either a social group of Kenyan or Kikuyu women under the age of sixty-five. The risk does not arise from being a woman or a Kikuyu woman but from being a member of or closely related to a member of the Mungiki movement. The appellant does not claim herself to be a member of the Mungiki movement. the risk to her arises from the fact that her father wanted her to undergo FGM.'

36. We are not satisfied that the Tribunal's view was flawed in the light of the material before us, including the expert evidence. We are not satisfied that it is arguable that the persecution apprehended is based on any other Convention relevant reason – either opinion or religion.

37. For the reasons we have given, this appeal is dismissed.

G. WARR
VICE PRESIDENT