



Home Office

OPERATIONAL GUIDANCE NOTE

KENYA

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1. Introduction

- 1.1** This document provides Home Office caseworkers 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. Caseworkers must refer to the relevant asylum instructions (AIs) for further details of the policy on these areas.
- 1.2** Caseworkers 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.
- 1.3** The conclusions in this guidance are based on the totality of the available evidence, not just the brief extracts contained herein, and caseworkers must likewise take into account all available evidence. It is therefore essential that this guidance is read in conjunction with the relevant country of origin information (COI) and any other pertinent data, such as country caselaw.
- 1.4** COI is published by the [Country of Origin Information Service \(COIS\)](#) and is available on the intranet.

- 1.5** Claims should be considered on an individual basis, but taking full account of the guidance contained in this document. Where a claim for asylum or humanitarian protection is being considered, caseworkers must consider any elements of Article 8 of the ECHR in line with the provisions of Appendix FM (Family Life) and paragraphs 276 ADE to 276DH (Private Life) of the Immigration Rules.
- 1.6** Where a person is being considered for deportation, caseworkers must consider any elements of Article 8 of the ECHR in line with the provisions of Part 13 of the Immigration Rules. Caseworkers must also consider if the applicant qualifies for discretionary leave in accordance with the published policy.
- 1.7** 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 caseworkers 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.

2. Country assessment

- 2.1** Caseworkers should refer the relevant COI Service country of origin information material. An overview of the human rights situation in certain countries can also be found in the [Foreign & Commonwealth \(FCO\) Human Rights and Democracy Report](#), which examines developments in countries where human rights issues are of greatest concern.

2.2 Actors of protection

- 2.2.1** Caseworkers must refer to section 7 of the AI - [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.
- 2.2.2** Caseworkers 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.
- 2.2.3** 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.
- 2.2.4** There is a large internal security apparatus that includes the Kenya Police Service (KPS) and the Administration Police Service (APS), the Antiterrorism Police Unit,

and the Criminal Investigation Department (CID), an autonomous subunit under the KPS responsible for criminal investigations. The APS, which has a strong rural presence throughout the country, provides security for the civilian population within the provincial administration structure and has the mandate for border security. The Kenya Wildlife Service is responsible for security and counter poaching operations within the national parks, and the paramilitary General Services Unit (GSU) is responsible for countering uprisings and guarding high-security facilities. The National Security Intelligence Service (NSIS) collects intelligence. The KPS, APS, CID, 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

- 2.2.5** Military forces, including the army, navy, and air force, are responsible for the external defence of the country and support civilian organizations in the maintenance of order. They are under the authority of the Ministry of State for Defence.²
- 2.2.6** Police were ineffective and corrupt, and impunity was a problem. There was a public perception that police often were complicit in criminal activity. Police often recruited unqualified candidates who had political connections or who paid bribes, which contributed to poorly conducted investigations. Police incompetence and complicity in criminal activity contributed to an increase in crime, especially in Nairobi, where crime rose 40 percent in 2011, according to police reports.³
- 2.2.7** Police often stopped and arrested citizens to extort bribes; those who could not pay were jailed on trumped-up charges (e.g., preparation to commit a felony) and beaten. Transparency International's 2012 *Bribery Index* concluded that police were extremely corrupt. The study noted that more than 60 percent of respondents reported being forced to pay bribes to the police. Press and civil society groups reported that police continued to resort to illegal confinement, extortion, physical abuse, and fabrication of charges to accomplish law enforcement objectives as well as to facilitate illegal activities. Police also reportedly accepted bribes to fabricate charges against individuals as a means of settling personal vendettas. Police often failed to enter detainees into police custody records, making it difficult to locate them.⁴
- 2.2.8** Instances of witness harassment and resultant witness insecurity continued to severely inhibit the investigation and prosecution of major crimes. The Witness Protection Agency was funded inadequately, and doubts about its independence were common.⁵
- 2.2.9** Impunity for arbitrary arrests, beatings, killings, and corruption among the security forces remained prevalent in 2012. In April, three people were killed during the forceful dispersion of a crowd by police in a suburb of Nairobi; six officers were suspended for the incident, but criminal proceedings had not begun at the end of

¹ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

² US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

³ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁴ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁵ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

2012. However, in the first conviction of police for extrajudicial killings, six officers were sentenced to death in December for the 2010 murders of seven taxi drivers; the sentence was being appealed.⁶

- 2.2.10** Police officers rarely were arrested and prosecuted for criminal activities, corruption, or using excessive force. Authorities sometimes attributed the failure to investigate a case of police corruption or unlawful killing to the failure of citizens to file official complaints. However, the required complaint form was available only at police stations, and there was considerable public skepticism regarding a process that assigned the investigation of police abuse to the police themselves. Human rights activists reported that at times the police officer in charge of taking complaints was the same one who had committed abuses. Some human rights activists were jailed after going to a police station to make a complaint.⁷
- 2.2.11** The government took some steps to curb police abuse and establish greater police accountability. In September 2011 the government passed legislation to establish a National Police Service Commission (NPSC), charged with appointing an inspector general and providing internal oversight of the police force. It also passed legislation to create the Independent Policing Oversight Authority (IPOA), the country's first civilian oversight board for police operations and misconduct. In September 2011 the president also signed into law the National Police Service Act, which established a unified national police service and set guidelines for its governance; however, the government was slow to implement the new police reform legislation, and some of the laws did not become operational until August 2012.⁸
- 2.2.12** Despite the new legislation the government resisted implementing police reform. In February 2012 President Kibaki and Prime Minister Odinga agreed on nominees to serve on the NPSC, but parliament rejected the nominees on grounds of unsuitability. A new slate of nominees was approved in September. The NPSC worked quickly to interview and shortlist candidates for the position of inspector general of police (IGP). David Kimaiyo, the new IGP, was sworn in on 24 December 2012.⁹
- 2.2.13** The Police Reform Implementation Committee operated to prioritize reforms of police operations and organization, without substantial progress. Its mandate ended in May 2012. A nine-person board tasked with making the IPOA functional took office in June but had made little progress in increasing accountability of the police by the end of 2012.¹⁰
- 2.2.14** Human Rights Watch reports in September 2013 that Kenya has not yet undertaken tangible measures to address accountability concerns within the police such as vetting police officers and restructuring the force to improve accountability and efficiency. As a result, human rights abuses by Kenyan police have continued

⁶ Freedom House, Freedom in the world 2013: Kenya 20 May 2013 <http://www.freedomhouse.org/report/freedom-world/2013/kenya>

⁷ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁸ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁹ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁰ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

and those responsible have not been held to account.¹¹

- 2.2.15** Police failed to prevent societal violence in numerous instances. According to the police, there were 543 cases of mob violence in 2011, 133 of which occurred in Nairobi. For example, on 24 June 2012, police failed to prevent a mob from beating three men suspected of an attempted robbery and setting them on fire. Police frequently responded to incidents of crime and terrorism by making arbitrary arrests. Those who were detained were overwhelmingly poor young males. According to human rights organizations, police resorted to battery and other forms of torture to coerce confessions from detainees and extort bribes.¹²
- 2.2.16** There were numerous reports that the government or its agents committed arbitrary and unlawful killings. Human rights groups estimated that police were responsible for approximately 1,000 extrajudicial killings between 2008 and 2012. The government took only limited action to hold accountable security forces suspected of unlawfully killing citizens and few police officers were prosecuted.¹³ In May 2013, the UN Committee Against Torture expressed concern at the persistent allegations of on-going extrajudicial killings, enforced disappearances, torture and excessive use of force by police officers, especially during 'special operations', as well as by the low rate of investigations and prosecutions of such acts.¹⁴
- 2.2.17** Human Rights Watch reports in February 2013 that the police are widely considered to be corrupt and in collusion with criminal groups.¹⁵ A preliminary survey on extrajudicial killings released in mid-August 2013, the human rights commission and the Independent Medico-Legal Unit (IMLU) found that, between May and August, police had shot dead 120 people in separate incidents under unclear circumstances. Police have not submitted reports to the Independent Police Oversight Authority to facilitate investigation in any of these cases. Police have also recently used excessive force against protesters and in other circumstances in which lethal force may have been unwarranted.¹⁶
- 2.2.18** The law provides for an independent judiciary, and the judiciary underwent significant reform and transformation during 2012. In contrast to previous years, the judiciary asserted and maintained its independence, despite attempts by the executive branch to influence the outcome of judicial decisions.
- 2.2.19** The new constitution includes several provisions designed to enhance the independence of the judiciary, which had been subservient to the executive for much of the period since the end of colonial rule. A Supreme Court, Court of Appeal, and Constitutional Court were established, and the new Supreme Court chief justice, Willy Mutunga, has built up the court's image as a trusted institution.

¹¹ Human Rights Watch, Kenya: Don't Expand Police Powers, 12 September 2013

<http://www.hrw.org/news/2013/09/12/kenya-don-t-expand-police-powers>

¹² US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹³ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1a, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁴ UN Committee Against Torture, Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5-31 May 2013), paragraphs 9, 11

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCOC%2fKEN%2f12877&Lang=en

¹⁵ Human Rights Watch, High Stakes- Political Violence and the 2013 Elections in Kenya, Summary, February 2013, <http://www.hrw.org/sites/default/files/reports/kenya0213webwcover.pdf>

¹⁶ Human Rights Watch, Kenya: Don't Expand Police Powers, 12 September 2013

<http://www.hrw.org/news/2013/09/12/kenya-don-t-expand-police-powers>

The new Judicial Services Commission handles the vetting and appointment of judges, and has been cited as an early success. However, the courts remain understaffed and underfinanced, leading to long trial delays that violate defendants' right to due process. A task force appointed in February 2012 to probe cases of postelection violence in 2007 and 2008 did not lead to any successful prosecutions during 2012. The Truth, Justice, and Reconciliation Commission, established in 2008 to investigate gross human rights abuses and historical injustices between independence and 2008, made only minor progress in 2012, heavily overshadowed by the ICC proceedings.¹⁷

2.2.20 If the applicant's fear is of ill-treatment/persecution by the state authorities, or by agents acting on behalf of the state, then it is unlikely, in some cases, that they can apply to those authorities for protection. If the ill-treatment/persecution is at the hands of non-state agents, then the provision of effective state protection is likely to be limited. Each case must be considered on its individual facts and the assessment of whether effective protection is available should be considered in relation to the particular circumstances and profile of the claimant and the latest country of origin information.

2.3 Internal relocation.

2.3.1 Caseworkers must refer to the AI 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.

2.3.2 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.

2.3.3 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.

2.3.4 Caseworkers 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.

2.3.5 Where a category of applicants' fear is of ill-treatment/persecution by the state authorities, then internal relocation to escape that persecution will not generally be an option. Very careful consideration must be given as to whether internal relocation would be a viable way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents.

¹⁷ Freedom House, Freedom in the world 2013: Kenya 20 May 2013 <http://www.freedomhouse.org/report/freedom-world/2013/kenya>

- 2.3.6** 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.
- 2.3.7** The constitution and law provide for freedom of internal movement, foreign travel, emigration, and repatriation, and the government generally respected these rights.¹⁸
- 2.3.8** The constitution states at Article 39 that:
- (1) Every person has the right to freedom of movement.
 - (2) Every person has the right to leave Kenya.
 - (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya¹⁹
- 2.3.9** The Organisation of Economic Cooperation and Development Social Institutions Gender Index, profile of Kenya, (OECD SIGI) stated that: ‘There do not appear to be any legal constraints on women’s freedom of movement in Kenya. Previously existing requirements that women secure their husband’s or father’s consent before obtaining a passport have been removed. However, of the women interviewed for the 2008-2009 Demographic and Health Survey (DHS), 26.3% reported that their husbands usually had the final say in deciding whether they were allowed to visit family and relatives.’²⁰
- 2.3.10** 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.
- 2.2.11** Careful consideration must be given to the relevance and reasonableness of internal relocation on a case by case basis taking full account of the individual circumstances of the particular claimant. Case workers need to consider the ability of the persecutor to pursue the claimant in the proposed site of relocation, and whether effective protection is available in that area. Caseworkers will also need to consider the age, gender, health, ethnicity, religion, financial circumstances and support network of the claimant, as well as the security, human rights and socioeconomic conditions in the proposed area of relocation, including the claimant’s ability to sustain themselves.

2.4 Country guidance 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

¹⁸ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 1d, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204131>

¹⁹ Kenya Law, The Constitution of Kenya, 27 August 2010 <http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf>

²⁰ Organisation of Economic Cooperation and Development Social Institutions Gender Index, Kenya, 2012 update <http://genderindex.org/country/kenya>

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.

Supreme Court. HJ & HT v SSHD [2010] UKSC31 7 July 2010

The Supreme Court hereby established the test which should be applied when assessing a claim based on fear of persecution because of an applicant's sexual orientation which is as follows:

(i) Is the applicant gay or someone who would be treated as gay by potential persecutors in the country of origin?

(ii) If yes, would gay people who live openly be liable to persecution in that country of origin?

(iii) How would the applicant behave on return? If the applicant would live openly and be exposed to a real risk of persecution, he has a well-founded fear of persecution even if he could avoid the risk by living discreetly.

(iv) If the applicant would live discreetly, why would he live discreetly? If the applicant would live discreetly because he wanted to do so, or because of social pressures (e.g. not wanting to distress his parents or embarrass his friends) then he is not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if he lived openly, then he is a refugee [paragraph 35]

VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049 (9 June 2008)

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.
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 \(22 September 2004\)](#)

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.
- 3.2** 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.

- 3.3** All asylum instructions (AIs) can be accessed via the Horizon intranet site. The instructions are also published externally on the Home Office internet site at [asylum policy instructions](#).
- 3.4** Each claim should be assessed to determine whether there is a reasonable likelihood 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 the Court of Appeal's judgment in [Karanakaran](#) should be followed when deciding how much weight to be given to the material provided in support of the claim (see the AI '[Considering the asylum claim and assessing credibility](#)').
- 3.5** For any asylum cases which involve children either as dependants or as the main applicants, caseworkers must have due regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. The Home Office instruction '[Every Child Matters; Change for Children](#)' sets out the key principles to take into account.
- 3.6** If the applicant does not qualify for asylum, consideration should be given as to whether a grant of humanitarian protection is appropriate. (See AI on [humanitarian protection](#)). Where an application for asylum and humanitarian protection falls to be refused, caseworkers must consider any elements of Article 8 of the ECHR in line with the provisions of Appendix FM (Family Life) and paragraphs 276 ADE to 276DH (Private Life) of the Immigration Rules.
- 3.7** They must also consider whether there are any compelling reasons for granting discretionary Leave (DL) to the individual concerned. (See AI on [discretionary leave](#)).

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

- 3.8** 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).
- 3.9** Caseworkers 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

- 3.10** 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.
- 3.11** 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.

- 3.12** 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.

Credibility

- 3.13** Caseworkers will need to assess credibility issues based on all the evidence available to them from the interview, documentary evidence and country of origin information. Caseworkers 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 AI ['Considering the asylum claim and assessing credibility'](#).
- 3.14** Caseworkers 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 Home Office file.
- 3.15** In all other cases, the caseworkers 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.

3.16 Women

- 3.16.1** Some applicants may make an asylum and/or a human rights claim based on sexual or gender based violence

Domestic and gender based violence

- 3.16.2** Rape and domestic violence are widespread and rarely prosecuted, and spousal rape is not prohibited by law.²¹ The law criminalizes rape, defilement, and sex tourism; however, enforcement remained limited, and as many as 95 percent of sexual offenses were not reported to the police. The law does not specifically prohibit spousal rape.²²
- 3.16.3** The law provides a maximum penalty of life imprisonment for rape, although sentences usually were no longer than the minimum of 10 years. Traditional dispute mechanisms frequently were used to address sexual offenses in rural areas, with village elders assessing financial compensation for the victims' families. NGOs reported difficulties in obtaining evidence and the unwillingness of witnesses to testify in sexual assault cases in areas where traditional dispute mechanisms were employed.²³

²¹ Freedom House, Freedom in the World 2013; Kenya 20 May 2013 <http://www.freedomhouse.org/report/freedom-world/2013/kenya>

²² US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

²³ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

- 3.16.4** Domestic violence against women was widespread but often condoned by society and seldom addressed in the courts. According to the 2009 Kenya Demographic and Health Survey (KDHS), 53 percent of women and 44 percent of men agreed that there exists sufficient justification for wife beating. The penal code does not contain specific provisions against domestic violence but treats it as assault. Police generally refrained from investigating cases of domestic violence, which they considered a private family matter. NGOs, including the Law Society of Kenya and FIDA, provided free legal assistance to some victims of domestic violence. In 2010 FIDA reported that 83 percent of women and girls in the country reported one or more episodes of physical abuse.²⁴
- 3.16.5** Many women and girls were sexually assaulted during the 2007–08 post-election violence, reportedly including by police. Reported cases of gender-based violence rose sharply in 2010. The police have launched a special unit to investigate and address gender-based violence, although its effectiveness remains to be proven.²⁵
- 3.16.6** Police statistics for 2011 indicated 4,517 reported cases of gender-based violence, including 934 rapes. In 2010 police reported 4,551 cases of gender-based violence, including 922 rapes. Human rights groups, however, estimated that the actual number of rapes and other cases of gender-based violence was much higher. The rate of reporting and prosecution of rape remained low because of the police practice requiring that victims be examined by a police physician; cultural inhibitions against publicly discussing sex, particularly sexual violence; the stigma attached to rape victims; survivors' fear of retribution; police reluctance to intervene, especially in cases where family members, friends, or acquaintances were accused of committing the rape; poor training of prosecutors; and the unavailability of doctors who might provide the evidence necessary for conviction.²⁶
- 3.16.7** Physicians for Human Rights similarly reports that domestic violence is a major problem in Kenya. Despite laws that allow victims to pursue justice against their attackers, police frequently choose not to investigate cases even when victims report the abuse, as police consider it a purely "family matter."²⁷ Amnesty International reports that just like their counterparts in other parts of the country, women in slums and informal settlements are victims of domestic violence – including rape, marital rape, physical assault and psychological violence within their homes and in the hands of spouses, partners and other family members. Domestic violence is the most prevalent form of violence that women face in the slums and informal settlements. Amnesty International reported that many women experienced rape and other forms of violence when walking to a latrine some distance away from their houses.²⁸

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

²⁴ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

²⁵ Freedom House, Countries at Crossroads 2012; Kenya 20 September 2012,

<http://www.freedomhouse.org/report/countries-crossroads/2012/kenya>

²⁶ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

²⁷ Physicians for Human Rights, Kenya: Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, May 2013

http://www.ecoi.net/file_upload/1930_1369647851_phr-kenya-cat50.pdf

²⁸ Amnesty International, Kenya- Submission to the United Nations Human Rights Committee for the 105th session of the Human Rights Committee (9 – 27 July 2012)

http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_Kenya_HRC.105.pdf

- 3.16.8** Many women do not seek legal redress because they do not trust the justice system.²⁹ In October 2013, three men accused of gang-raping and dumping a 16 year old girl in a pit latrine were ordered by police to cut grass as punishment. Her back was broken during the attacks and she now uses a wheelchair. Rights activists and MPs denounced the police for failing to investigate the girl's complaints.³⁰
- 3.16.9** In a December 2012 report, the Small Arms Survey noted that once a crime is recorded in the Occurrence Book at a police station, the police are obliged to follow up on the case. In practice, however, they may solicit a bribe; may send a survivor home to reconcile with the accused; or may use scare tactics to avoid taking action. Police also push women to pursue traditional dispute mechanisms, involving a chief, elder, or family member to adjudicate a case informally. These mechanisms may lead to reconciliation as well as material compensation, but they also leave the perpetrator at large to reoffend. Police officers often view gender-based physical violence cases as petty or minor offences. Many women who attempt to report an assault or a rape are ridiculed and verbally abused. Women of limited economic means are openly discriminated against. A police source estimated that 75% of his colleagues seek to make money out of a rape case.³¹
- 3.16.10** Besides a lack of trained officers and resources, access to justice is also hampered by the long legal procedures which victims need to go through when reporting an attack. Kenyan law requires that all cases of rape or other attacks are recorded in a document known as a P3 form. The rape victim must get a form from the police, take it to a hospital and have it filled out by the doctor who examines them. But often the forms are not provided to the victim until it is too late. In addition, doctors charge 1,500 Kenyan shillings (US\$18), to fill them out. Victims are responsible for paying for the form to be completed and for asking the doctor to present the evidence in court. In a bid to solve the problem, the health ministry is launching a new form which will be available at hospitals free of charge.³²
- 3.16.11** National guidelines on the management of sexual violence, including the handling of forensic evidence, post-rape care, and victim support, were promulgated in 2009, but implementation mechanisms remained weak.³³
- 3.16.12** Police procedures for handling cases of rape and sexual assault created substantial barriers to the investigation and prosecution of suspected perpetrators. In addition to requiring those who allegedly experienced sexual assault to be examined by a police physician prior to the initiation of an investigation, police prosecutors also required the same physician to testify during trial. At the beginning of 2012 there was only one police physician in Nairobi, and human rights groups noted that the physician was often unavailable to conduct exams, frequently failed to appear in court, and issued examination reports that conflicted with the findings of other medical professionals. Following reports by human

²⁹ Amnesty International, Kenya: Submission to the United Nations Human Rights Committee: For the 105th session, 22 June 2012 <http://www.amnesty.org/en/library/asset/AFR32/002/2012/en/1a25708e-ac39-45d8-bb86-371dd2080321/afr320022012en.pdf>

³⁰ BBC, Kenyans accuse police of ignoring gang rape, 10 October 2013 <http://www.bbc.co.uk/news/world-africa-24477488>

³¹ Small Arms Survey, Battering, Rape, and Lethal Violence A Baseline of Information on Physical Threats against Women in Nairobi, December 2012, II. Impunity perpetuating the status quo <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP13-VAW-Nairobi.pdf>

³² Institute for War and Peace Reporting, Kenyan Police Needs Sexual Crimes Unit – Experts, 16 October 2013 <http://iwpr.net/report-news/kenyan-police-needs-sexual-crimes-unit-%E2%80%93-experts>

³³ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204131>

groups criticizing the physician's unavailability, the police hired an additional physician for Nairobi. Police physicians generally were not present in rural areas.³⁴

3.16.13 During 2012 police approved a change in procedure to allow clinical officers, in addition to police physicians, to examine victims of sexual violence; however, authorities did not implement the change by the end of 2012, and the new forms used to report sexual assaults were not available at most police stations. Police also lacked the facilities to preserve forensic evidence. As a result numerous alleged cases of sexual violence were not investigated by the police and numerous cases were dismissed from court due to lack of evidence.³⁵

3.16.14 The final report of the Commission of Inquiry on Postelection Violence included a chapter on the widespread sexual and gender-based violence following the disputed election in 2007-08. There was no government effort to prosecute anyone in connection with the reported abuses.³⁶

Discrimination

3.16.15 Kenyan law prohibits gender-based discrimination, and the new constitution strengthens requirements for gender equality, Traditional practices continue to restrict women's rights, however, and women's property rights have been limited under customary and formal laws of inheritance and succession. A court ruled in early 2011 that the new constitution clearly forbids any restriction on a woman's inheritance rights based on her marital status. The constitution also includes a provision allowing a woman to pass citizenship to her children or spouse. Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women. The 2011 Matrimonial Property Bill also provides new safeguards for married women's property rights.³⁷

3.16.16 Following the March 2013 national elections, 87 of the 416 seats in the newly-established National Assembly and Senate chambers are held by women. Previously, just 22 women sat in the old 222-seat Parliament, which did not have a Senate.³⁸

3.16.17 Women experienced discrimination in matrimonial rights, property ownership, and inheritance rights. Women held only 6% of land titles. Under traditional law women in many ethnic groups cannot own land. Women had difficulty moving into non-traditional fields, were promoted more slowly, and were more likely to be laid off. The average monthly income of women was approximately two-thirds that of men. Societal discrimination was most apparent in rural areas. Women also faced discrimination in access to employment and to credit. The justice system, particularly customary law, often discriminated against women, limiting their political and economic rights and relegating them to second-class citizenship.³⁹

³⁴ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

³⁵ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

³⁶ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

³⁷ Freedom House, Countries at Crossroads 2012; Kenya 20 September 2012, <http://www.freedomhouse.org/report/countries-crossroads/2012/kenya>

³⁸ UN Women, Women elected to one-fifth of seats during Kenyan elections, 28 March 2013 <http://www.unwomen.org/co/news/stories/2013/3/women-elected-to-one-fifth-of-seats-in-kenya>

³⁹ US State Department, Human Rights Report Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

Because of wider societal gender-based discrimination (including in relation to education and access to credit), women are disadvantaged when it comes to work opportunities.⁴⁰

Female Genital Mutilation

- 3.16.18** In Kenya, according to the most recent Demographic Health Survey (DHS), the estimated prevalence of FGM in girls and women (aged 15-49 years) is 27.1% (DHS 2008-09). This represents a steady decrease from 37.6% in 1998, and 32.2% in 2003. There are significant regional variations, with prevalence ranges from 0.8% in the west to over 97% in the north-east (DHS 2008-09).⁴¹
- 3.16.19** The practice is particularly prevalent among the Somalis who live predominantly in the North Eastern province practice (97.7%), with 75% having undergone the most severe Type III infibulation. The prevalence is also highest among the Kisii (96.1%) and the Maasai (73.2%). The Kisii and Maasai practice Type I clitoridectomy and Type II excision respectively. By contrast, the Luhya and Luo have the lowest rates of less than 1%.⁴²
- 3.16.20** In Kenya, FGM is performed mostly on girls aged between 12 and 18. Some studies have shown that girls are now being cut earlier, between the ages of 7 and 12. It is thought that the decrease is to avoid detection as a response to legislation banning the practice. The proportion of women who have undergone FGM declines with age, indicating a decline in the popularity of the procedure in the younger generations.⁴³
- 3.16.21** FGM is a deeply rooted cultural practice, although the reasons vary between ethnic groups. For some, such as the Meru, Embu and Maasai, it is an important rite of passage. FGM is closely tied to marriage-ability for some ethnic groups, such as the Maasai. For some ethnic groups such as the Somali, FGM is linked to concepts of family honour and the need to preserve sexual purity. Along the Kisii, FGM is believed to be necessary to control women's sexual desires and distinguishes them from their neighbouring Luo ethnic group.⁴⁴
- 3.16.22** The medicalisation of FGM has grown in Kenya in recent years. Despite being illegal this means that the procedure takes place in a hospital or clinic and is done by medical professionals using surgical instruments and anaesthetics. In a 2003 survey, 46% of Kenyan daughters underwent FGM via medicalisation, meaning the majority of girls are still cut by traditional practitioners. Although medicalisation decreases the negative health effects of the procedure, this has led to a misconception that hospital/clinic FGM is a benign and acceptable form of the practice. According to UNICEF and other NGOs, medicalisation obscures the human rights issues surrounding FGM/C and prevents the development of effective and long-term solutions for ending it.⁴⁵

⁴⁰ Amnesty International, Kenya: Submission to the United Nations Human Rights Committee: For the 105th session, 22 June 2012 <http://www.amnesty.org/en/library/asset/AFR32/002/2012/en/1a25708e-ac39-45d8-bb86-371dd2080321/afr320022012en.pdf>

⁴¹ 28 too many, Country profile: FGM in Kenya, May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴² 28 too many, Country profile: FGM in Kenya, May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴³ 28 too many, Country profile: FGM in Kenya, May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴⁴ 28 too many, Country profile: FGM in Kenya, May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴⁵ 28 too many, Country profile: FGM in Kenya, May 2013

- 3.16.23** In September 2011 the government passed a law making it illegal to practice FGM/C, procure the services of someone who practices FGM/C, or send a person out of the country to undergo the procedure. The new law also makes it illegal to make derogatory remarks about a woman who has not undergone FGM/C. Although the new law was praised by NGOs and others opposed to FGM/C, FGM/C was practiced widely, particularly in rural areas.⁴⁶
- 3.16.24** Physicians for Human Rights reports in May 2013 that although the Kenyan government outlawed the practice of FGM in 2011, no cases have yet been brought under the law. The practice continues unabated, and those who perform the circumcisions are free to do so with impunity.⁴⁷ The organisation 28 Too Many cites the Office of the Attorney General as stating in a 2013 interview that there have only been three successful prosecutions under the 2011 Act.⁴⁸ According to the Independent Medico-Legal Unit (IMLU), the criminalisation of FGM in and of itself will not resolve this problem which stems from engrained social and cultural practices.⁴⁹ The UN Committee Against Torture noted that most of the concerned communities do not view FGM as a crime and therefore fail to report it.⁵⁰
- 3.16.25** Anti-FGM initiatives face a number of challenges, including: cultural sensitivities surrounding FGM and the difficulty with identifying appropriate entry points into communities; entrenched religious and cultural beliefs; high levels of illiteracy, making dissemination of information challenging; difficulties covering the vast geographical areas and remote populations; lack of adequate rescue homes for run-away girls; lack of support from politicians that represent communities that practise FGM for fear of losing seats; and lack of national coordination of anti-FGM activities.⁵¹
- 3.16.26** In a 2008 fact-finding mission report on the Mungiki, Landinfo states that the Mungiki have been criticised for encouraging, demanding and enforcing FGM practices upon girls and women in its communities, on the grounds that FGM is a traditional African practice.⁵² Physicians for Human Rights reports that the Mungiki threaten and perform circumcision on women without their consent as a form of torture, terror, and control, claiming a return to more traditional Kenyan values. The government has been unable and/or unwilling to stop the Mungiki's violence, which is often disproportionately aimed at women.⁵³

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴⁶ US Department of State, Country Reports on Human Rights Practices For 2012: Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁴⁷ Physicians for Human Rights, Kenya: Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, May 2013

http://www.ecoi.net/file_upload/1930_1369647851_phr-kenya-cat50.pdf

⁴⁸ 28 too many, Country profile: FGM in Kenya, 2nd Anti-FGM act (2011), May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁴⁹ Independent Medico-Legal Unit, Alternative report in response to the second periodic report by Kenya to the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 April 2013

http://www.ecoi.net/file_upload/1930_1369646155_imlu-uncat-kenya-cat50-report.pdf

⁵⁰ UN Committee Against Torture, Kenya: Second periodic report of States parties due in 2012, submitted in response to the list of issues (CAT/C/KEN/Q/2) transmitted to the State party pursuant to the optional reporting procedure (A/62/44, paras. 23 and 24), Paragraph 62, 30 November 2013

<http://www.refworld.org/pdfid/51dfe7434.pdf>

⁵¹ 28 too many, Country profile: FGM in Kenya, Challenges faced by anti-FGM initiatives, May 2013,

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁵² Landinfo Report Kenya 2010, Mungiki: Abusers or Abused?, 5.1 Mungiki and Female Genital Circumcision, 29 January 2010, http://www.landinfo.no/asset/1123/1/1123_1.pdf

⁵³ Physicians for Human Rights, Kenya: Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, May 2013

http://www.ecoi.net/file_upload/1930_1369647851_phr-kenya-cat50.pdf

3.16.27 There are many local NGOs, CBOs, faith-based organisations, international organisations and multilateral agencies working in Kenya to eradicate FGM. A broad range of initiatives and strategies have been used. Among these are: health risk/harmful traditional FGM practices approach; addressing the health complications of FGM; educating traditional FGM practitioners and offering alternative income; alternative rites of passage (ARPs); religious-oriented approach; legal approach; human rights approach; intergenerational dialogue; promotion of girls' education to oppose FGM and supporting girls escaping from FGM/child marriage.⁵⁴

3.16.28 Some churches and NGOs provided shelter to girls who fled their homes to avoid FGM/C, but community elders frequently interfered with attempts to stop the practice. Various communities and NGOs instituted "no cut" initiation rites for girls as an alternative to FGM/C; however, in some communities some girls continued to insist on undergoing the practice.⁵⁵

See also: [Actors of protection](#) (section 2.3 above)
[Internal relocation](#) (section 2.4 above)
[Caselaw](#) (section 2.5 above)

3.16.29 Conclusion. Although Kenyan law prohibits gender-based discrimination there still remains discrimination against women in Kenya in matrimonial rights, property ownership, inheritance rights and access to employment and credit. Sexual and gender based violence is widespread, especially domestic violence. As it is regarded as a domestic matter and often condoned by society, the crime is underreported and the police seldom intervene in such cases. Further issues comprising access to protection for victims of gender based violence include: the stigma attached to rape victims; survivors' fear of retribution; poor training of prosecutors; a lack of facilities to preserve forensic evidence; and the difficulty and expense of accessing a P3 form. Police are also reported to solicit bribes from victims, to send survivors home to reconcile with the accused, and to ridicule or verbally abuse women who attempt to report an assault or a rape.

3.16.30 The inability and unwillingness of the police to act on reports of domestic violence suggests that some women will be unlikely to be able to obtain effective state protection. Applicants may be able to escape such violence by internally relocating to another area of Kenya, but it should be noted that women, and especially single women, with no support network are likely to be vulnerable and may be subjected to destitution. The reasonableness of internal relocation must be assessed on a case by case basis taking full account of the individual circumstances of the particular claimant.

3.16.31 Though an average of 27% of Kenyan women have undergone FGM, with a prevalence rate of up to 97% in some rural districts, in September 2011 the government passed a law making it illegal to practice FGM/C. The authorities actively take measures to prevent FGM, although there have been extremely few prosecutions and it remains deeply rooted socially and culturally and widely practised, particularly in rural areas. In *VM* the Tribunal found that insufficient

⁵⁴ 28 too many, Country profile: FGM in Kenya, Executive Summary, May 2013

http://www.28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁵⁵ US Department of State, Country Reports on Human Rights Practices For 2012: Kenya, Section 6, 19 April 2013
<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

protection is available from the Kenyan authorities for persons fearing forcible FGM by the Mungiki.

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

3.17 The Mungiki

3.17.1 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.

3.17.2 Treatment. The Mungiki movement is the largest of several organized armed criminal groups in Kenya with a large following among the Kikuyus. They operate primarily in the slums of Nairobi, in Central Province and in the Rift Valley. Although Mungiki offers poor residents in slum areas protection and social services, their chief mode of operation is extortion and violence. Gross human rights violations against citizens, adversaries and defecting members have been attributed to them.⁵⁶ The Kenyan authorities have not succeeded in their attempts to limit Mungiki's influence or abuses, despite crack downs which reportedly also included summary executions of suspected adherents. It is generally accepted that the Mungiki controls most of the city's matatu (minibus) routes and run protection rackets in slums such as Mathare. The majority of media reports on Mungiki tend to focus on incidents of violence performed by the organisation's members. This focus makes it easy to overlook Mungiki's religious and political origins, and the values harboured by many of its members. Mungiki began as a religious organisation purporting a return to traditional Kikuyu spirituality and moral values.⁵⁷ 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).⁵⁸

⁵⁶ Landinfo Report Kenya 2010: Mungiki: Abusers or Abused?, Summary, 29 January 2010, http://www.landinfo.no/asset/1123/1/1123_1.pdf

⁵⁷ Think.Africa.Press: The ICC, Kenyatta & Mungiki 25 October 2011 <http://thinkafricapress.com/kenya/icc-kenyatta-mungiki>

⁵⁸ U.S. Department of State, 2011 Country Report on Human Rights Practices: Kenya, section 6, 24 May 2012, <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186208.htm>

- 3.17.3** With its brutal manner of operation, Mungiki has come to symbolise gang violence in Kenya. Since it first appeared as a religious sect advocating for the rights of the poor in the 1990s, it has evolved into one of the most feared underground outfits in the country.⁵⁹
- 3.17.4** The U.S. Department of State reports that the 2002 ban on membership in the Mungiki criminal organization remained in effect at the end of 2012. The Mungiki espoused political views and cultural practices that were controversial in mainstream society. The government declared the group a criminal organization in 2002 because it ran protection rackets, particularly in the public transportation sector, and harassed and intimidated residents. The Mungiki had a significant following among the poor and unemployed.⁶⁰
- 3.17.5** President Kenyatta and Deputy-President Ruto, who were both senior political figures at the time of the post-election violence in 2007, are accused by the International Criminal Court (ICC) of crimes against humanity including murder, forcible population transfer, and persecution. President Kenyatta is also accused of responsibility for rape, forced circumcision and penile amputation, carried out by the Mungiki, a criminal gang allegedly under his control.⁶¹ The ICC has delayed President Kenyatta's trial until February 2013 following the September 2012 attack on the Westgate shopping mall in the Kenyan capital.⁶² Physicians for Human Rights reports that the Mungiki threaten and perform circumcision on women without their consent as a form of torture, terror, and control, claiming a return to more traditional Kenyan values. The government has been unable and/or unwilling to stop the Mungiki's violence.⁶³ For further information, see section 3.16 Women.
- 3.17.6** In September 2012, Freedom House reported that the Mungiki and other criminal bands are a serious threat to the daily lives of many average Kenyans. Extortion of businesses is commonplace, especially in large cities and towns, and numerous kidnappings for ransom have been reported.⁶⁴
- 3.17.7** From the 1990s to 2005, criminal gangs in Central region enjoyed close ties with senior officials in government, whose patronage made it difficult for police to investigate and prosecute gang members. But the relationship between officials and gangs, especially the Mungiki gang, deteriorated in 2005 and the state began to crackdown on gang activities. In 2007 then-Minister for Internal Security John Michuki issued a shoot to kill order for Mungiki members, saying the police will "wipe them out." The order led to serious human rights violations, including, as the Kenya National Commission on Human Rights reported, the extrajudicial killing of over 500 gang members by police between 2005 and 2007. Since then the government has taken no clear measures to ensure the identification and

⁵⁹ Standard Digital, Two decades of Mungiki's cold blooded killings, 3 September 2013,

http://www.standardmedia.co.ke/?articleID=2000092685&story_title=two-decades-of-mungiki-s-cold-blooded-killings

⁶⁰ US Department of State Country Reports on Human Rights Practices For 2012; Kenya, Section 2b, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁶¹ Amnesty International, Kenya's ICC trials, 16 September 2013

<http://www.amnesty.org/en/library/asset/AFR32/007/2013/en/20206edc-594c-4089-b6f2-d88acef83564/afr320072013en.pdf>

⁶² BBC News, UN rejects Africa bid to halt Kenya leaders' ICC trials, 15 November 2013

<http://www.bbc.co.uk/news/world-africa-24961169>

⁶³ Physicians for Human Rights, Kenya: Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, May 2013

http://www.ecoi.net/file_upload/1930_1369647851_phr-kenya-cat50.pdf

⁶⁴ Freedom House, Countries at Crossroads 2012; Kenya 20 September 2012,

<http://www.freedomhouse.org/report/countries-crossroads/2012/kenya>

prosecution of those behind the killings. After the 2007-2008 election related violence, however, the Commission of Inquiry into Post-Election Violence said that links between Mungiki and some politicians began to return, limiting again the ability of the police to investigate this group. Some of those who tried to investigate the Mungiki have been killed. In parts of Central region such as Karatina, Human Rights Watch heard how residents have lost faith in police and the provincial administration for failing to take action against gangs. A businessman from Karatina said: "Most people just don't bother to report threats from these gangs to police, because they will not do anything. Others have accepted protection from the gangs, so they report cases to the gangs, who will mete out instant justice, rather than report to police." According to Human Rights Watch, in the run-up to the March 2013 elections in central Kenya, as with previous elections, politicians seem to have hired gangs, including the violent Mungiki, to intimidate voters. Police have taken no effective action against these illegal groups despite the passage of a law in 2010 to respond to the threat of armed gangs.⁶⁵

- 3.17.8** On 4th August 2013 the Kenyan daily post reported that confirmed reports indicate that the outlawed Mungiki group is very much alive and kicking in Nakuru town. The group that was banned by the Government for being behind the many killings in the country has re-emerged in Nakuru and running 90 percent of businesses in the town. According to one former Mungiki member, the group openly runs their activities with local authorities aware of their existence. Unlike in the past now the group is more organized and is run openly without any fear. The ex-Mungiki member said that the group is all over town and they collect money from traders without any fear. Every trader gives out 100 shillings everyday as their revenue to the member leader and the payment is mandatory. The ex-member disclosed that the police are very much aware of their activities in the town but they fear approaching them lest they die and so they have to cooperate.⁶⁶
- 3.17.9** All Africa reported in May 2013 that police had been carrying out an operation to get rid of suspected Mungiki members from Gatundu where they have been terrorizing residents. The crackdown follows a spate of robberies, murders, arson, and a widespread extortion racket that has paralysed business and farming interests in the region. Police sources said the crackdown was ordered by the Inspector General David Kimaiyo following a meeting of top security commanders at State House on 25 April.⁶⁷
- 3.17.10** Landinfo cites the Immigration and Refugee Board of Canada as noting that the Mungiki Defence Council (MDC) is the primary armed fraction of Mungiki. MDC is responsible for retaliations against defecting members, revenge killings included. MDC is heavily armed and carries AK-47s and other types of guns in addition to the more widespread swords, machetes and knives that regular Mungiki members may carry. There is conflicting evidence regarding the treatment of applicants claiming to be defectors from the Mungiki. The Independent Medico-Legal Unit (IMLU) stated in 2008 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

⁶⁵ Human Rights Watch, High Stakes- Political Violence and the 2013 Elections in Kenya, February 2013, <http://www.hrw.org/sites/default/files/reports/kenya0213webwcover.pdf>

⁶⁶ The Kenyan Daily Post, FEAR as Mungiki Re-emerges in Nakuru, 4 August 2013, <http://www.kenyan-post.com/2013/08/fear-as-mungiki-re-emerges-in-nakuru.html>

⁶⁷ All Africa, Kenya: Mungiki Comeback in Gatundu, 13 May 2013, <http://allafrica.com/stories/201305140166.html>

themselves, although the Mungiki do carry out revenge attacks. IMLU have provided shelter to ex-Mungiki members at secret locations. According to IMLU, the Mungiki has also threatened former members that have sought refuge in neighbouring countries. People who used to have a high profile within the movement are especially targeted, due to the harm that they can cause to the organisation in case they talk. According to Crisis Group, “[i]t is likely that thousands of adherents wish to leave the sect, but memories of beheadings of defectors in 2007 serve as a deterrent”. The Kenyan National Commission on Human Rights (KNCHR) said in 2008 that defected Mungiki members will be left alone providing they do not threaten the movement’s interests. However, Landinfo considers that both the existence of MDC and examples of Mungiki reactions to deserters, suggest that defectors are at credible risk of retaliation by Mungiki.⁶⁸

See also: [Actors of protection](#) (section 2.3 above)
[Internal relocation](#) (section 2.4 above)
[Caselaw](#) (section 2.5 above)

3.17.11 Conclusion. Members of the Mungiki movement commit murder, robberies, arson, extortion, kidnappings and violence. Despite the passage of a law in 2010 to respond to the threat of armed gangs, the authorities have taken limited action against the Mungiki and this has primarily consisted of police crackdowns resulting in extra-judicial killings of Mungiki members. There are also links between politicians and the Mungiki, including President Kenyatta, further undermining the ability of the police to investigate crimes perpetrated by Mungiki members. Some of those who tried to investigate the Mungiki have been killed. The evidence also suggests that there may be a risk of serious harm to some ex-Mungiki members from within the organisation. Applicants with a previously high profile within the Mungiki are likely to be at greater risk.

3.17.12 Caseworkers 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. In the country guidance case of [JA](#) the Tribunal found that any fear of the Mungiki is not for a Refugee Convention reason. If, on the circumstances of an individual case it is found that internal relocation is unduly harsh, it may be appropriate to grant humanitarian protection. However caseworkers must note that members of the Mungiki have been responsible for serious human rights abuses. The claimant’s involvement in any such crime should be carefully considered as evidence of serious criminality that may mean they the person falls to be excluded.

3.18 Gay men and lesbians

3.18.1 Some applicants may make asylum and/or human rights claims based on ill-treatment amounting to persecution as gay men, lesbians, bisexual, transgender or intersex persons in Kenya.

3.18.2 Treatment The penal code criminalizes “carnal knowledge against the order of nature,” which is interpreted to prohibit consensual same-sex sexual activity and specifies a maximum penalty of 14 years’ imprisonment. A separate statute

⁶⁸ Landinfo Report, Jan 2010, Mungiki: Abusers or Abused?, 6. Mungiki reactions against defectors, 29 January 2010, http://www.landinfo.no/asset/1123/1/1123_1.pdf

specifically criminalizes sex between men and specifies a maximum penalty of 21 years' imprisonment. Police detained persons under these laws, particularly suspected sex workers, but released them shortly afterward. There were no reported prosecutions of individuals for same-sex sexual activity during 2012. Police statistics for 2011 indicated 114 "unnatural offenses," down from 154 in 2010.⁶⁹

- 3.18.3** Same sex sexual practices remain criminalized in Kenya, and even though there are few convictions based on sections 162 to 165 of the Penal Code that criminalize these practices, LGBTI persons are routinely harassed by the police, held in remand houses beyond the constitutional period without charges being preferred against them, and presented in court on trumped-up charges.⁷⁰
- 3.18.4** According to the Kenya Human Rights Commission, there "is a cartel of corrupt police officials who routinely extort and blackmail LGBTI persons with the threat of arrest and imprisonment if they do not give in to those bribes." The report further noted that "the most common of trumped up charges was possession of narcotic drugs where reports were received of police "planting" rolls of bhang (cannabis sativa) on the suspects. In the Coast, it was reported that the police and other state officials usually arrest them (LGBTI persons) along the beaches and charge them with wrong offences the most common being drunk and disorderly and prostitution. Similar reports were received in Nairobi where city council security officers arrest LGBTI persons for the same reasons (...) Those who fail to give bribes or sexual favours are charged with trumped up charges and sometimes raped by state security officers. In the Coast province, respondents who do sex work reported to have been arrested by the police officers on night patrol only for them to be raped in dark street alleys then thereafter released. Attempts to report such incidents to the police were unsuccessful due to the reluctance of the police to investigate and prosecute their own."⁷¹
- 3.18.5** The organisation Identity Kenya reported in September 2012 that "several blackmailing incidents all involving gay men have shown that several police officers stationed or operating from Central Police Station in Nairobi's CBD are extorting money from gay men under the threat of arrests and prosecution".⁷² With regards to arrests, Amnesty International highlighted that "there have been a number of arrests of LGBTI people under other laws, such as loitering, soliciting, or impersonation. Amnesty International was told that sometimes individuals are threatened with arrest under the provisions of the Penal Code that criminalize same-sex relations for the purposes of extortion by the police".⁷³ The Kenya Human Rights Commission further highlighted that service providers fail to provide services to LGBTI persons: "some health institutions deliberately refuse to treat

⁶⁹ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁷⁰ Kenya Human Rights Commission, The Outlawed Amongst Us, A study of the LGBTI community's search for equality and non-discrimination in Kenya, 2.1 Harassment by State Officials, 18 May 2011, http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷¹ Kenya Human Rights Commission, The Outlawed Amongst Us, A study of the LGBTI community's search for equality and non-discrimination in Kenya, 2.1 Harassment by State Officials, 18 May 2011, http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷² Identity Kenya, Central Police Station in Nairobi a Criminal Hub of Gay Blackmailers, 4 September 2012, <https://identitykenya.com/index.php/homepage/featured/578-central-police-station-in-nairobi-a-criminal-hub-of-gay-blackmailers>

⁷³ Amnesty International, Making Love a Crime: Criminalization of same-sex conduct in sub-Saharan Africa, 5.1. Arbitrary Arrests, Detention and Deprivation of Liberty, April 2013, <http://www.amnesty.org/en/library/asset/AFR01/001/2013/en/9fd91b7-bc0e-4ea7-adae-7e51ae0ce36f/afr010012013en.pdf>

LGBTI persons, schools and colleges expel students on grounds of actual or presumed sexual orientation or gender identity and the police fail to investigate and prosecute persons who perpetrate violence or violate rights of LGBTI persons”.⁷⁴

- 3.18.6** Kenyan law and practice only recognizes the male and female gender, no recognition is made of intersex, due to the binary norm evident in the country. There is no legal framework that allows or facilitates Transgender and Intersex individuals to choose their gender and have it recognized by law; most intersex individuals are taken through unnecessary corrective surgeries when they are born or simply assigned a gender role and raised as such without being given a chance to choose their gender or undergo a sex correction surgery when they are of age. The transgender persons suffer lack of legal recognition and are legally bound to a gender they do not want to identify with. This is a violation of their freedom of expression. The government’s persistent failure to address and make cognizance of the falsity of the gender binary norms have resulted in State sanctioned homophobia.⁷⁵
- 3.18.7** According to the Kenya Human Rights Commission, stigma and discrimination are the major problems that LGBTI persons in Kenya face. In most instances this is as a result of failure to appreciate the human diversity in sexual orientation and gender identity. As observed elsewhere in this report, the failure to address and bring out these issues in the public have resulted in the same being treated as taboo topics and thus creating superstitious beliefs on the same.⁷⁶
- 3.18.8** The stigma usually begins from family and neighbours, who alienate, harass and humiliate LGBTI persons when they are “outed”. Close friends and workmates or school mates also perpetuate this stigma against the LGBT persons. Only 18% of the respondents reported to have come out to their families or having been “outed”. 89% of the respondents who came out or were outed reported having being disowned by their family members on discovery of their sexual orientation or gender identity...Some of them were forced to attend counselling sessions in the belief that they were undergoing a psychological crisis and thus required help to get over the “confusion”.⁷⁷
- 3.18.9** The Kenya Human Rights Commission study further found that “the most reported forms of violence include, but are not limited to, physical violence (harassment, riots, beatings, lynching and mob justice), hateful printed publications (text messages, posters, books, printed and online publications) and hate speech. The common form of violence was verbal where insults and derogatory terms were used in reference to LGBTI persons who are often referred to in words that portray them as subnormal, pathological, perverted and deserving of annihilation”. This related to both state and non-state actors.⁷⁸

⁷⁴ Kenya Human Rights Commission, The Outlawed Amongst Us: A study of the LGBTI community’s search for equality and non-discrimination in Kenya, Executive Summary, 18 May 2011,

http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷⁵ Kenya Human Rights Commission, The Outlawed Amongst Us, A study of the LGBTI community’s search for equality and non-discrimination in Kenya, Chapter 3: KHRC’s Analysis, 18 May 2011,

http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷⁶ Kenya Human Rights Commission, The Outlawed Amongst Us, A study of the LGBTI community’s search for equality and non-discrimination in Kenya, 2.2. Stigma and Exclusion by Family and Society, 18 May 2011

http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷⁷ Kenya Human Rights Commission, The Outlawed Amongst Us, A study of the LGBTI community’s search for equality and non-discrimination in Kenya, 2.2. Stigma and Exclusion by Family and Society, 18 May 2011

http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷⁸ Kenya Human Rights Commission, The Outlawed Amongst Us: A study of the LGBTI community’s search for equality

- 3.18.10** LGBT advocacy organizations, such as the Gay and Lesbian Coalition of Kenya, were permitted to register and conduct activities. However, societal discrimination based on sexual orientation was widespread and resulted in loss of employment and educational opportunities. Violence against the LGBT community also occurred, particularly in rural areas and among refugees. NGO groups reported that police intervened to stop attacks but generally were not sympathetic to LGBT individuals or concerns.⁷⁹
- 3.18.11** On 25 June 2012, a transgender individual was beaten by her employer and other community members in Kisumu, who alleged that she intended to rape the children in the house where she was employed as a domestic servant. Police intervened but subsequently arrested her on charges of impersonation of character. A Kisumu-based LGBT rights group intervened in the case and succeeded in securing the individual's release and relocation to Nairobi.⁸⁰
- 3.18.12** During 2012 multiple political leaders made public statements critical of same-sex relationships and LGBT rights. For example, Prime Minister Odinga reportedly suggested during a political rally in Langata that gays should be put in prison. Eldoret MP and ICC (International Criminal Court) indictee William Ruto, labeled by Gay Trust Kenya as "persistently homophobic," issued repeated statements criticizing same-sex relationships and accused the KNCHR [Kenya National Commission on Human Rights] of pushing a foreign agenda for its defence of the human rights of LGBT persons. The Guardian newspaper reported in December 2012 of David Kuria's withdraw from elections in Kenya, because "of lack of funds to cover logistics and his personal security. He had received threatening text messages saying he would bring "a curse to the land"" as Kenya's first openly gay politician.⁸¹ LGBT advocacy organizations noted that stricter enforcement of hate speech laws by the NCIC [National Cohesion and Integration Commission], as well as strict guidelines against hate speech adopted by major media groups during 2012, decreased instances of homophobic hate speech.⁸²
- 3.18.13** In July 2013, Gay Star News published an article reporting that the Gay and Lesbian Coalition of Kenya (GALCK) released a report detailing a growing number of violent acts against gays in recent weeks where gay men have been "slashed with machetes and beaten with hammers in a series of hate attacks [...] which have already claimed at least one life".⁸³ Similarly, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association, activists in July 2013 have "raised the alarm over the increasing cases of attacks targeting gay men, male sex workers and transgender women especially at the Coast".⁸⁴ In August 2012, three lesbian women were brutally assaulted and sexually molested in

and non-discrimination in Kenya, 2.3 Physical Violence and Threats of Death, 18 May 2011,

http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html

⁷⁹ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁸⁰ US Department of State, Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁸¹ The Guardian, Kenya's first gay political candidate reveals why he quit race, 25 December 2012,

<http://www.theguardian.com/world/2012/dec/25/kenya-gay-candidate-ends-campaign>

⁸² US Department of State Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁸³ GayStarNews, Gay men hacked with machetes and murdered in wave of hate crimes in Kenya, 17 July 2013,

<http://www.gaystarnews.com/article/whats-behind-series-recent-violent-hate-crimes-against-gays-kenya170713>

⁸⁴ International Lesbian, Gay, Bisexual, Trans and Intersex Association, Attacks on LGBTI, Sex Workers Worrying, 1 July 2013, <http://ilga.org/ilga/en/article/oakBfqZ1rh>

Nairobi, according to reporting by Identity Kenya.⁸⁵ In June 2012, it was reported that two men were beaten by a mob as they were caught “in the act” by passersby. One managed to escape while the other died after being stoned by a crowd of people.⁸⁶

3.18.14 No anti-LGBT publicity campaigns were conducted during 2012; however, sensational reporting often inflamed societal prejudices.⁸⁷

See also: [Actors of protection](#) (section 2.3 above)
[Internal relocation](#) (section 2.4 above)
[Caselaw](#) (section 2.5 above)

3.18.15 Conclusion Homosexual acts are illegal in Kenya and can carry a prison sentence. LGBT persons continue to be subject to societal harassment, discrimination, intimidation and threats to their wellbeing, as well as arrests, extortion and violence from the police. This can in individual cases amount to persecution and in general the Kenyan authorities do not provide gay men, lesbians and bisexuals or those perceived as such with effective protection. Where caseowners conclude that a claimant is at real risk of persecution in Kenya on account of their sexual orientation then they should be granted asylum because gay men, lesbians and bisexuals in Kenya may be considered to be members of a particular social group.

3.18.16 Where gay men and lesbians do encounter social hostility they are unlikely to be able to avoid this by moving elsewhere in Kenya. This is because homophobic attitudes are prevalent across the country. The Supreme Court in the case of HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

3.19 Prison conditions

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

3.19.2 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.

3.19.3 Consideration. Prison and detention centre conditions continued to be harsh and life threatening. A 2009 prison assessment by the Kenya National Commission on Human Rights (KNCHR) concluded that torture, degrading and inhuman

⁸⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association, Three Lesbians Beaten, Sexually Assaulted in Nairobi CBD Using Bottles, 22 August 2012, <http://ilga.org/ilga/en/article/nGO9L0Q1NQ>

⁸⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association, Gay man stoned to death in Nairobi slum, 14 June 2012, <http://ilga.org/ilga/en/article/nAiAdBn1rg>

⁸⁷ US Department of State Country Reports on Human Rights Practices For 2012; Kenya, Section 6, 19 April 2013 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

treatment, unsanitary conditions, and extreme overcrowding were endemic in prisons. Prison staff routinely beat and assaulted prisoners. According to media reports, prison officials also raped female inmates. Fellow inmates also committed rapes. Prisoners sometimes were kept in solitary confinement far longer than the legal maximum of 90 days. The KNCHR and human rights groups noted that the Department of Prisons began implementing reforms after the KNCHR assessment, working with the KNCHR to train human rights workers and establish paralegal clinics in prisons to cut down on abuse. Pretrial detention in police stations continued to be harsh and life-threatening, with no evidence of improvement.⁸⁸

- 3.19.4** The UN Committee Against Torture remained “deeply concerned” in May 2013 about “detention conditions, in particular the persistent levels of overcrowding, lack of appropriate health services, prevalence of prison violence, including inter-prisoner violence and sexual abuse, and the practice of detaining children under the age of four alongside their mothers”.⁸⁹ Amnesty International also reported on “cases of ill-treatment of people in police detention” in its annual report covering 2012.⁹⁰
- 3.19.5** Following its visit to Kenya in October 2013, the World Organisation Against Torture (OMCT) expressed concern over the “unacceptable” overcrowding in pre-trial detention and underlined that, despite good laws which have been passed in recent years, “continuous impunity for torture, and other forms of cruel, inhuman or degrading treatment” persist.⁹¹ Human Rights Watch reports that the Kenyan military and police have been involved in arbitrarily rounding up large numbers of ethnic Somali Kenyans and Somali refugees and subjecting them abuses including rape and attempted sexual assault; beatings; arbitrary detention; extortion; the looting and destruction of property; and various forms of physical mistreatment. It found that the Kenyan military has detained scores of civilians, despite the fact that it has no legal authority to do so”.⁹²
- 3.19.6** As of October 2012, the Legal Resources Foundation (LRF) reported a total prison population of approximately 52,000, including 2,756 women and 49,244 men. Of these, 18,720 were in pretrial detention. The country’s 108 prisons had a designed capacity of 25,000 inmates. The LRF attributed poor prison conditions to lack of funding, overcrowding, inadequate staff training, and poor management. Prison officers, who received little applicable training, discriminated against prisoners with mental problems and transgender prisoners.⁹³
- 3.19.7** In April 2013, the Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI) stated that “mass overcrowding remains the single most important challenge for the Kenya Prison Service. The conditions make it difficult to provide basic needs to prisoners, including adequate living conditions, and

⁸⁸ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁸⁹ UN Committee Against Torture, Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5-31 May 2013), paragraph 12, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCOC%2fKEN%2f12877&Lang=en

⁹⁰ Amnesty International, Annual Report 2013: Kenya, Human rights violations by police, 23 May 2013, <http://amnesty.org/en/region/kenya/report-2013>

⁹¹ World Organisation Against Torture (OMCT), Kenya: Torture reforms must tackle implementation gap and end impunity, 5 October 2013, http://www.omct.org/files/2013/10/22401/kenya_pr_final_mission.pdf

⁹² Human Rights Watch, Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis, Summary, May 2012, <http://www.hrw.org/sites/default/files/reports/kenya0512webwcover.pdf>

⁹³ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

access to medical and psychiatric care.⁹⁴

- 3.19.8** Due to the overcrowded and unhygienic prison conditions, tuberculosis (TB) and other diseases are widespread among prisoners in Kenya. HIV/AIDS is prevalent among prisoners, and the inability of the Kenya Prison Service to distribute condoms to prisoners exacerbates the situation”.⁹⁵
- 3.19.9** Prisoners generally received three meals a day, but portions were inadequate and sometimes divided into two as punishment. Water shortages, a problem both inside and outside of prison, continued to be a problem. Sanitary facilities were inadequate. Medical care was poor, particularly for those with tuberculosis or HIV/AIDS. Supplies of antiretroviral drugs and other medications were inadequate, and insufficient food lessened the effectiveness of available medicine. Prison hospitals could not meet the needs of prisoners. Many inmates petitioned the courts for transfer to outside hospitals, but administrative problems, such as lack of transportation, often delayed court-ordered hospital attention. Prisoners generally spent most of their time indoors in inadequately lit and poorly ventilated cellblocks. This was especially true for the more than one-third of prisoners awaiting trial, as they were not engaged in any work programs that would allow them to leave their cells.⁹⁶
- 3.19.10** According to the government, 187 prisoners died in 2011, the majority from infections or other generally preventable causes. Overcrowding, unhygienic conditions, and inadequate medical treatment contributed to prisoner deaths.⁹⁷
- 3.19.11** In small jails female prisoners were not always separated from males. There were no separate facilities during pretrial detention, and sexual abuse of female prisoners was a problem. Conditions for female inmates in small, particularly rural, facilities were worse than for men. Human rights groups reported that police officers routinely solicited sexual favours from female prisoners and that many female inmates resorted to prostitution to obtain basic necessities, such as sanitary towels and underwear, which were not provided by the Department of Prisons. Civil society activists witnessed young children, women, and men sharing the same cells. Convicted mothers were not allowed to keep their children unless they were nursing. The LRF reported that prisons did not have facilities, lessons, beds, or special food for children, nor did children have access to medical care. Children born to women in custody had difficulty obtaining birth certificates.⁹⁸
- 3.19.12** Minors generally were separated from the adult population, except during the initial detention period at police stations, when adults and minors of both sexes often were held in a single cell.⁹⁹

⁹⁴ Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI), Alternative report to the UN committee against Torture regarding the consideration of Kenya's second report, 15 April 2013, http://www.ecoi.net/file_upload/1930_1369321323_fhri-pri-kenya-cat50.pdf

⁹⁵ Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI), Alternative report to the UN committee against Torture regarding the consideration of Kenya's second report, 15 April 2013, http://www.ecoi.net/file_upload/1930_1369321323_fhri-pri-kenya-cat50.pdf

⁹⁶ US Department of State Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁹⁷ US Department of State , Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁹⁸ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

⁹⁹ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

- 3.19.13** While the Department of Prisons took steps to improve recordkeeping during 2012, police frequently failed to enter detainees into police custody records, resulting in excessive pretrial detention.¹⁰⁰
- 3.19.14** Noncustodial community service programs served to alleviate prison overcrowding. However, the total prison population did not decrease, as the majority of inmates were petty offenders whose pretrial detention frequently exceeded the punishment prescribed for their crimes. There were no other known alternatives to incarceration for nonviolent offenders. Prisoners and detainees sometimes were denied the right to contact relatives or lawyers. Family members who wanted to visit prisoners commonly reported bureaucratic and physical obstacles that generally required a bribe to resolve. In 2011 the government instituted remote parenting and open family days at prisons to increase prisoners' access to family members. According to the LRF, prisoners had reasonable access to legal counsel and other official visitors, although there was insufficient space to meet with visitors in private and conduct confidential conversations.¹⁰¹
- 3.19.15** The LRF reported that prisoners were able to file complaints with the courts and had the ability to send letters written by paralegals to the courts without appearing personally. There were no prison ombudsmen to handle prisoner complaints, but prisons increased the availability of paralegal clinics, which appeared to decrease the incidence of abuse. Some magistrates and judges made prison visits during 2012, providing another avenue for prisoners to raise grievances. The government also established court user committees, which included paralegals and prison officials, to increase prisoners' access to the judicial system. The LRF reported that the government designated human rights officers to serve in all prisons; however, many lacked necessary training, and some prisons did not have a functioning human rights officer.¹⁰²
- 3.19.16** The government permitted prison visits by local human rights groups during 2012.¹⁰³
- 3.19.17** New prison facilities and housing for prison staff were built during 2012, mental health facilities for offenders were refurbished, and bedding and meals for inmates improved. Nonetheless, human rights groups considered the improvements inadequate.¹⁰⁴
- 3.19.18 Conclusion** Prison conditions and pre-detention facilities in Kenya are harsh and sometimes life-threatening, resulting in incidences of detainee's death, and have been described as amounting to cruel inhuman or degrading treatment. Extreme overcrowding, inadequate sanitary conditions, poor and inadequate healthcare and generally unhygienic and inadequate living conditions being particular problems. In addition to these adverse conditions there are numerous reports that officials act with impunity and regularly abuse, torture, ill-treat, assault and rape prisoners. The sexual abuse of female prisoners and the targeted abuse of ethnic

¹⁰⁰ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁰¹ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁰² US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁰³ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

¹⁰⁴ US Department of State, Country Reports on Human Rights Practices For 2012:Kenya, Section 1c, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204131>

Somali Kenyans has been reported on.

3.19.19 Prison and pre-trial detention conditions are likely to reach the article 3 threshold in most cases. Where applicants can demonstrate a real risk of imprisonment on return to Kenya, a grant of Humanitarian Protection will generally be appropriate. 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, ethnic background, religion and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate.

4. Unaccompanied minors claiming in their own right

4.1 Unaccompanied minors claiming in their own right who have not been granted asylum or HP can only be returned where the Secretary of State is satisfied that safe and adequate reception arrangements are in place in the country to which the child is to be returned.

4.2 At present the Home Office does not have pre-approved arrangements in place with NGOs or other organisations in Kenya to provide alternative adequate reception arrangements in cases where the minor cannot be returned to their family. Those who cannot be returned should be considered for leave as an Unaccompanied Asylum Seeking Children (UASC).

4.3 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 UASC as soon as possible after the claim for asylum is made, while ensuring that those endeavours do not jeopardise the child's and/or their family's safety.

4.4 Information on the infrastructure within Kenya, which may potentially be utilised to assist in endeavouring to trace the families of UASC, can be obtained from the Country of Origin Information Service (COIS).

4.5 Caseworkers should refer to the AI: [Processing an Asylum Application from a Child](#), for further information on assessing the availability of safe and adequate reception arrangements, UASC Leave and family tracing. Additional information on family tracing can be obtained from the [interim guidance](#) on Court of Appeal judgment in [KA \(Afghanistan\) & Others \[2012\] EWCA civ1014](#).

5. Medical treatment

5.1 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.

5.2 Caseworkers 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).

- 5.3** 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.
- 5.4** 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, and the absence of resources through civil war or similar human agency.
- 5.5** 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.
- 5.6** 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.
- 5.7** Where a caseworker 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. Caseworkers must refer to the AI on [Discretionary Leave](#) for the appropriate period of leave to grant.
- 6. Returns**
- 6.1** 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.
- 6.2** 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.
- 6.3** 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](#).

6.4 Individuals can return voluntarily to their country of origin / place of habitual residence at any time in one of three ways:

- leaving the UK by themselves, where the applicant makes their own arrangements to leave the UK
- leaving the UK through the voluntary departure procedure, arranged through the UK Immigration service, or
- leaving the UK under one of the [Assisted Voluntary Return \(AVR\) schemes](#).

**Country Specific Litigation Team
Immigration and Border Policy Directorate
Home Office**

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