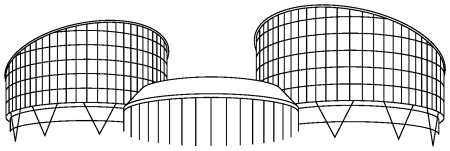

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF R.B.A.B. AND OTHERS v. THE NETHERLANDS

(Application no. 7211/06)

JUDGMENT

STRASBOURG

7 June 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of R.B.A.B. and Others v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 17 May 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7211/06) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Sudanese nationals on 20 February 2006.

2. The applicants were represented by Ms W. Eusman, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicants complained under Article 3 of the Convention that there was a real risk that the second and third applicants would be exposed to female genital mutilation ("FGM") if they were to be expelled to Sudan.

4. On 24 October 2008 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are a married couple, Mrs R.B.A.B. and Mr H.S., their two daughters, X and Y, and their son Z. The children were born in 1991, 1993 and 1996, respectively. The applicants have been in the Netherlands since 2001.

A. Proceedings before the introduction of the application

6. On 28 April 2001 the applicants entered the Netherlands, where the first and second applicants filed separate asylum applications, and Mrs R.B.A.B. also filed applications on behalf of the other three applicants (the children, who were all minors). The immigration authorities conducted interviews with the first and second applicants on 8 May 2001 (*eerste gehoor*) and 9 August 2001 (*nader gehoor*). An additional interview (*aanvullend gehoor*) was conducted with the second applicant on 2 November 2001.

7. The first and second applicants stated that they had previously lived in Dilling in Sudan's South Kordofan province and that they had fled Sudan after Mr H.S. had attracted the attention of the Sudanese authorities on account of his activities for the opposition movement M.

8. On 7 December 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*, the "Deputy Minister") notified the first and second applicants of her intention (*voornemen*) to reject their asylum requests. In the light of various contradictions in the statements given by the first and second applicants, their inability to answer basic questions about the respective tribes they claimed to belong to, and the second applicant's inability to provide simple topographic details of the city and the surroundings of the place where he claimed he had grown up and/or to provide any details about the M. opposition movement (goal, members, structure, leader) for which he claimed to have been active, the Deputy Minister concluded that no credence could be attached to the applicants' asylum statement.

9. In two separate decisions of 17 January 2002, after the applicants' lawyer had filed written comments (*zienswijze*) concerning the intended refusals, the Deputy Minister rejected the first and second applicants' asylum requests, finding that the written comments had not dispelled her doubts concerning the credibility of their asylum statement.

10. The first and second applicants' appeal against this decision were declared inadmissible on procedural grounds by the Regional Court (*rechtbank*) of The Hague sitting in Zwolle in a joint ruling, the first and second applicants having failed to submit the requisite grounds for their appeals, even though they had been given extra time to remedy this shortcoming. The applicants' objection (*verzet*) was dismissed on 10 September 2002 by the Regional Court. No further appeal lies against this ruling.

11. On 12 April 2003 the first and second applicants – and Mrs R.B.A.B. also on behalf of the other applicants – filed a second asylum request, which was based on essentially the same grounds as their initial request. They submitted various documents in support of their declaration. On 13 April 2003, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) notified the first and second applicants

of her intention to reject their fresh asylum request, holding that their repeat requests were not based on newly emerged facts or altered circumstances as required by section 4:6 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*). The new documents submitted by the first and second applicants only served to increase the already existing doubts as to the credibility of their asylum statement. In two separate decisions of 14 April 2003, having received the applicants' written comments on the intended decision, the Minister rejected the applicants' second asylum request on the grounds given in his notice of intention. The first and second applicants did not lodge an appeal against this decision before the Regional Court of The Hague even though it would have been possible to do so.

12. On 14 June 2005 the first and second applicants, and Mrs R.B.A.B. also on behalf of the other applicants, filed a third asylum request based on the claim that, if they were to be sent back to Sudan, their daughters X and Y would be subjected to female genital mutilation ("FGM"), contrary to Article 3 of the Convention, due to tribal and social pressure. In interviews with the immigration authorities held on 16 June 2005, the first and second applicants stated that they opposed FGM but would be unable to protect their daughters against it. They further submitted a document issued by the Sudanese Embassy in the Netherlands on 26 April 2005 stating that the applicants "are all Sudanese citizens although they do not possess the requisite documents to enable them to obtain a Sudanese laissez-passer".

13. On 17 June 2005, the Minister for Immigration and Integration notified the first and second applicants separately of her intention to reject their third asylum request. The Minister doubted the sincerity of the applicants' purported fear that their daughter would be subjected to FGM because they had not raised this argument in their previous asylum requests. The Minister also took into consideration the order amending the Aliens Act 2000 Implementation Guidelines 2004/36 (*Wijzigingsbesluit Vreemdelingencirculaire 2000*, "WBV 2004/36"), which was based on an official report on Sudan drawn up by the Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*) on 3 February 2004 (DPV/AM-823666), according to which women who had had the benefit of a higher education (namely a university or higher professional level education) and who were living in the larger cities in Sudan did not experience any social stigma for not subjecting their daughters to FGM, whereas women in the rural areas who had received little or no schooling had little choice but to subject their daughters to this practice. As the first and second applicants had still not substantiated their personal identities or given a credible statement concerning their place of residence in Sudan, the Minister considered that they had not established that they did not belong to the group of more highly educated people able to reject the practice of female circumcision. The Minister also considered that the second applicant constituted a danger to public order, having accepted a negotiated penalty

(*transactieaanbod*) in order to settle out of court a criminal charge for shoplifting.

14. On 20 June 2005 the applicants filed their written comments concerning the intended refusal of their third asylum request. They argued that the Minister had failed to present a proper reasoning for her finding that it had not been demonstrated that the first applicant did not belong to the group of highly educated women who would be able to resist the social pressure to circumcise their daughters, especially as the first applicant had stated in her first request for asylum that she had only had a primary school level education. The first applicant therefore offered to take an IQ test to prove her level of education.

15. In two separate decisions of 20 June 2005 the Minister rejected the first and second applicants' asylum request on the grounds detailed in her notice of intention. The Minister added that it was not for her to examine the first applicant's level of education through an IQ test but rather for the applicants to prove their identities and background in their asylum application.

16. In a joint ruling given on 12 June 2005 the provisional-measures judge (*voorzieningenrechter*) of the Regional Court of The Hague sitting in Zwolle granted the first and second applicants' appeals, quashed the impugned decisions and remitted the case to the Minister for a fresh decision. The provisional-measures judge held:

> "The judge notes that it is no longer in dispute that the petitioners are Sudanese nationals. Nor is it in dispute that both daughters of the petitioners, currently 14 and 11 years old, have not been circumcised.
>
> According to the policy guidelines set out in C1/4.3.3 Vc 2000, a girl can – if return would entail a real risk of genital mutilation – qualify for an asylum-based residence permit ... The following conditions apply:
>
> - there exists a risk of genital mutilation;
> - the authorities of the country of origin are unwilling or unable to provide protection to persons exposed to an imminent risk of genital mutilation; and
> - no internal relocation possibility is deemed to exist in the country of origin.
>
> According to chapter A8 Vc 2000 "Country-specific part, the asylum policy in respect of Sudan" under 5.5 Vc, genital mutilation is widespread in Sudan. Although there is a Health Act forbidding genital mutilation, the Sudanese authorities hardly ensure compliance with that act. The parental freedom of choice (as the court understands, whether or not to have their daughters circumcised) is connected to the cultural attitudes of the family and surroundings. Women with a higher education in larger towns will generally not have their daughters circumcised. This will generally not give rise to problems from their social environment. The term 'women with a higher education' is to be understood to mean women who have had an academic or higher vocational education. According to the official report of 3 February 2004, women with a low level of education living in rural areas have little choice. According to the same chapter it cannot be deduced from the official report whether it

is possible to avoid circumcision by settling elsewhere in Sudan, meaning that for the assessment of the question whether there is an internal relocation alternative, each individual's declaration is of decisive importance.

The defendant's refusal to grant the requested residence permit is based to a large extent on the fact that the identity and origin of, in particular, [the first applicant] has not been demonstrated, but also because in the proceedings concerning the first asylum request, it was found that statements lacking credence had been given. For that reason, it is not possible to assess whether the conditions set out in the policy guidelines are met.

The refusal thus reasoned cannot be upheld.

The policy guidelines are aimed at protecting girls and women against circumcision, an act which according to the policy is to be seen as a violation of Article 3 [of the Convention]. ...

The assertion that [the first applicant] based her first asylum request on an asylum statement subsequently found to be implausible is correct. However, it is unclear what the relevance of that conclusion is in the context of the present [asylum] application, which is concerned with the protection of the daughters and not of [the parents]."

17. On 19 July 2005 the Minister filed a further appeal against this judgment with the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Council of State.

18. On 25 August 2005, the Administrative Jurisdiction Division granted the Minister's further appeal, quashed the judgment of the Regional Court and rejected the first and second applicants' appeal against the Minister's decision of 20 June 2005. It considered that, pursuant to section 31 § 1 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), it was for the applicants to demonstrate as plausible those facts and circumstances which could lead to the conclusion that they were eligible for admission pursuant to the policy in force, and not for the Minister to demonstrate the opposite. As not only the applicants' statements about their identity and origin but also their asylum statement had been found to lack credibility in a decision of 17 January 2002 which had obtained the force of *res iudicata*, the Minister could reasonably have found that the applicants had not made out a persuasive case to show that they complied with the conditions for admission under the policy concerned, that the authorities could not provide them with protection, and that there was no internal relocation alternative for them. No further appeal lay against this ruling.

B. Developments subsequent to the lodging of the application

19. The third applicant, Ms X., gave birth to a daughter on 11 June 2011 and to a son on 15 March 2013. On 1 September 2015 Ms X. was granted a Netherlands residence permit for the purpose of remaining with her partner. On 15 September 2015 she informed the Court that she did not wish to maintain the application in so far as it concerned her.

20. In the meantime, on 7 November 2012, the Minister for Immigration, Integration and Asylum Policy (*Minister voor Vreemdelingenzaken en Integratie*) rejected a request for a residence permit filed by the fourth applicant, Ms Y., who had come of age in the meantime. On the same day Ms Y. filed an objection (*bezwaar*) against this refusal and, on 30 November 2015, she attended a hearing on that objection before an official commission during which she stated that in 2012, as a volunteer for two non-governmental organisations, she had disseminated information about FGM, for which purpose she had attended a training course.

21. On 29 December 2015 the Minister rejected the fourth applicant's objection. In so far as the fourth applicant would allegedly be exposed to the risk of being subjected to circumcision in Sudan, the Minister noted that her parents opposed this practice and therefore found it likely that they would not force Ms Y. to be circumcised. As regards pressure from the social environment, the Minister noted that Ms Y had still not submitted any documents substantiating her identity or alleged Dilling origin. In this situation, the Minister found that it was not necessary to address the question of whether internal relocation would be a possibility. No further information about these proceedings has been submitted.

22. On 11 April 2013 the fifth applicant, Mr Z., applied for a residence permit under the Transitional Regulation on Children Residing Long-Term in the Netherlands (*overgangsregeling langdurig in Nederland verblijvende kinderen*), which provided that minors without a residence permit who had been residing in the Netherlands for over five years could obtain a residence permit if they met certain criteria. These criteria included that the minor in question must have applied for asylum at least five years before reaching the age of 18 and must not have evaded monitoring by the Netherlands authorities for more than three months. The close family members of such minors could also qualify for accompanying family-member residence permits for close relatives (that is to say parents and siblings). The fifth applicant also sought accompanying family-member residence permits for his parents, his sisters Y. and X., and for the latter's two children, who are minors.

23. On 30 July 2013 this request was rejected by the Deputy Minister of Security and Justice (*Staatssecretaris van Veiligheid en Justitie*), who held that the applicants had not been in touch with the designated immigration authorities for over three months. On 1 September 2015, after remittal of the case by the Administrative Jurisdiction Division on 22 July 2015, the petitioners' objection was again rejected by the Deputy Minister. No further information about these proceedings has been submitted.

24. In a letter of 24 September 2014, the Deputy Minister informed the Mayor of Amsterdam that he would not avail himself of his discretionary powers to admit the applicants to the Netherlands. The applicants' objection was declared inadmissible by the Deputy Minister, who held that the

content of the letter of 24 September 2014 was not a decision within the meaning of section 1:3 of the General Administrative Law Act which could be challenged in administrative appeal proceedings. Although the applicants' appeal against this decision was granted on 1 September 2015 by the Regional Court of The Hague sitting in Amsterdam, it nevertheless held that the legal effects of the impugned decision were to remain intact. No further information about these proceedings has been submitted.

II. RELEVANT DOMESTIC MATERIAL

25. The official report (*ambtsbericht*) on Sudan released by the Netherlands Minister of Foreign Affairs in April 2010 states the following in respect of the situation of women in Sudan:

> "After the regime change in 1989, the position of women deteriorated. Women were forced into the background of public life. Many highly educated women lost both their jobs and their freedom of movement. Strict dress codes and codes of behaviour were imposed on women employed by educational and (semi-)governmental institutions.
>
> *Genital mutilation*
>
> There is no specific statutory provision rendering genital mutilation of women (FGM) a criminal offence. The Criminal Code merely mentions a prohibition of damaging acts against girls and women. The interpretation of this legislative provision is left to the judge. In practice, perpetrators of genital mutilation are not prosecuted. In 2008 Sudan pledged to eradicate FGM within 10 years. However, the Sudanese authorities have not been consistent in the implementation of this policy. Whilst the National Council of Child Welfare is active in combatting FGM, inter alia in collaboration with UNICEF, the Council of Ministers, on the other hand, deleted in February 2009 a. provision prohibiting FGM from the draft bill for the Children's Act. The Children's Act was adopted on December 2009 and contains no provision prohibiting FGM.
>
> FGM is widespread in Sudan. The percentage of women in North-Sudan having undergone FGM is estimated at about 90%. In so far as known, FGM is practiced by all North-Sudanese population groups (Arab and non-Arab). However, other population groups residing in the north, including the southern Sudanese, have also adopted the practice. Nothing is known about the extent to which pressure in exerted on communities in northern Sudan that do not traditionally practise FGM. ...
>
> Genital mutilation takes place in childhood, generally between the ages of four and ten. It may occur that women who have not undergone FGM are forced to undergo this when they get married. It is not possible to say anything about the specific circumstances in which circumcision takes place at a later age, such as the place of residence or the level of education of the woman concerned.
>
> Because genital mutilation is a parental choice, the question does not arise whether and to what extend girls can avoid it. The parents' decision is closely connected with the cultural attitudes of the family and the surrounding community. In practice it does not occur that people move home in order to avoid genital mutilation. There are no shelters in Sudan for women or girls seeking to avoid FGM.

> An increasing number of urban, educated families are refusing to have their daughters circumcised. Generally these families do not experience any problems. The lesser educated and people living in rural areas are often unable or unwilling to make the choice not to have their daughters circumcised due to great pressure emanating from the community."

26. The country assessment report on Sudan drawn up by the Netherlands Minister of Foreign Affairs in July 2015 reads in its relevant part:

> "There is no specific statutory provision rendering genital mutilation of women (FGM) a criminal offence. The Criminal Code merely mentions in general terms the ban on 'female circumcision' without any further definition. The interpretation of this legislative provision is left to the judge. In practice, those who commit FGM are not prosecuted.
>
> FGM in Sudan is still being carried out at a large scale. Girls are circumcised traditionally to prepare them for marriage, for religious reasons and – based on superstition – for 'health reasons'. The most recent estimate of the percentage of circumcised women between 15-49 years old in Sudan is 89%. ... UNICEF and UNFPA [United Nations Population Fund] conduct large-scale campaigns to stop FGM. These campaigns have rendered circumcision a topic of debate. Discussions are being held within families and in the press and on social media even photographs are being shown. There is, however, also a strong influence of the pro-FGM lobby which presents it as the traditional values and norms being affected by the West. Sheikh Abdel-Hay Yusuf is voicing this. It appears from UNICEF figures that the percentage of girls having been circumcised between the ages of 5 to 9 has reduced from 41 percent in 2006 to 35.5 percent in 2010.
>
> Because genital mutilation is a parental choice, the question does not arise whether and to what extend girls can avoid it. The parents' decision is closely connected with the cultural attitudes of the family and the surrounding community. In so far as known, in practice it does not happen that people move home for the purpose of avoiding genital mutilation. The local NGO SEEMA refers victims for medical help."

III. RELEVANT INTERNATIONAL MATERIAL

27. FGM comprises all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. The World Health Organisation ("the WHO") noted the following key facts in its Fact Sheet on FGM (as updated in February 2016): more than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia where FGM is concentrated and is mostly carried out on young girls between infancy and 15 years of age.

28. There are different forms of FGM (see "Eliminating Female Genital Mutilation: An Interagency Statement", 2008, authored by various international organisations including the WHO, the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNICEF) and the UN Development Fund for Women (UNIFEM)). These include clitoridectomy, excision and infibulation. The same Interagency Statement described FGM

as a violation of the right to freedom from torture, inhuman and degrading treatment, meaning that protection from FGM was provided for by various international treaties (the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women), by regional treaties (the Protocol to the African Charter on Human and People's Rights Relating to the Rights of Women in Africa, the "Maputo Protocol") as well as by consensus documents published by several international organisations. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment considers that FGM amounts to torture even if it is legal and/or medicalised (Report to the UN General Assembly, 14 January 2008. See also the "Global strategy to stop health-care providers from performing female genital mutilation", 2010, published jointly by the WHO, UNHCR, UNICEF, UNIFEM and others). Sudan signed the Maputo Protocol on 30 June 2008 but has not yet ratified it.

29. The United Kingdom Home Office Country of Origin Information Report on Sudan of 16 April 2010 includes the following observations on the subject of FMG:

> "25.40 The USSD [United States Department of State] Report 2008 recorded that: '...The law does not prohibit FGM. While a growing number of urban, educated families no longer practiced FGM, there were reports that the prevalence of FGM in Darfur had increased as persons moved to cities. The government actively campaigned against it. Several NGOs worked to eradicate FGM.' The UNICEF Sudan country page, accessed 15 January 2010, reported that '[FGM] and cutting affects 68 per cent of women and girls – mostly in the north of Sudan.'
>
> 25.41 UNICEF reported on 6 February 2009 that the organisation commended the efforts made by the Sudanese government, civil society and local communities to bring an end to the practice of FGM in the country.
>
> 'The dangers that female genital mutilation and cutting create for girls and women have been recognized by the government, religious leaders, health professionals, community elders and individual families in Sudan, and we applaud the collective efforts now being taken to eradicate the practice entirely. It is unacceptable that any girl should face this dangerous and unnecessary violation of her rights,' noted UNICEF Acting Representative Dr. Iyabode Olusanmi.
>
> 25.42 However, The Sudan Tribune reported on 8 February 2009 that Sudanese activists had slammed a decision by the Sudanese cabinet to drop an article banning the practice of female genital cutting in the country. The report stated that the government took its decision in accordance with an Islamic fatwa on the issue:
>
> 'The Council of Ministers on February 5 dropped the article (13) of the draft Children's Act of 2009, which provides for the ban of female genital mutilation as part of other customs and traditions harmful to the health of the child, and after approval of the draft Children's Act 2009. The cabinet decided to drop the article, which deals with female circumcision, taking into account the advisory opinion of the Islamic Fiqh Academy, which distinguish between harmful circumcision or infibulation (Pharaonic circumcision) and the circumcision of Sunna, a less extensive procedure.

25.43 A press statement issued by UNICEF on 7 January 2010 however stated that the 'article dealing with female genital mutilation/cutting which was taken out of this bill [The Child Act] will be included in the revision of the Criminal Act in the near future'."

30. As regards FGM in Sudan, the Operational Guidance Note on Sudan released in August 2012 by the United Kingdom Home Office cites the following extracts from a country guidance determination issued by the United Kingdom Immigration and Asylum Tribunal (FM (FGM) Sudan CG [2007] UKAIT00060) on 27 June 2007:

"'Significant action is being taken in Sudan, both within government and by NGOs, to combat the practice of female genital mutilation in all its forms. Legal sanctions are, however, unlikely to be applied where a woman has been subjected by her family to FGM'.

...

'There is in general no real risk of a woman being subjected to FGM at the instigation of persons who are not family members. As a general matter, the risk of FGM being inflicted on an unmarried woman will depend on the attitude of her family, most particularly her parents but including her extended family. A woman who comes from an educated family and/or a family of high social status is as such less likely to experience family pressure to submit to FGM. It is, however, not possible to say that such a background will automatically lead to a finding that she is not at real risk.'

...

'The risk of FGM from extended family members will depend on a variety of factors, including the age and vulnerability of the woman concerned, the attitude and whereabouts of her parents and the location and "reach" of the extended family.'

...

'If a woman's parents are opposed to FGM, they will normally be in a position to ensure that she does not marry a man who (or whose family) is in favour of it, regardless of the attitude of other relatives of the woman concerned.'"

31. The "Joint Evaluation of the UNFPA-UNICEF Joint Programme on FGM/C: Accelerating Change 2008–2012" in respect of Sudan, published in July 2013, includes the following:

"In 1983, when Sharia law was introduced, the article prohibiting FGM/C was removed from the penal code.

Since then there have been several attempts to criminalise all forms of FGM/C but none have been successful. The most significant recent setback occurred in 2009, when the Council of Ministers decided to remove Article 13 of the 2009 Child Act, which would have prohibited FGM/C as a harmful practice and tradition affecting the health of children.

Despite limited progress made at the national level, several states in Sudan have managed to pass laws prohibiting all forms of FGM/C. An anti-FGM/C law was passed in the state of South Kordofan in 2008 and is now being used as a model for other states."

32. The United States Department of State's "Country Reports on Human Rights Practices 2014", published on 25 June 2015, reads:

> "Female Genital Mutilation and Cutting (FGM/C): There is no national law prohibiting FGM/C. The states of South Darfur and Red Sea passed laws prohibiting FGM/C as a harmful practice affecting the health of children.
>
> FGM/C is traditionally practiced in the country. According to UNICEF and the UN Population Fund (UNFPA), the national prevalence of FGM/C among girls and women 15-49 years old was 88 percent. Within the country prevalence varies geographically and depends on the custom of local ethnic groups. The 2010 Sudan Household Health Survey indicated considerable variations in the practice of FGM/C from one region to another, from 99.4 per cent in the Northern State compared with a rate of 68.4 per cent in Western Darfur.
>
> Girls are generally cut when they are five to 11 years old. Comprehensive figures were not available for the year. The government and UNICEF reported a shift in attitudes towards FGM/C and observed downward trends in the prevalence of FGM/C between the household health surveys in 2006 and 2010. The 2010 survey concluded 34.5 percent of girls ages five to nine were cut, as compared with 41 percent in 2006. Of girls and women ages 15-19, 37 percent favored FGM/C in 2010, compared with 73 percent in 2006.
>
> The government attempted to curb the prevalence of FGM/C and made public awareness campaigns on the subject a top priority. In 2008 the National Council on Child Welfare, with support from UNICEF, launched the National Strategy to Abolish FGM/C in Sudan (2008-18). Under the strategy the government introduced 'Saleema', a public awareness campaign to counter FGM/C, which received significant attention through local media.
>
> The government agreed to a three-year program with UNICEF, the UNFPA, and the WHO to seek to end FGM/C in the country. In October the government hosted a conference in Khartoum to promote the 'Saleema' campaign and anti-FGM/C initiatives."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicants complained that their expulsion to Sudan would subject them to inhuman and degrading treatment contrary to Article 3 of the Convention. They argued in particular that the third and fourth applicants would be subjected to female genital mutilation in Sudan, with neither the other applicants nor the Sudanese authorities in a position to protect them.

34. Article 3 reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

35. The Government contested that argument.

A. Admissibility

1. The third applicant

36. The Court notes that the third applicant does not wish to maintain the application in so far as it concerns her as she has now been granted a residence permit.

37. The Court considers that, in these circumstances, the applicant may be regarded as no longer wishing to pursue her application, within the meaning of Article 37 § 1 (a) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case.

38. It is therefore appropriate to strike the case out of the list to the extent that it concerns the third applicant.

2. The other applicants

39. The Court notes that the application as brought by the first, second, fourth and fifth applicants is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

40. The applicants submitted that the reason the first and second applicants had not mentioned their fear of their daughters' being subjected to FGM until their third asylum request was that they had believed that the problems faced by the second applicant would suffice for them to obtain asylum. Furthermore, their daughters had not been at risk in the Netherlands, and the first and second applicants had therefore not deemed it a pressing issue to be brought up in the earlier procedures.

41. The applicants underlined that the issue had become more pressing after the family's first asylum request had been rejected and when they were told to leave the Netherlands. During their stay in that country the first applicant had learned more about women's rights and her daughters had expressed their aversion to FGM.

42. The applicants further submitted that the first and second applicants had managed to avoid their elder daughter being subjected to FGM in Sudan by saying that she suffered from asthma and was therefore too sick. Moreover, although the fourth applicant was now indeed outside the age-range during which FGM is generally performed, international material showed that it was by no means uncommon for women to undergo the procedure at a later stage in life (e.g. before marriage or after childbirth).

This was often due to strong pressure exerted by (older) female counterparts in the community.

43. The applicants were, moreover, of the opinion that it was a contravention of the absolute protection afforded under Article 3 for the Government to assume that, since the first and second applicants had failed to demonstrate that they had not received a higher education, they must therefore have received such a higher education. The applicants argued that it had become sufficiently evident during the domestic procedures that the first and second applicants had not had the benefit of a higher education.

44. Lastly, the applicants submitted that international evidential material showed that the effect of education on the choice made regarding the performance of FGM had not proven to be significant and that a substantial proportion of educated families do still practice it, albeit in a less extreme form.

45. The Government argued that, in the light of the Court's established case-law, it was up to the applicants to substantiate that there would be a real risk of a violation of the provision of Article 3 if they were to return to their country of origin.

46. Although the Government acknowledged that FGM is contrary to Article 3 and is common practice in parts of Sudan, they considered that the applicants had failed to establish that the fourth applicant would face a real risk of being subjected to it.

47. Moreover, the Government submitted that the fact that the applicants had only advanced the risk of FGM as part of their third attempt to obtain asylum cast doubts on the veracity of their claim in that respect.

48. The Government also emphasised that in all three asylum procedures the applicants had failed to establish their identity, origin, education history and former place of residence in Sudan. Given that the practice of FGM in Sudan was much more common in the North than in the South, the applicants had therefore not convincingly demonstrated that the fourth applicant risked being subjected to FGM.

49. Finally, the Government held that FGM was traditionally practised on girls aged between 4 and 10, and the fourth applicant was now well past that age. However, when the family had fled Sudan, the daughters had been aged 7 and 10, that is to say at the age when they would both have been at most risk of FGM. Since the first and second applicants had apparently been able to avoid FGM being performed on their daughters up until that point, the Government failed to see why the applicants would be unable to continue with such resistance if they were to return to Sudan.

2. The Court's assessment

(a) General principles

50. The Court reiterates at the outset that the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Marguš v. Croatia* [GC], no. 4455/10, § 129 with further references, ECHR 2014 (extracts)).

51. It also reaffirms that the right to political asylum and the right to a residence permit are not, as such, guaranteed by the Convention and that, under the terms of Article 19 and Article 32 § 1 of the Convention, the Court cannot review whether the provisions of the 1951 Refugee Convention have been correctly applied by the Netherlands authorities (see, for instance, *I. v. the Netherlands* (dec.), no. 24147/11, § 43, 18 October 2011).

52. It is the Court's settled case-law that – as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention – Contracting States have the right to control the entry, residence and removal of aliens. However, expulsion by a Contracting State may give rise to an issue under Article 3 – and hence engage the responsibility of that State under the Convention – where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such circumstances, Article 3 implies an obligation not to deport the person in question to that country. Article 3 principally applies to prevent a deportation or expulsion in cases where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts by the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection (see *N. v. the United Kingdom* [GC], no. 26565/05, §§ 30-31 with further references, ECHR 2008).

53. As to the material date, the existence of such risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012). However, since the applicants have not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive (see *Chahal v. the United Kingdom*,

15 November 1996, § 86, *Reports of Judgments and Decisions* 1996‑V; *M.A. v. Switzerland*, no. 52589/13, § 54, 18 November 2014; and *Khamrakulov v. Russia*, no. 68894/13, § 64, 16 April 2015).

(b) Application of the general principles to the present case

54. It is not in dispute that subjecting a child or adult to FGM amounts to treatment proscribed by Article 3 of the Convention (see, in this context, *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007 *Izevbekhai and others v. Ireland* (dec.), no. 43408/08, 17 May 2011, § 73). Nor is it contested that a considerable majority of girls and women in Sudan have traditionally been subjected to FGM and continue to be, although attitudes appear to be shifting given that the prevalence of FGM in Sudan is gradually declining. The crucial issue for the present purposes is to assess whether the fourth applicant would face a real risk of being subjected to FGM upon her return to Sudan.

55. The Court has, first and foremost, given consideration to the legal position on FGM in Sudan. Despite the fact that there is no national law prohibiting FGM, some provinces – including the province of South Kordofan where the applicants claim to come from – have passed laws prohibiting FGM as a harmful practice affecting the health of children (see paragraphs 31-32 above). The Court has further noted that, although the reported average prevalence rate of FGM in Sudan varies between 68% and 88%, action is being taken in Sudan, both within government and by NGOs, to combat FGM in all its forms and these efforts have resulted in both a perceptible decline in the prevalence of FMG and a noticeable drop in support for this practice (see paragraph 32 above).

56. It appears that in general there is no real risk of a girl or woman being subjected to FGM at the instigation of persons who are not family members. In the case of an unmarried woman, the risk of FGM being practised will depend on the attitude of her family, most particularly her parents but also her extended family and, if a woman's parents are opposed to FGM, they will normally be in a position to ensure that she does not marry a man who (or whose family) is in favour of it, regardless of the attitude of other relatives of the woman concerned (see paragraph 30 above).

57. The Court therefore concludes that the question of whether a girl or young woman will be circumcised in Sudan is mainly one of parental choice and finds it established that when parents oppose FGM they are able to prevent their daughter(s) from being subjected to this practice against their wishes.

58. In this context, the Court notes that the fourth applicant is a healthy adult woman whose parents and siblings are against FGM. The Court further notes that, apart from the third applicant, none of the applicants has been admitted to the Netherlands and it is likely that they will be removed

together, as a family, to Sudan. The Court lastly notes that the applicants' alleged home town is situated in the province of South Kordofan, where the authorities have passed laws prohibiting FGM.

59. In view of the above, the Court does not find that it has been demonstrated that the fourth applicant will be exposed to a real risk of being subjected to FGM and thus to treatment contrary to Article 3 upon return to Sudan. Accordingly, her removal would not give rise to a violation of Article 3 of the Convention. As the allegations of the first, second and fifth applicants are all contingent on the risks to the fourth applicant, it follows that their removal would not give rise to a violation of Article 3 of the Convention, either.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to strike the application out of its list of cases in accordance with Article 37 § 1 (a) of the Convention in so far as it concerns the complaints brought by the third applicant;

2. *Decides* that the remainder of the application is admissible;

3. *Holds* that there would be no violation of Article 3 of the Convention in the event of the removal of the first, second, fourth and fifth applicants to Sudan.

Done in English, and notified in writing on 7 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Luis López Guerra President