OPERATIONAL GUIDANCE NOTE

Kenya

CONTENTS

1. Introduction

1.1 This document provides UK Border Agency caseowners 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. Caseowners must refer to the relevant Asylum Instructions for further details of the policy on these areas.

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

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

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

1.3 With effect from 27 July 2007 Kenya is a country listed in section 94 of the Nationality, Immigration and Asylum Act 2002 in respect of men only. 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, made on or after 27 July 2007, is refused caseowners must certify the claim as clearly unfounded unless satisfied that it is not. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail. Kenya is not listed in section 94 in respect of women. If, following consideration, a claim from a woman is refused, caseworkers may, however, certify the claim as clearly unfounded on a case-by-case basis if they are satisfied that it is. The information set out below contains relevant country information, the most common types of claim and guidance from the courts, including guidance on whether cases are likely to be clearly unfounded.

2. Country assessment

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

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

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

http://centralcontent.fco.gov.uk/resources/en/pdf/human-rights-reports/accessible-hrd-report-2010

2.3 Actors of protection

2.3.1 Caseowners must refer to the Asylum Policy Instruction on considering the protection (asylum) claim and assessing credibility. To qualify for asylum, an individual not only needs to have a fear of persecution for a Convention reason, they must also be able to demonstrate that their fear of persecution is well founded and that they are unable, or unwilling because of their fear, to avail themselves of the protection of their home country. Caseowners should also take into account whether or not the applicant has sought the protection of the authorities or the organisation controlling all or a substantial part of the State, any outcome of doing so or the reason for not doing so. Effective protection is generally provided when the authorities (or other organisation controlling all or a substantial part of the State) take reasonable steps to prevent the persecution or suffering of serious harm by for example operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

2.3.2 Kenyan security forces are made up of the Armed Forces (Army, Navy and Air Force) and the Kenyan National Police Service, which includes some paramilitary forces, used for internal security duties. The Armed Forces operate on the basis of voluntary service with a nine year obligation, and a minimum age of 18 years. The Kenyan military (which numbers approximately 22,000 personnel) is well trained and resourced, in comparison with other countries in the region.[1]

2.3.3 The Kenyan Police Service comprises about 40,000 personnel, and its structure is based upon the old British colonial system. It includes a civilian wing, based in administrative centres and divided into separate operational units including a Criminal Investigation Department (CID), the National Security Intelligence Service, an air wing and a Port Police. An Anti-Corruption Unit reports to the CID. The Police General Service Unit (GSU) is an autonomous paramilitary force dealing with internal security issues. The Tourism Police provide security for tourists.[2] The police are widely considered to be ineffective and corrupt; various observers have reported extra-judicial killings, human rights violations and an atmosphere of impunity.[3]

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

[1] COI Report chap. 8: Kenya December 2011
[2] COI Report chap. 8: Kenya December 2011
[3] USSD: Human Rights report Kenya 2010
[4] USSD: Human Rights report Kenya 2010

human rights activists who had been particularly active with the fact-finding mission were murdered shortly after the mission ended.[5]

2.3.5 The UN Special Rapporteur made a number of observations on the factors contributing to police abuses and impunity; these included a dysfunctional criminal justice system which actively incentivizes police to deal with crime by killing suspects, a lack of internal and external police accountability mechanisms, witness intimidation, and a lack of police training, discipline and professionalism.[6] His findings were rejected by the Government, but the Ministry of Internal Security acknowledged separately that police had killed 308 youths in 2008.[7] The Kenya National Dialogue and Reconciliation Monitoring Review Report, October 2010 made similar observations, and urged the government to make reforms as soon as possible.[8]

2.3.6 In 2008, a Police Oversight Board was set up to hear complaints from the public and recommend disciplinary actions. By the end of 2010, this board was still not functional due to a lack of political will, and concerns expressed by the police at lack of representation.[9]

2.3.7 The Government has taken some steps to improve police accountability and reduce abuse, although progress has been slow. In 2009, the Government inaugurated the National Task Force on Police Reform (NTFPR). Also in 2009, President Kibaki removed Hussein Ali as police commissioner; he had been identified as one of the key officials considered a stumbling block to reform in the police force in official reports. His tenure had been marred by extra-judicial killings of more than 500 Mungiki members in 2007, and also brutal police killings and human rights violations during the 2008 post-election violence. This has been recognised as a positive step by Kenyan society, the NGO community and international observers. The Kenyan media reported that in 2009, several dozen police officers were arrested for petty corruption in the last quarter of the year.[10] From late 2010 to 2011, an escalation in the number of alleged extrajudicial killings perpetrated by the police has been reported, and police impunity remains a serious problem.[11] In March 2010, seven taxi drivers were executed in slums west of Nairobi, and in September 2010, police killed fourteen people and dumped their bodies in Kinale Forest. No trials have yet taken place for these killings.[12]

2.4 Internal relocation.

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

2.4.2 The law provides for freedom of movement and the government generally respects this right

[5] COI Report chap. 8.38: Kenya December 2011
[6] Kenya: 2009 Report of UN Special Rapporteur
[7] USSD: Human Rights report Kenya 2010 section 1a
[8] COI Report chap. 8.10-11: Kenya December 2011
[9] COI Report chap. 8.56: Kenya December 2011
[10] USSD: Human Rights report Kenya 2010 section 4
[11] COI Report chap. 8.60-61: Kenya December 2011
[12] USSD: Human Rights report Kenya 2010 section 1a

in practice.[13] The Constitution states that every person has the right to freedom of movement and the right to leave Kenya, and that every citizen has the right to enter, remain in and live anywhere in Kenya. There are no legal constraints on women's freedom of movement, although some women are prevented from travelling by their husbands.[14]

2.4.3 Interference with the right to freedom of movement is generally limited to residents of the refugee camps at Kakuma and Dadaab. Thousands of refugees are confined to camps in Kenya, denied freedom of movement or choice of residence.[15] Kenya has an informal encampment policy for the majority of refugees in Kenya, restricting their movement to the confines of refugee camps. This policy has not been justified or formalised legally, and violates international human rights law and the rights of refugees to move freely in their country of refuge unless particular conditions are met. The Refugees Act of 2006 (Kenya) brought about the introduction of procedures allowing a small number of refugees (less than 3% in 2009) to move outside the camps with 'movement passes'. These are unlawful according to international law, and are further complicated by a 'security vetting committee' which screens all refugees' applications to move outside the camp. Those refugees found outside the camps without such passes are arrested, fined and sometimes imprisoned for months at a time. Some face abuses by prison guards, and some refugees are turned back or arrested at police checkpoints, even when travelling with movement passes.[16]

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

2.5 Caselaw

VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049
The AIT heard the above case in November/December 2007. It was promulgated in June 2008. This guidance supersedes that in FK (FGM - Risk and Relocation) Kenya CG [2007] UKAIT 00041.

The Tribunal concluded at Paragraph 242:

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. A decision to undergo FGM is said to be one made by the individual woman if an adult and by the parent(s) or other family members (e.g. a grandparent) if a child. However, since the practice is outlawed under the Children Act 2001, it would not appear that an adult could lawfully consent on behalf of a child. A child cannot lawfully consent to such a procedure. In law, an adult woman who does not consent to FGM may only rely upon making a complaint of assault under the criminal law. A woman may be placed under undue pressure by family, including her husband or partner and his family, and/ or community members, to agree to FGM for herself or for her child (see 6 below). There are only one or two examples of prosecution of those who have performed FGM, whether on children or women and sentences have been lenient.

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. A thorough examination of all the relevant factors must be undertaken in each case given the position of

[13] USSD: Human Rights report Kenya 2010 section 2d
[14] COI Report chap. 21.19: Kenya December 2011
[15] COI Report chap. 27.09: Kenya December 2011
[16] Human Rights Watch Welcome to Kenya June 17 2010

women within Kenyan society and the usual need for kinship links in the place of relocation in order to sustain such movement successfully. For example, under the customary law of most ethnic groups, a woman cannot inherit land and must live on the land as a guest of males who were relatives by blood or marriage.

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

6. In general, a woman and/or her child will only be at real risk of FGM if she comes from, or becomes connected by marriage, partnership or other family ties, to an ethnic group (or sub-group) where FGM is practised and 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.

7. There is evidence that the Mungiki seek 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. There is also evidence of the Mungiki imposing political and cultural beliefs upon others, for example by confronting in public women who are wearing trousers, stripping them and forcing them to change into skirts or long dresses.

8. The Mungiki is an organization that both uses and is used by government, with links to some politicians. It is an extremely secretive sect, the origins of which are unclear, whose members are oathed, and which, since at least the 1990s has left behind a trail of violence in its rejection of western culture. It is said to be the politically motivated wing of a religious organization, and to also have an armed wing akin to an army unit. Mostly drawn from the Gikuyu/Kikuyu and inspired by the Mau Mau rebellion of the 1950s against British colonial rule, thousands of young Kenyans flock to the sect. It is claimed by the leadership that it has at least 2 million members around the country, many of whom have infiltrated government organizations, offices, factories and schools, albeit mostly at a low level. They have been involved in battles with the police and have raided police stations to free detained members. Instead of or as well as clubs, machetes and swords, they also use AK-47 assault rifles. The authorities are unwilling or unable to control the Mungiki and the authorities use the Mungiki as agents of political violence, in particular at election time, which has been seen most recently following the first elections of the new millennium and the elections of 27 December 2007.

9. Through its Gikuyu/Kikuyu members who move around the country for work and those who run or are connected to the country wide taxi business (Matatu), the Mungiki has both a presence and an information network, particularly in urban areas and around bus and other transport stations across the country, albeit that the information network is not one that necessarily works speedily.

10. 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, in particular where the appellant is a Gikuyu/Kikuyu woman, when the Mungiki may be expected to take more particular interest in her and in any Mungiki connections that she may have, so that she may, dependant upon her characteristics and history, then become of adverse interest, and persecution or other serious harm may ensue. Although the Mungiki may also target those of other ethnic origin, for example the Luo, for political reasons); and (ii) she can reasonably be expected to live in that place, having regard to the general circumstances prevailing in it and the personal circumstances of the appellant (paragraph 3390 of HC 395). 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 Office and Others* [2006] UKHL 5).

11. In considering internal relocation it is important to bear in mind the religious and/or cultural context, particularly as to whether there is any family or sub-clan support available to the woman in the proposed area of relocation. In general it will be easier for a member of a particular tribe to relocate to an area where there are others from her tribe to provide shared culture and support, rather than relocating to an area populated by a different tribe. Much will depend upon the individual circumstances of the woman and the availability or otherwise of a support structure within the proposed area of return. See also 4 above. In considering the issue of relocation it is

important that the situation of the family and extended family be examined, particularly as to cultural context, education, economic lifestyle and work experience.

JA (Mungiki – not a religion) Kenya [2004] UKIAT 00266
The Tribunal allowed the Secretary of State's appeal against the determination of an Adjudicator who allowed the appeal of a citizen of Kenya on asylum and human rights grounds (Articles 3 and 8).

The appellant claimed that he had suffered persecution from the Mungiki for having abandoned them. Formerly a Christian, he had joined them for a year but on leaving had been detained, beaten and threatened with death on two occasions, the second detention being from a village to which he relocated, because they did not want him to disclose their secrets. He reported one incident to the police but claimed that they took no action. He is now HIV positive and in the UK has married a Sudanese HIV positive woman with three children, who had ELR at the time of the Adjudicator appeal, which was subsequently converted to ILR.

The grounds of appeal pursued before the Tribunal challenged the Adjudicator's finding that the persecution by the Mungiki was for a Convention reason(religion), that the Kenyan government do not offer a sufficiency of protection against the Mungiki, and that the Adjudicator erred in allowing the appeal under Articles 2, 3 and 8 on account of the Respondent's HIV status.

IAT findings:

- The Tribunal reviewed: the Kenya **CIPU report April 2003,** para 6.72, and noted "there is nothing in the section about any belief system."; **The US State Department report on International Religious Freedom October 2001** which states "Whilst religion may have played a role in the formation of the group, observers believe that it is not a key characteristic of the group…"; **The US State Department report on Human Rights published 2003** which states "many observers characterize the Mungiki as a vigilante group or gang because of the criminal activities.." The Tribunal concluded "Given the apparent absence of any belief system…we are not satisfied that the Mungiki are a religious group…..**It (the Mungiki) appears negative about other religions rather than positively asserting any belief system of its own**. **We are not satisfied that any adverse attention from the Mungiki could properly be described as being for a Convention reason**."(paras 9-14)

- On the issue of sufficiency of protection, the Tribunal reviewed the objective evidence and stated "Kenya has a significant internal security system. Paragraph 6.74 of the CIPU report refers to scores of people being arrested during a major crackdown on members of the Mungiki in October 2002….." As to the actions of the Respondent "To report a matter on one occasion and then say no action has been taken, does not establish a lack of sufficiency of protection…. The authorities are clearly willing to deal with Mungiki… "The Adjudicator erred in law… no sufficient evidence to enable him to properly conclude that there is an insufficiency of protection available to the respondent from the authorities in Kenya." (paras 15-16)

- On internal flight: "Mungiki are mainly Kikuyu…Kikuyu do not occupy the whole of Kenya…..no evidence that the Mungiki are particularly organized…nor is there evidence that they operate in all the major towns and cities. No satisfactory evidence that he could not relocate from a safety point of view….no evidence that it would be unduly harsh to expect the respondent to relocate elsewhere." **Adiambo [2002] UKIAT 03536** not binding and distinguishable.(paras 17-19)

- As to HIV status: "no evidence of lack of treatment in Kenya such as to bring the case outside **N [2003] EWCA Civ 1369.** (para 20)

- As to Article 8, although the respondent's wife has ILR, ILR entitles somebody to stay in the UK but does not require them to stay. It is a matter for the respondent and his wife whether she decides to accompany him. The fact that both are HIV positive, the respondent has been here for 4½ years, their relationship is 4 years old and the wife has children (Kenyan citizens) are not exceptional, following consideration of **M (Croatia) [2004] UKIAT 00024.** It would not be disproportionate to require the Respondent to apply for entry clearance as a spouse.(paras 21 –24)

3. Main categories of claims

3.1 This Section sets out the main types of asylum claim, humanitarian protection claim and discretionary leave claim on human rights grounds (whether explicit or implied) made by those entitled to reside in Kenya. Where appropriate it provides guidance on whether or not

an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below.

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

3.3 If the applicant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the applicant qualifies for neither asylum nor Humanitarian Protection, consideration should be given as to whether he/she qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.

3.4 All Asylum Instructions can be accessed via the on the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:

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

3.5 Credibility

3.5.1 This guidance is **not** designed to cover issues of credibility. Caseowners will need to consider credibility issues based on all the information available to them. For guidance on credibility see 'establishing the facts of the claim (material and non-material facts)' in the Asylum Instruction 'considering the protection (asylum) claim' and 'assessing credibility'. Caseowners 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. In all other cases, the caseowner should satisfy themselves through CRS database checks that there is no match to anon-biometric visa. Asylum applications matches to visas should be investigated prior to the asylum interview, including obtaining the Visa Application Form (VAF) from the visa post that processed the application.

3.6 Female genital mutilation (FGM)

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

3.6.2 ***Treatment.*** Female genital mutilation (FGM) is widely practised in Kenya. The actual incidence of FGM is variable, depending on ethnicity and region. Although the law prohibits FGM for children, it is particularly prevalent in rural areas, and is usually performed at an early age. According to UNICEF, one third of women between the ages of 15 and 49 had undergone FGM, and in June 2009 an obstetrician estimated that 32% of women had

suffered from the procedure.[17] FGM frequently leads to birth complications resulting in the death of the baby, the mother or both. The practice of severe forms of FGM contributes to maternal mortality: an estimated 4,500 women die every year due to pregnancy-related complications, many of which are due to FGM.[18]

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

- Universal among the Somali, Abagusii, Kuria, Maasai and Samburu (over 90%)
- Highly prevalent among the Taita Taveta (62%), Kalenjin (48%), Embu (44%) and Meru (42%)
- Practiced to a lesser extent among Kikuyu (34%) and Kamba (27%)
- Not practiced among some ethnic groups, notably Luo, Luhya, Teso and Turkana.[19]

3.6.4 According to the Kenya Demographic Health Survey of 2009, 27% of women nationally have been circumcised, although figures are higher in specific regions. For example, only 1% of women in Western Province have been circumcised, but the figure is 98% in North Eastern Province. Approximately 31% of women in rural areas have been circumcised, but this drops to approximately 17% in urban areas. The proportion of Muslim women who are circumcised is double that of Christian women.[20] Legal reforms have helped to protect female children, but criminalising the practice has also had an adverse effect, in that medical complications related to the practice are frequently not brought to the attention of health services for fear of prosecution. There is some evidence that the overall incidence of FGM is slowly declining in Kenya, although it remains more prevalent within particular ethnic groups. Some reports indicate that the incidence has lessened in younger women and girls, mainly due to increased awareness of legislation and health implications.[21] To a lesser extent, the incidence is beginning to decline within the Somali community in Kenya, who have traditionally practised FGM almost universally.[22]

3.6.5 The Government of Kenya has taken a clear position on the abandonment of FGM and other harmful tribal practices. It is illegal to carry out FGM on females aged 18 or younger, although no similar protection currently exists for women over the age of 18. Article 14 of the Children Act states that: "No person shall subject a child to female circumcision, child marriage or other cultural rites, customs, or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical and psychological development". The penalty for subjecting a child to FGM is 12 months imprisonment, or a fine of 50,000 Kenyan Shillings, or both. Kenya has signed the 2005 Maputo Protocol, which explicitly forbids FGM.[23]

3.6.6 More churches and NGOs are providing shelter to girls who flee their homes to avoid FGM, and many communities and NGOs have introduced 'no cut' initiation rites for girls as an alternative to FGM. [24] In some areas, e.g. West Pokot and Narok 'safe havens' for girls have been set up by various charitable NGOs. In other, Muslim, areas 'Religious Dialogue Conferences have been initiated to combat the myth that FGM is a requirement of Islam, particularly in Garissa and Mombasa.[25] The situation is improving slowly, despite resistance and resentment, but 'alternative rites-of-passage' are gradually persuading tribal

[17] COI Report chap. 21.40: Kenya December 2011
[18] COI Report chap. 22.04: Kenya December 2011
[19] Population Council: FGM Survey
[20] Kenya Demographic Health Survey Chapter 16 Gender-Based Violence 2009 Kenya Health Survey
[21] Population Reference Bureau: FGM Update:2010
[22] FGM and the Somali Community: FGM 2010
[23] COI Report chap. 22.20: Kenya December 2011
[24] COI Report chap. 22.23-25: Kenya December 2011
[25] FIDA Kenya Study on FGM Kenya

elders and others who fear that girls will not learn to be women without such initiation ceremonies.[26], [27] The government has also promoted the use of alternative rites in addition to developing education campaigns in its attempts to end FGM. In June 2009, the Minister of Gender, Children and Social Development supported the development of Kenya's policy for abandoning the practice of FGM. The government launched the National Plan of Action for Accelerating the Abandonment of FGM in Kenya (2008 – 2012). However, there are concerns that the practice is being driven underground.[28]

3.6.7 The available evidence suggests that the ability and willingness of the authorities to protect women from the imposition of FGM is slowly increasing. The number of churches, NGOs and other organisations actively working to protect women and girls from FGM and to end the practice is also steadily increasing. However, the accessibility of such protection is variable, geographically and in terms of the circumstances of individual women. It is easier for women to access protection in areas where FGM is less culturally prevalent. For women and girls in rural areas, particularly in parts of Kenya where FGM remains a culturally desirable practice, the accessibility of protection is likely to be more difficult. Women who are particularly disadvantaged by poverty or illiteracy may be unaware that such protection exists, or prevented from accessing it by circumstantial practicalities.[29]

3.6.8 To date, there have been relatively few prosecutions of FGM practitioners in Kenya, however, the combined approach of criminalisation of FGM, increasing awareness of the adverse health implications of the practice, and promotion of alternative rite of passage ceremonies, together with Government willingness to prohibit the practice, are having a steady impact on the numbers of women and girls being subjected to FGM. The evidence shows that the overall incidence of FGM in Kenya has declined from 38% in 1998, to 32% in 2003, and 27% in 2009.[30] This suggests that the measures above are having some success. This is supported by the NGO 'World Vision', whose spokesperson stated that the incidences of both FGM and early marriage are decreasing.[31] There is also evidence that the incidence of FGM is lower amongst girls who have received secondary education.[32]

3.6.9 There are particular concerns for applicants whose FGM claim includes fear of the Mungiki. The Mungiki have been criticised for encouraging, demanding and enforcing FGM practices upon girls and women in its communities, on the grounds that it is a traditional African practice.[33] The Mungiki are known to force their female family members to undergo FGM. There is no evidence to suggest either that the condition of being married is any protection to women, or that single women are at greater risk. FGM may also be forced upon the wives of Mungiki defectors. Anti-FGM legislation provides protection to children and girls below the age of 18; it does not address the protection needs of adult women. However, there are community centres, particularly in the southern areas of the Rift Valley, that now provide sanctuary to young women and girls who have escaped forced FGM.[34]

See also: Actors of protection (section 2.3 above)

Internal relocation (section 2.4 above)

Caselaw (section 2.5 above)

3.6.10 ***Conclusion.*** Caseowners must assess the credibility of the applicant and the evidence they submit in accordance with the relevant Asylum Instructions (see para 3.2 – 3.5 above). Though an average of 27% of Kenyan women have undergone FGM, with a prevalence

[26] COI Report chap. 22.26-27: Kenya December 2011 & FIDA Kenya Study on FGM Kenya
[27] The Guardian, April 29 2011: Female Genital Mutilation in Pokot
[28] COI Report chap. 22.20-21: Kenya December 2011
[29] FIDA Kenya Study on FGM Kenya
[30] COI Report chap. 22.19: Kenya December 2011
[31] COI Report chap. 22.26: Kenya December 2011
[32] Women's Global Education Project: WGEP Kenya
[33] Landinfo Report 2010: Mungiki: Abusers or Abused?
[34] Australian Government Refugee Review Tribunal Country Advice Kenya July 2010

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

3.6.11 Caseowners should consider cases in which there is no Mungiki element within the context of the AIT guidance on internal relocation at Paragraph 242(10) and 242(11) of the Country Guidance case above together with updated reports on the developing country situation. In general internal relocation is likely to be a viable option in such cases.

3.6.12 For cases where there is a Mungiki element, caseowners should consider cases on their individual merits, with particular reference to Paragraph 242(9) of the Country Guidance case, together with updated reports on the country situation. Given the increasing efforts of the Kenyan authorities to crack down on suspected Mungiki members, and also that Kenya has an area of 224,081 square miles, with a population of approximately 40,000,000 people, internal relocation may be feasible in individual cases.

3.7 The Mungiki

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

3.7.2 ***Treatment***: The Mungiki sect is the largest of several organized armed criminal groups in Kenya. They operate primarily in the slums of Nairobi, in Central Province and in the Rift Valley. They claim to offer poor residents in slum areas protection and social services, but their chief mode of operation is extortion and violence. Gross human rights violations against citizens, adversaries and defecting members have been attributed to them.[35] However, suspected Mungiki members have also been targeted and killed by the police. In March 2009, Oscar Kamau King'ara, executive director of the local NGO Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK), and Paul Oulu, OFFLACK's programme coordinator, who had been interviewed by the UN Special Rapporteur in February 2009 were murdered, reportedly on the orders of senior police. The authorities claimed that the men were suspected of having ties with the Mungiki.[36]

3.7.3 Mungiki members are primarily from the Kikuyu tribal group. They represent themselves as protectors of Kikuyu culture posing as a traditional religious group. The Mungiki are said to reject "Western" values and belief systems. Instead, they support the return to traditional tribal customs and beliefs, including female circumcision. They are known for their extreme violence, including beheading and dismembering their victims, and are one of the most feared criminal organisations in Kenya. In 2002, the Kenyan government outlawed the sect after it was linked to a series of killings in Nairobi but, despite the ban, the group has remained active. The ban has remained in effect since then. They are involved in a number of violent criminal activities, including extortion and execution-style killings. Members of the sect are known to particularly target matatu (minibus) operators for extortion. They also charge "protection fees" to slum residents and demand money for basic services such as water and electricity.[37]

3.7.4 The matatu industry is an unregulated method of road transport mainly associated with urban commuter routes in Nairobi and Mombasa, though there are inter-city matatus and rural matatu services as well. Five persons travelling in a 'matatu' minibus in Nairobi in

[35] Landinfo Report Kenya 2010: Mungiki: Abusers or Abused?
[36] USSD: Human Rights report Kenya 2010 section 1a
[37] Landinfo Report Kenya 2010: Mungiki: Abusers or Abused?

October 2009 were shot and killed by the police, who claimed they were armed Mungiki members. Residents of the area denied this, stating that they were genuine matatu operators. No action was taken against the police involved in the shootings. In March 2010, the police reportedly killed seven suspected Mungiki members in Nairobi, claiming that they were involved in extortion against motorcycle taxi drivers.[38]

3.7.5 Mungiki Members are generally unemployed youths of the Kikuyu ethnic group. Poverty and unemployment in Kenya are thought to make youths susceptible to the group's pressures. Media reports suggest that young men who try to avoid being recruited face harassment and threats from existing members.[39] The Mungiki operate in secrecy and the group is described as "amorphous" with its members largely unrecognisable to outsiders. They do not have a highly centralised organisational structure and may have sub-organisations that are in competition with each other. It is reported that most members are poor, with little or no education. Leaders, particularly those with a more public profile, tend to have university degrees.[40]

3.7.6 The Mungiki have claimed connections to the nation's political elite, although the group is not formally connected to the state. The Kenyan police have been accused by several observers of complicity with the Mungiki and of allowing the sect to 'operate with impunity'. The evidence supports this view, despite the lethal crackdowns perpetrated by the police in recent years and notwithstanding some police attempts to halt extortion by Mungiki members.[41] Violent clashes between Matatu operators, police and suspected Mungiki members occur regularly.[42]

3.7.7 In June 2010 the President of Kenya assented to the Witness Protection (Amendment) Act, which paved the way for the establishment of an independent and autonomous Witness Protection Agency. A Witness Protection Advisory Board, chaired by the Attorney General was appointed amid concerns by civil society that it lacks neutrality, considering state organs have been accused of perpetrating violations during the post-election violence. In June 2010 the Government signed commitments to protect all witnesses identified by the Chief Prosecutor. In its first meeting in September 2010, the Witness Protection Advisory Board approved the protection of 20 witnesses who have applied for cover, and the recruitment of directors and staff.[43]

3.7.8 Following the murder of Oscar Kamau King'ara and Paul Oulu of OFFLACK, the Government accused OFFLACK of being a front for the Mungiki, and criticised their role in providing information on extra-judicial killings of Mungiki members to the UN Special Rapporteur. In 2008, OFFLACK had reported that police were linked to the continued disappearance and deaths of suspected Mungiki members. Police threatened and intimidated witnesses to the killings, and four witnesses went into exile. The prime minister requested international assistance to investigate these murders, but the minister for foreign affairs subsequently rejected such assistance, and no credible investigation had been carried out by mid 2010.[44]

3.7.9 The police have responded with great brutality to Mungiki criminality. In June 2009, the UN Special Rapporteur, following his earlier visit to Kenya, condemned the Mungiki and urged the government to deal with their criminality as a priority. He also reported that police efforts to crush the Mungiki were too extreme, and actively undermined the rule of law.[45] Notwithstanding reports that some police officers have operated in collusion with Mungiki members, the government have taken steps to deal with criminal gangs, including Mungiki.

---

[38] USSD: Human Rights report Kenya 2010 section 1a
[39] COI Report chap. 9.11: Kenya December 2011
[40] Landinfo Report Kenya 2010: Mungiki: Abusers or Abused?
[41] COI Report chap. 9.13-15: Kenya December 2011
[42] Daily Nation, 28/9/2011: http://www.nation.co.ke/News/regional/Two+hurt+in+matatu+Mungiki+clash/-/1070/1244834/-/15jmwdbz/-/index.html
[43] COI Report chap. 8.15-16: Kenya December 2011
[44] USSD: Human Rights report Kenya 2010 section 1a
[45] Landinfo Report Jan 2010 Mungiki: Abusers or Abused?

The government has enacted a new law to deal with organised crime and criminal groups. The law provides for stiff penalties for involvement in organised crime. The coming into force of this law coincided with the resumption of a nationwide 'crackdown' on the Mungiki.[46]There is conflicting evidence regarding the safety on return of applicants claiming to be defectors from the Mungiki. The Independent Medico-Legal Unit (IMLU) has stated that Mungiki members who desert the organisation are at serious risk of being killed, or at least severely harassed. They reported that many police officers are involved in Mungiki business, and if there is risk of their connections being exposed, they choose to eliminate the deserter. IMLU stated that most attacks on protected Mungiki members are perpetrated by the police themselves, although the Mungiki do carry out revenge attacks. IMLU have provided shelter to ex-Mungiki members at secret locations. In contrast, the Kenyan National Commission on Human Rights (KNCHR) has said that defected Mungiki members will be left alone providing they do not threaten the movement's interests.[47]

3.7.10 The Mungiki have relatively extensive networks, in part due to their extortion rackets involving matatu drivers and conductors. However, the Mungiki membership is composed mainly of Kikuyu; their field of operation extends through Central Province, Nairobi and the Rift Valley following their ethnic distribution. They are said to have reduced in number and influence as a result of numerous crackdowns by the police within the last 2 to 3 years.[48] Kenya has an area of 224,961 square miles, and a population of 40.8 million (UN figures 2010) and it is therefore likely that most individuals with a fear of Mungiki would be able to relocate in an area beyond their influence.

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

Internal relocation (section 2.4 above)
Caselaw (section 2.5 above)

3.7.12 ***Conclusion***: Caseowners must assess the credibility of the applicant and the evidence they submit in accordance with the relevant Asylum Instructions (see paras 3.2 – 3.5 above). The evidence suggests that there may be a risk of harm to some ex-Mungiki members from within the organisation.

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

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

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

3.8 Prison conditions

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

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

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

3.8.3 Prison and detention centre conditions continued to be harsh and life-threatening during 2010.[49] The Kenya National Commission on Human Rights (KNCHR) conducted an assessment of prisons during 2009 and concluded that torture, degrading and inhuman treatment, insanitary conditions and extreme overcrowding were endemic in Kenyan prisons. The assessment also documented assaults and beatings of prisoners by prison staff at Nairobi Remand and Meru Women's Prisons, and also at Kisumu Women's Prison. The Commissioner of Prisons reported that prisons were filled to 200% capacity during 2010. The Legal Resources Foundation Trust stated that on the last day of 2010, there were 49,757 prisoners being held in prisons with a recommended capacity of 22,000.[50]

3.8.4 In 2009, prison personnel stated that the rape of male and female prisoners, mainly by fellow inmates, continued. Other reports stated that it is common for prison officials to rape female inmates. Many prisoners die annually from infectious diseases spread by overcrowding, lack of sanitation and inadequate medical treatment. During 2010, reportedly 218 prisoners died while incarcerated. Prisoners are frequently kept in solitary confinement for much longer than the legal maximum of 90 days. Prisoners and detainees at some prisons are often denied the right to contact relatives or lawyers, and family members wanting to visit prisoners face numerous physical and bureaucratic obstacles, each requiring a bribe to overcome.[51] There are no separate facilities for minors in pre-trial detention. Civil society activists witnessed young children, women and men sharing the same cells. According to reports, prisons do not have facilities, lessons, beds or special food for children, and they do not have access to medical care.[52]

3.8.5 Prisoners generally receive three meals per day in prison, but portions are reportedly inadequate, and half rations are frequently given as punishment. Water shortages are a frequent problem, although the government did build one well and improved two water treatment plants during 2010. Medical care for those with tuberculosis or HIV/AIDS is poor, and such prisoners are not provided with food supplements to enable them to digest specialist medication.[53] However, during 2010, prisoners were generally able to make complaints to the courts and have the ability to send paralegal-written letters to the court without appearing personally. Some magistrates and judges made visits to prisons, providing further opportunities to report grievances. The KNCHR have a mandate to visit prisons and investigate allegations of inhumane conditions. The Commissioner of Prisons reported that human rights training took place in prisons during 2010, and there are reportedly intelligence officers working in prisons to report on conditions and any abuse.[54]

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

---

[49] USSD: Human Rights report Kenya 2010 section 1c
[50] COI Report chap. 12.02: Kenya December 2011
[51] USSD: Human Rights report Kenya 2010 section 1c
[52] USSD: Human Rights report Kenya 2010 section 1c
[53] USSD: Human Rights report Kenya 2010 section 1c
[54] COI Report chap. 12.02: Kenya December 2011

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

4. Discretionary Leave

4.1 Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See Asylum Instructions on Discretionary Leave) Where the claim includes dependent family members consideration must also be given to the particular situation of those dependants in accordance with the Asylum Instructions on Article 8 ECHR.

4.2 With particular reference to Kenya the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should *not* imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instructions on Discretionary Leave and the Asylum Instructions on Article 8 ECHR.

4.3 Minors claiming in their own right

4.3.1 Minors claiming in their own right who have not been granted asylum or HP can only be returned where (a) they have family to return to; or (b) there are adequate reception and care arrangements. At the moment we do not have sufficient information to be satisfied that there are adequate reception, support and care arrangements in place for minors with no family in Kenya. Those who cannot be returned should, if they do not qualify for leave on any more favourable grounds, be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions.

4.4 Medical treatment

4.4.1 Applicants may claim they cannot return to Kenya due to a lack of specific medical treatment. See the IDI on Medical Treatment which sets out in detail the requirements for Article 3 and/or 8 to be engaged.

4.4.2 Health services in Kenya are provided at varying levels, ranging from small clinics serving villages and small communities, up to large teaching hospitals. Services are pluralistic; the public sector accounts for approximately 52% and the rest are provided by the private sector. This comprises various faith based charitable organisations, non-government organisations and also private profit-making facilities.[55] The healthcare system is based on a referral system extending from Kenyatta National Hospital in Nairobi, through provincial and district hospitals to rural health centres and dispensaries.[56]

4.4.3 The government has introduced a system of full or partial fee waiver for access to government hospitals, in order to increase access to health care for indigent patients. However, a lack of progress in some key areas reportedly undermines this aim. A shortage of medical staff, unequal distribution of medical staff and health facilities and frequent shortages of medical supplies including family planning supplies disadvantage the

[55] COI Report chap. 24.01-2: Kenya December 2011
[56] International Centre for Aids Care & Treatment Programme: Kenya: Health care system

poorest.[57] A limited number of hospitals provide facilities for kidney dialysis. The Kenyatta National Hospital provides treatment for cancer, but is reportedly the only public hospital offering such treatment and care.[58]

4.4.4 HIV/AIDS carries a heavy social stigma in Kenya, and many citizens reportedly avoid testing due to social pressures. Many women who are HIV+ do not tell their husbands for fear of being banished from the home. Those who are particularly at risk of HIV infection, including sex workers and men who have sex with men, are often too afraid to seek diagnosis, or to inform others of their HIV+ status, due to their fear of stigma and social disapprobation.[59] However, the government and various private organisations do provide a network of more than 8000 counselling and testing centres providing free HIV/AIDs diagnosis. The diagnosis of other sexually transmitted infections is available at hospitals and clinics throughout the country. The number of health facilities providing antiretroviral therapy increased from 731 in 2008 to 943 in 2009.[60]

4.4.5 A Kenyan not-for-profit organisation, Liverpool Voluntary Counselling, Testing, Care and Treatment (LVCT) provides a number of HIV care services. According to its website, it provides technical assistance to the government and partners in strengthening responses to HIV prevention and care. It provides HIV counselling and testing services, treatment and care programmes, and services to vulnerable and high risk groups, e.g. survivors of sexual violence, the deaf, men who have sex with men, young people and sex industry workers.[61] The International Centre for AIDS Care & Treatment Programmes (ICAP) support a full range of HIV/AIDS services, including antiretroviral therapy for adults and children, care for HIV-infected pregnant women and their children, and integrated TB/HIV care and treatment.[62]

4.4.6 Kenya has little provision for mental health, although mental illness is common in Kenya. The government does have a mental health programme, but spends only 0.01% of its health budget on mental health. There is only one psychiatrist for every 500,000 people, and only a third of these work in the public sector. The remainder provide expensive private treatment. Other, non-health sectors, including education, the prison service, the police, community development, gender and children, regional administration and local government all have significant concerns regarding mental health, but general health programmes have been slow to recognise the importance of mental health provision.[63] This may partly be due to a common perception amongst many Kenyans that mental illness is caused by demons and evil spirits, and therefore best treated by faith healers or witch doctors rather than medical doctors.[64], [65]

4.4.7 The Article 3 threshold will not be reached in the majority of medical cases and a grant of Discretionary Leave will not usually be appropriate. Where a caseowner considers that the circumstances of the individual applicant and the situation in the country reach the threshold detailed in the IDI on Medical Treatment making 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.

5. Returns

5.1 There is no policy which precludes the enforced return to Kenya of failed asylum seekers who have no legal basis of stay in the United Kingdom.

5.2 Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a

[57] COI Report chap. 24.03: Kenya December 2011
[58] COI Report chap. 24.14, 19: Kenya December 2011
[59] AVERT International HIV & AIDS charity: HIV & AIDs in Kenya
[60] COI Report chap. 24.10: Kenya December 2011
[61] COI Report chap. 24.12: Kenya December 2011
[62] International Centre for Aids Care & Treatment Programme: Kenya: Health care system
[63] COI Report chap. 24.21-22: Kenya December 2011
[64] COI Report chap. 24.23: Kenya December 2011
[65] IRIN 2011: Kenya: Poor State of Mental Health

travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should however be considered in line with the Immigration Rules.

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

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

www.refugee-action.org/ourwork/assistedvoluntaryreturn.aspx

Country Specific Litigation Team
Immigration Group
UK Border Agency

February 2 2012