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The Protection of Asylum Seekers Against Female Genital Mutilation
in the UK

M.B.S. Thesis

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ABBREVIATIONS

AIT Asylum and Immigration Tribunal

API Asylum Policy Instruction

CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEAS Common European Asylum System

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

COI Country of Origin Information

CRC Convention on the Rights of the Child

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

FGC Female Genital Cutting

FGM Female Genital Mutilation

FGM/C Female Genital Mutilation/Cutting

FGMPO Female Genital Mutilation Protection Order

FTT First-Tier Tribunal

IAC Immigration and Asylum Chamber

IAT Immigration Appeal Tribunal

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IDT Inhuman or degrading treatment

IJ Immigration judge

LR Legal representative

PSG Particular social group

SSHD Secretary of State for the Home Department

UDHR Universal Declaration of Human Rights

UNHCR United Nations High Commissioner for Refugees

UT Upper Tribunal

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INTRODUCTION

‘[O]n no conceivable view [is] the practice of female genital mutilation capable of being a reason for persecution: [...] female genital mutilation [is] a lawful practice which [is] engaged in by almost all of Sierra Leone's ethnic groups.’¹

An adjudicator in 2003

‘It is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention.’²

Lord Bingham in 2006

Female Genital Mutilation (FGM) has been recognised as a human rights violation both internationally and in the UK. The UK takes a firm stance against the practice and has pledged to provide the best possible protection against it for UK nationals and residents. Yet, when it comes to FGM as a ground for seeking asylum, the UK is less eager to protect. The UK outlawed FGM in 1985, still as recently as 2003 it was not universally accepted that FGM is a form of persecution, as evident from the first quotation above. Though this attitude has changed, as the second quotation makes clear, women seeking asylum due to a fear of FGM still face problems establishing a right to protection.

Indeed, frequently decisions by the Home Office, tribunals and courts are flawed and thus overturned on appeal. Such successful appeals are the topic of this paper, which, by analysing them, aims to identify why mistakes are made in deciding FGM asylum claims and how this can be avoided. The analysis will show that the protection of asylum seekers against FGM in the UK, like the protection of UK nationals and residents, largely depends on understanding the cultural context of the practice. Even though both UK nationals or residents and asylum seekers are at risk of the same type of harm, the protection of the latter is limited by the government's omission to provide the same breadth of information on the cultural context of FGM to professionals dealing with asylum seekers that is provided to those who work with UK nationals or residents.

¹ *Johnson v SSHD* (2004) CSOH, 2005 SLT 393, 1.

² *K v SSHD, Fornah v SSHD* [2006] UKHL 46, [2007] 1 AC 412 [25].

As a basis for the discussion of successful appeals in FGM cases, the paper first provides an overview of both the complex topic of FGM and the equally complicated asylum and appeals systems, and looks at FGM in international and UK domestic law. The first chapter introduces the practice of FGM, describing in detail medical and cultural issues related to the practice in order to illustrate the complexities surrounding FGM, the role it plays in women's lives and the consequences of opposing it.

The second chapter begins by looking at FGM in a human rights context; conceiving of FGM as a human rights violation forms the basis both for outlawing FGM in the UK as well as for viewing it as a form of persecution and thus as a reason for seeking asylum. The chapter goes on to consider UK domestic law on FGM and government policy on the practice in order to identify how effectively UK nationals and residents are protected against FGM. The chapter then touches on whether this protection extends to asylum seekers.

Chapter three provides the basis for a detailed discussion of the protection of asylum seekers against FGM by introducing the UK asylum and appeals systems. It then summarises successful appeals against refusals of protection where the basis of the claim was a fear of FGM. The cases discussed were heard at different tribunals and courts over a span of 14 years. In addition, the section aims to broadly identify the reasons why the appeal was successful in order to categorise the cases for analysis in chapter four.

Chapter four analyses the mistakes identified in chapter three: an incorrect assessment of the reality of the risk of undergoing FGM, a wrong determination regarding membership of a particular social group (PSG) and a flawed finding on the feasibility of internal relocation. It also outlines the evidence, guidelines and training judges and representatives can access when dealing with FGM cases. The chapter explains the process of refugee status determination and aims to identify whether there are any challenges specific to FGM claims and how they can be overcome in order to improve decision making.

Throughout, the paper is supplemented by opinions of professionals who work in the field of immigration and asylum law, two immigration judges (IJs) and four legal representatives (LRs), two of whom are barristers, one a solicitor and one an

immigration caseworker, and all of whom have dealt with FGM cases.³ Their experiences and recommendations were obtained in semi-structured interviews conducted in July 2015, transcripts of which can be found in the appendix to this paper. Attempts were made to include Home Office case owners and Treasury solicitors who have represented the Home Office in FGM asylum cases but all interview requests were declined.

Since interview questions aimed at eliciting information about FGM cases in particular, responses by those professionals who have dealt with a high number of FGM cases and who currently practice are perhaps somewhat more relevant than answers by those who have dealt only with a small number of FGM cases and/or no longer practice.⁴ Certainly, however, the sample of professionals interviewed and the number of cases they have dealt with are too small to draw universally valid conclusions from their responses. Nevertheless, all interviewees offered useful insights into the adjudication of FGM asylum cases and their answers illustrate some of the problems encountered in decision making, without any claim to completeness.

The paper concludes with an evaluation of the quality of protection of asylum seekers against FGM in the UK and sums up issues that arise frequently in FGM asylum claims as well as recommendations on how mistakes can be avoided and decision making improved.

This paper concentrates on asylum claims made due to a fear of undergoing FGM, even though there are other FGM-related asylum claims, which will briefly be touched on in the course of the analysis. A fear of undergoing FGM, however, is the primary reason advanced for seeking protection in all of the case law analysed; it is

³ Those professionals who wished to remain anonymous are designated as 'IJ A', 'LR A', 'LR B' and 'LR C'. IJ Geoffrey Care and LR Dr Kathryn Cronin agreed to the use of their real names; they will be abbreviated 'GC' and 'KC', respectively.

⁴ IJ A has been a judge since 1992 and has dealt with a 'handful [of FGM cases] each year.' [Interview with IJ A, Immigration Judge of the UK Upper Tribunal, Immigration and Asylum Chamber (London, UK, 22 July 2015), questions 2 and 11]; Geoffrey Care retired in 2003 and has adjudicated '[n]o more than two or three' FGM cases. [Interview with GC, Chairman of the UK Immigration Appeal Tribunal, retired (Odense, Denmark, 27 July 2015), questions 2 and 10]; LR A is a barrister currently practising and has taken on 'several dozens' of FGM cases. [Interview with LR A, Immigration Barrister (Manchester, UK, 14 July 2015) questions 1 and 7]; LR B is an immigration caseworker and has dealt with four FGM cases. [Interview with LR B, Immigration Caseworker (Manchester, UK 15 July 2015) questions 1 and 6]; Dr Kathryn Cronin is a practising barrister who has 'done scores of' FGM cases. [Interview with KC, Immigration Barrister (London, UK, 16 July 2015) questions 1 and 7]; LR C 'was a solicitor in practice until September 2014' and has taken on '[a]pproximately three [FGM cases] between 2009/2010 and 2014.' [Interview with LR C, Immigration Solicitor (Berlin, Germany, 12 July 2015) questions 1 and 4].

further the issue which the discourse around FGM in the UK focuses on and a type of claim all IJs and LRs interviewed have dealt with.⁵

Almost a decade after the House of Lords judgement quoted above made it clear not only that FGM is a form of persecution but also that in order to adjudicate an asylum claim based on FGM the practice must be examined in its social and cultural context,⁶ it is this context which is still too often misunderstood or dismissed even though it is of paramount importance. The first chapter is dedicated to presenting as many of the complexities surrounding the practice as possible and to countering some frequent misconceptions.

⁵ IJ A, question 10; GC, question 9; LR A, question 6; LR B, question 5; KC, question 6; LR C, question 6.

⁶ *K and Fornah* (n 2) [53] and [93].

1. FEMALE GENITAL MUTILATION

FGM is a traditional practice that exists in different forms in many countries and which is being discussed controversially by anthropologists, human rights activists, medical practitioners and those affected by the practice, to name but a few. All these and others have different opinions about FGM, whether the practice is beneficial or harmful, and about the best way to treat FGM, either as an integral part of many cultures that should be tolerated or as a human rights violation that has to be stopped.

There are many different reasons for practising FGM as it has different meanings in different cultures, which, combined with women's general status in societies affected by FGM, has an effect on their ability to avoid undergoing the practice. However, not every community affected by FGM has been studied yet, those that have been studied may have changed since they were last described by anthropologists or other researchers, and even the most up-to-date findings for one community cannot be used to make general claims about FGM. All of this leads to uncertainties in talking about FGM. Because of the complexities and uncertainties surrounding the practice some of the discourse about FGM is informed by generalisations and unsubstantiated beliefs, which may lead those confronted with FGM, for example asylum decision makers, to drawing wrong conclusions about the people it affects.

As mentioned already, FGM is a controversial topic and while this paper attempts to present different views and opinions on the subject, in dealing with the protection of asylum seekers against FGM it is necessarily biased in regarding FGM as harmful in so far as women who fear it should be able to seek protection from it. This bias, some will argue, is already apparent in the use of the term "FGM", as controversy begins with the terminology used to describe the practice, which is the subject of the first subchapter.

1.1. TERMINOLOGY AND DEFINITION

The term FGM has been criticised for being limited in representing a 'specific moral and ideological' stance, ie the stance that FGM is a harmful practice and should be

abolished.⁷ It is, however, this stance exactly that allows for asylum claims based on FGM and thus, as well as in line with the use of this term by the World Health Organization (WHO) and the United Nations,⁸ as well as in UK government publications, this paper will use the term “FGM”, except when directly quoting publications that have opted for the use of a different term.

The term “mutilation” best describes what awaits women and girls who are subjected to this practice and makes clear why women who fear FGM seek asylum for protection from it. The Oxford English Dictionary defines “mutilation” as ‘[t]he act or process of disabling or maiming a person by wounding a limb or organ.’⁹ The term “cutting”, on the other hand, used in the supposedly more neutral “Female Genital Cutting” (FGC), is insufficient to describe the practice, since according to the WHO definition of FGM, the procedure constitutes more than ‘to make [an] incision,’ as the term “cutting” suggests.¹⁰ 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.’¹¹ The practice is divided into four types:

1. Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
2. Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are "the lips" that surround the vagina).
3. Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.
4. Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.¹²

⁷ Janice Boddy, ‘Violence Embodied? Circumcision, Gender Politics and Cultural Aesthetics’ in RE Dobash and RP Dobash (eds), *Rethinking Violence Against Women* (Sage Publications 1998) 80.

⁸ WHO, ‘Eliminating Female Genital Mutilation: An Interagency Statement’ (*World Health Organization* 2008) <http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf?ua=1> accessed 16 April 2015, 22.

⁹ ‘mutilation, n’ (*OED Online*, OUP April 2015) <www.oed.com/view/Entry/124329> accessed 16 April 2015.

¹⁰ ‘cut, v’ (*OED Online*, OUP April 2015) <www.oed.com/view/Entry/4634> accessed 16 April 2015.

¹¹ WHO, ‘Female Genital Mutilation, Fact Sheet N°241’ (*World Health Organization* 2014). <www.who.int/mediacentre/factsheets/fs241/en/> accessed 15 April 2015.

¹² *ibid.*

Reports exist of other forms of FGM, such as ‘cutting of the inner genitalia’, to facilitate sexual intercourse with young girls and childbirth.¹³

Some publications use the term Female Genital Mutilation/Cutting (FGM/C) as a compromise, but this term also includes the inadequate “cutting”. Another term frequently used, especially by affected resident communities, is “Female Circumcision”, a term similarly inappropriate, as circumcision is defined as the ‘action of circumcising; practised as a religious rite by Jews and Muslims’,¹⁴ thus likening FGM to male circumcision, though FGM is ‘considerably more invasive’ than male circumcision.¹⁵ Some women who have undergone FGM prefer the term circumcision and object to the use of the term mutilation because they do not see themselves as mutilated and do not wish to be victimised, or because they feel patronised by Western vocabulary and condemnation of their culture.¹⁶

It is, however, possible to distinguish between the act of mutilating a woman and the woman who has survived this mutilation. In an attempt not to engage in the ‘polemical, preachy, advocacy-driven’ writing often associated with the use of the term FGM, this paper will not dismiss women’s reasons for performing FGM as “backward” or these women as ‘hapless victims’.¹⁷ Instead, the terms “FGM survivor” rather than “victim” and “cut woman” rather than “mutilated woman” will be used. When speaking of women and girls who have undergone or may undergo FGM, the term “affected communities” rather than “practising communities” will clarify that not every woman and girl in such a community condones or carries out FGM. In order to distinguish between affected communities in regions where FGM is traditionally¹⁸ practised (eg Sierra Leone) and in regions where it is not (eg the UK), the former will be referred to as affected resident communities and the latter as

¹³ Bettina Shell-Duncan and Ylva Hernlund, ‘Female “Circumcision” in Africa: Dimensions of the Practice and Debates’ in Bettina Shell-Duncan and Ylva Hernlund (eds), *Female “Circumcision” in Africa* (Lynne Rienner Publishers 2000) 5.

¹⁴ ‘circumcision, n’ (*OED Online*, OUP April 2015) <www.oed.com/view/Entry/33270> accessed 16 April 2015.

¹⁵ Human Rights Watch, ‘Q&A on Female Genital Mutilation’ (*Human Rights Watch*, 16 June 2010) <www.hrw.org/news/2010/06/10/qa-female-genital-mutilation> accessed 16 April 2015.

¹⁶ Shell-Duncan and Hernlund (n 13) 6.

¹⁷ Janice Boddy, ‘Gender Crusades: The Female Circumcision Controversy in Cultural Perspective’ in Ylva Hernlund and Bettina Shell-Duncan (eds), *Transcultural Bodies: Female Genital Cutting in Global Context* (Rutgers University Press 2007) 52.

¹⁸ While in most affected communities FGM has been practised for centuries, in some the practice has been adopted much more recently, for example, girls in the village of Myabé in southern Chad began undergoing FGM ‘as a fashion statement’ and against the wishes and traditions of their community only in the 1980s. [Lori Leonard, ‘Adopting Female “Circumcision” in Southern Chad: The Experience of Myabé’ in Bettina Shell-Duncan and Ylva Hernlund (eds), *Female “Circumcision” in Africa* (Lynne Rienner Publishers 2000) 181.]

affected migrant communities. Women and girls from affected resident communities who flee those communities due to a fear of FGM and arrive in a receiving country will be called affected asylum seekers. They are the subject of this paper and as such their experiences also contribute to the terminology used here; they seek protection from a practice they oppose and fear. Even though members of their former resident communities who condone the practice have the right to have their traditions respected and the right to call this tradition “circumcision”, affected asylum seekers, likewise, have the right to avoid what to them is not a mere cut but a mutilation, whatever its extent.

This extent of FGM, its prevalence, consequences and reasons for performing it vary considerably. These issues are the topic of the next subchapter.

1.2. PREVALENCE, MEDICAL AND CULTURAL ISSUES

As mentioned above, there are different types of FGM. Types varies for different affected resident communities, eg in Mali the most common type of FGM is excision¹⁹ while in Yemen clitoridectomy is most common.²⁰

It has been claimed that FGM is practised

in more than 20 African countries, as well as Malaysia, Indonesia, southern parts of the Arabian peninsula, Pakistan, some communities of the former Soviet Union, the United Arab Emirates, Oman, Bahrain, South Yemen, Peru, Brazil, eastern Mexico, and among Australian aborigines.²¹

Other sources also mention the ‘Bedouins in the Negev region of Israel’,²² Iraq,²³ some provinces in Iran²⁴ and Thailand,²⁵ ‘the Bohra Muslims in India’ and affected

¹⁹ Terre des Femmes, ‘Mali’ (*Terre des Femmes* 2013) <www.frauenrechte.de/online/index.php/themen-und-aktionen/weibliche-genitalverstuemmung2/unser-engagement/aktivitaeten/genitalverstuemmung-in-afrika/fgm-in-afrika/1460-mali> accessed 14 June 2015.

²⁰ Terre des Femmes, ‘Jemen’ (*Terre des Femmes* 2013) <www.frauenrechte.de/online/index.php/themen-und-aktionen/weibliche-genitalverstuemmung2/unser-engagement/aktivitaeten/genitalverstuemmung-in-asien/1556-jemen> accessed 14 June 2015.

²¹ Alison L Boden, *Women's Rights and Religious Practice: Claims in Conflict* (Palgrave Macmillan 2007) 86f.

²² Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan 2001) 194.

²³ UNICEF, ‘Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change’ (*UNICEF* 2013) <www.childinfo.org/files/FGCM_Lo_res.pdf> accessed 4 April 2015, 2nd and 3rd page (unnumbered) ‘29 countries, more than 125 girls and women’.

migrant communities.²⁶ According to a 2013 UNICEF report, African countries affected by FGM include, in descending order of prevalence, Somalia, Guinea, Djibouti, Egypt, Eritrea, Mali, Sierra Leone, Sudan, the Gambia, Burkina Faso, Ethiopia, Mauretania, Liberia, Guinea-Bissau, Chad, Côte d'Ivoire, Kenya, Nigeria, Senegal, the Central African Republic, the United Republic of Tanzania, Benin, Ghana, Togo, Niger, Cameroon and Uganda.²⁷

The prevalence in the African countries varies considerably, from 98 per cent for all women and girls in Somalia, 50 per cent in Guinea-Bissau, to 1 per cent in Uganda.²⁸ However, the report shows that prevalence can also vary regionally within one country, for example in Liberia FGM is highly prevalent in the north and much less common in the south,²⁹ and that FGM is generally more prevalent in rural than in urban areas.³⁰ Furthermore, prevalence varies between tribe or ethnic group; in Kenya the Kikuyu are affected by FGM while the Luo are not.³¹

Girls and women are cut at different ages, from infancy to adulthood;³² LR Kathryn Cronin finds that with Home Office decision makers and judges 'the most common misconception is that it only occurs to children' even though there is 'almost a life-long risk.'³³

Reasons for performing FGM differ widely among affected communities. In some affected communities it is believed that a woman's body is cleaner and more aesthetic once she has been cut, some believe FGM is necessary to ensure a woman's health and to prevent promiscuous behaviour as well as complications during childbirth, others think that the practise will preserve a woman's virginity, make her fertile and that it is more pleasurable for a man to sleep with a woman who has been

²⁴ Kameel Ahmady, 'A Comprehensive Research Study on Female Genital Mutilation/Cutting (FGM/C) in Iran- 2015' <<http://kameelahmady.com/wp-content/uploads/Kameel%20-%20EN%20Final.pdf>> accessed 24 July 2015, 4.

²⁵ Claudia Merli, 'Male and Female Genital Cutting Among Southern Thailand's Muslims: Rituals, Biomedical Practice and Local Discourses' (2010) 12(7) *Culture, Health & Sexuality* <<http://dx.doi.org/10.1080/13691051003683109>> accessed 24 July 2015, 725.

²⁶ Boddy, 'Violence Embodied?' (n 7) 81.

²⁷ UNICEF (n 23) 2nd and 3rd page (unnumbered) '29 countries, more than 125 girls and women'.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid* 38.

³¹ Shell-Duncan and Hernlund (n 13) 7.

³² Boddy, 'Gender Crusades' (n 17) 48.

³³ KC, question 12.

cut.³⁴ FGM is also a marker of gender and ethnic identity and can be a 'rite of passage' into adulthood.³⁵

Some affected communities believe that FGM is required by religion and because many of the countries in which it is practised largely adhere to Islam, it is often believed to be an Islamic practice.³⁶ In fact, however, FGM 'predates Islam'³⁷ and is practiced by 'Muslims, Roman Catholics and other Christians, including Protestants and Orthodox Christians',³⁸ and 'Jews, as well as followers of traditional African religions.'³⁹

While reasons for performing FGM are manifold, one - if not the - overreaching reason is the marriageability of women⁴⁰ which brings 'economic security.'⁴¹ In most affected communities women are expected to remain virgins until they are married; especially infibulated women are likely to still be virgins at marriage because sexual penetration requires deinfibulation.⁴² Men may also refuse to marry women who have not undergone FGM, thus leaving girls and their families little choice.⁴³

Just like many other aspects surrounding FGM, the consequences of the procedure are a contentious topic, with different parties claiming that diverse problems or benefits result from having FGM performed. While the World Health Organisation (WHO) states that FGM holds '[n]o health benefits, only harm,' some affected communities believe that FGM is beneficial for a woman's health,⁴⁴ and the medical anthropologist Ellen Gruenbaum argues that FGM may not be healthy for the individual woman but is not harmful to reproduction per se, as the practice has existed for centuries without leading to affected communities' extinction.⁴⁵

Health consequences vary according to the type of FGM performed, yet as an argument for abolishing the practice, complications that can arise from the most severe form of FGM (infibulation) have been described as applying to all types of

³⁴ Olayinka Koso-Thomas, *The Circumcision of Women: A Strategy for Eradication* (Zed Books 1992) 5.

³⁵ Ellen Gruenbaum, *The Female Circumcision Controversy* (University of Pennsylvania Press 2001) 48.

³⁶ Boddy, 'Gender Crusades' (n 17) 48.

³⁷ Boden (n 21) 86.

³⁸ UNICEF (n 23) 72.

³⁹ Gruenbaum, *The Female Circumcision Controversy* (n 35) 33.

⁴⁰ Boddy, 'Violence Embodied?' (n 7) 94.

⁴¹ Gruenbaum, *The Female Circumcision Controversy* (n 35) 45.

⁴² *ibid* 78f.

⁴³ *ibid* 130.

⁴⁴ Koso-Thomas (n 34) 5.

⁴⁵ Ellen Gruenbaum, 'Is Female "Circumcision" a Maladaptive Cultural Pattern?' in Bettina Shell-Duncan and Ylva Hernlund (eds), *Female "Circumcision" in Africa* (Lynne Rienner Publishers 2000) 45f.

FGM.⁴⁶ The WHO does not distinguish between different types of FGM when warning that '[i]mmediate complications can include severe pain, shock, haemorrhage (bleeding), tetanus or sepsis (bacterial infection), urine retention, open sores in the genital region and injury to nearby genital tissue.'⁴⁷ The procedure can also result in death, albeit rarely.⁴⁸ The WHO further states that '[l]ong-term consequences can include: recurrent bladder and urinary tract infections; cysts; infertility; an increased risk of childbirth complications and newborn deaths [and] the need for later surgeries.'⁴⁹ This list is not exhaustive; other sources mention '[d]elay in wound healing', scarring, 'painful intercourse', '[a]nal incontinence and fissure', complications occurring after childbirth such as fistulae, mental health problems like depression, as well as reduced female sexual pleasure.⁵⁰

This last point is often brought forward by feminists who oppose the practice⁵¹ but is contested by some women who have undergone the procedure and claim that FGM has in fact enhanced the pleasure they experience during intercourse.⁵² In this context it is useful to remark that '[p]leasure is not a universal experience' which may explain the different experiences of women with FGM.⁵³ However, while pleasure is not a universal experience, pain is: every human being has 'the capacity to experience physical pain.'⁵⁴ Enduring the pain of FGM is often considered a demonstration of a woman's strength⁵⁵ but no matter how stoically borne, it is always an injury causing 'suffering.'⁵⁶

Suffering is caused since usually FGM is performed at home with instruments such as razor blades, scalpels or scissors and without anaesthetic;⁵⁷ however, in some countries, eg Egypt, the procedure is strongly medicalised and thus the use of

⁴⁶ Ylva Hernlund and Bettina Shell-Duncan, 'Transcultural Positions: Negotiating Rights and Culture' in Ylva Hernlund and Bettina Shell-Duncan (eds) *Transcultural Bodies: Female Genital Cutting in Global Context* (Rutgers University Press 2007) 14.

⁴⁷ WHO, 'Female genital mutilation' (n 11).

⁴⁸ Boddy, 'Violence Embodied?' (n 7) 85.

⁴⁹ WHO, 'Female genital mutilation' (n 11).

⁵⁰ Koso-Thomas (n 34) 26f.

⁵¹ Boddy, 'Gender Crusades' (n 17) 52f.

⁵² Fuambai Ahmadu, 'Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision' in Bettina Shell-Duncan and Ylva Hernlund (eds), *Female "Circumcision" in Africa* (Lynne Rienner Publishers 2000) 305.

⁵³ Juliet Rogers, *Law's Cut on the Body of Human Rights: Female Circumcision, Torture and Sacred Flesh* (Routledge 2013) 28.

⁵⁴ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press 1985) 161.

⁵⁵ Shell-Duncan and Hernlund (n 13) 16.

⁵⁶ 'pain, n.1' (*OED Online*, OUP April 2015) <www.oed.com/view/Entry/136056> accessed 16 April 2015.

⁵⁷ UNICEF (n 23) 46.

anaesthetic is more likely.⁵⁸ Medicalisation can range from the use of clean instruments for cutting and the use of ‘antibiotics [...] and using local anaesthetic’ to having FGM performed ‘in hospitals or clinics’⁵⁹; the latter may appear safer and less invasive, but is in fact ‘anatomically more damaging’ as more tissue can be removed while avoiding excessive blood loss.⁶⁰ Medicalisation is a trend legitimising the practise of FGM and impeding its abolition.⁶¹

The topic of abolishing FGM, its ““eradication””⁶² as some who condemn the practice call it, is another contentious issue. The act of condemning FGM ‘appear[s] to condemn an entire people and their cultural values.’⁶³ Affected communities are likely to react defensively to the views of “Western” opponents to FGM, which they perceive as ‘cultural interference’⁶⁴ or they react with defiance, practising FGM in spite of laws prohibiting the procedure.⁶⁵

In Western culture FGM is often called an ““exotic””⁶⁶, ““backward”” or ““barbaric”” practice in eradication campaigns.⁶⁷ It is noteworthy in this context that clitoridectomies were once performed in Western Europe as a cure for ‘nymphomania, masturbation, hysteria, depression, epilepsy and insanity.’⁶⁸ Furthermore, though performed for different reasons, FGM exists in Western societies even today in the form of female cosmetic surgeries, which are deemed medically necessary, thus clarifying that creating so-called ““designer vaginas”” does not constitute a human rights violation or break domestic law, even though the end result can look strikingly similar to some forms of FGM.⁶⁹

As will be discussed in chapter two, international legal discourse on FGM treats the practice as a human rights violation, though without taking into account the fact that FGM is part of the culture of many people in the world that there is the human right to culture.⁷⁰ Nevertheless, in the context of seeking asylum the question

⁵⁸ ibid 109.

⁵⁹ Shell-Duncan and Hernlund (n 13) 31.

⁶⁰ Pierre Foldes and Frédérique Martz, ‘The Medicalisation of Female Genital Mutilation’ (May 2015) 49 Forced Migration Review <www.fmreview.org/en/climatechange-disasters.pdf> accessed 5 June 2015, 82.

⁶¹ Shell-Duncan and Hernlund (n 13) 31.

⁶² ibid 24.

⁶³ Gruenbaum, *The Female Circumcision Controversy* (n 35) 25.

⁶⁴ ibid.

⁶⁵ ibid 20.

⁶⁶ Boddy, ‘Violence Embodied?’ (n 7) 78.

⁶⁷ Gruenbaum, *The Female Circumcision Controversy* (n 35) 25.

⁶⁸ Koso-Thomas (n 34) 15.

⁶⁹ Hernlund and Shell-Duncan (n 46) 19.

⁷⁰ Riki Holtmaat and Jonneke Naber, *Women’s Human Rights and Culture: From Deadlock to Dialogue* (Intersentia 2011) 45.

whether or not to treat FGM as a human rights violation does not need to weigh the right to culture against the right to remain bodily intact. Asylum seekers who ask for protection due to a fear of FGM are likely to oppose the practice and thus the question is not whether these women and girls have the right to have their culture respected but whether or not they have the right to be protected from undergoing a practice they object to.

The moment a person is forced against her will to submit to a procedure that will be painful, irreversible and potentially dangerous, this person can invoke the argument that her human rights will be violated unless she gains the protection of a receiving state. Another possibility would be to try and avoid undergoing FGM, for example by relocating within the country of origin or by asking the home state for protection; the next section examines this option.

1.3. AVOIDING FGM

Women will likely try to avail themselves of any possibilities of avoiding FGM before taking a step as drastic as leaving their country, and in asylum proceedings are asked to demonstrate that there is no sufficient state protection and no internal relocation available to them.⁷¹ Thus, it is necessary to examine what possibilities women have to avoid FGM as well as the consequences they face for doing so if they succeed.

As described above, the meaning of practicing FGM varies among affected resident communities, thus it is not possible to make a general assessment of the difficulties women face for opposing FGM. It is, however, possible to examine some examples of situations in which FGM may be avoided and counter-examples of circumstances that will make this impossible.

UNICEF found that some women and girls in affected resident communities wish FGM would end, for example in Burkina Faso (where prevalence is 76%) 90% of women and girls think FGM should not be performed.⁷² However, not all women are convinced that FGM should be abolished. Conspicuously, in most countries with an apparently high readiness to abolish the practice, prevalence is already comparatively

⁷¹ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 288ff.

⁷² UNICEF (n 23) 2nd and 3rd page (unnumbered) '29 countries, more than 125 girls and women.'

low, while in countries with a high prevalence women and girls seem less convinced that the practice should end.⁷³

At any rate, thinking that the practice should end and actually refusing to undergo FGM are two very different things. As explained above, one of the most important reasons for submitting to FGM is marriageability and with it economic security. A woman who refuses to undergo FGM may ‘face social exclusion and be denied the possibility of marriage and family life.’⁷⁴ In communities where the prospective husband gives a woman’s parents a dowry but expects his future wife to undergo FGM before marriage, eg in rural Kenya, the parents may force their daughter to submit to the procedure because they need the money, thus the girl’s only possibility of avoiding FGM is to leave her family, something considered scandalous.⁷⁵

In many countries with affected resident communities a single woman could not simply change her place of residence as women may not be allowed to travel alone, for example in Egypt,⁷⁶ may be at risk of experiencing sexual violence, such as rape, for example in Somalia⁷⁷ or would not be able to obtain a new home or a job.⁷⁸ In cases where girls undergo FGM at an early age, they do not have the option of leaving their families. Even if a girl’s parents object to FGM, it is usually grandmothers or other older female members of the family who will make the decision that a girl will be cut, as they are regarded as ‘cultural authorities.’⁷⁹

Additionally, beliefs about the benefits of FGM may persuade women to undergo it, as they do not wish to be seen as dirty, ugly or promiscuous, as opposed to cut women who are seen as clean, beautiful and chaste. In Sierra Leone women who have not undergone FGM ‘are derisively referred to as Boroka [...] meaning

⁷³ *ibid.*

⁷⁴ *K and Fornah* (n 2) [93].

⁷⁵ Madeleine Bunting, ‘Kenyan Girls Fight Back Against Genital Mutilation’ (*The Guardian*, 18 April 2011) <www.theguardian.com/global-development/poverty-matters/2011/apr/18/kenyan-girls-rebel-against-fgm> accessed 11 May 2015.

⁷⁶ Home Office, ‘Operational Guidance Note: Egypt’ (*Home Office*, December 2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/365888/Egypt__OGN_v3_1_19_December_2013__re-issued_July_2014_.pdf> accessed 15 May 2015, 5.

⁷⁷ Home Office, ‘Country Information and Guidance - Somalia: Women Fearing Gender-based Harm / Violence’ (*Home Office*, February 2015) <www.refworld.org/docid/54d1daef4.html> accessed 12 May 2015, 6 and 8.

⁷⁸ Lisa Dornell, ‘Afterword’ in Benjamin N Lawrence and Gayla Ruffer (eds), *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2015) 247.

⁷⁹ Fatimah Kelleher, ‘FGM and Child Marriage: Grandmothers Are Part of the Problem and the Solution’ (*The Guardian*, 17 July 2014) <www.theguardian.com/global-development-professionals-network/2014/jul/17/mothers-grandmothers-fgm-child-marriage> accessed 11 May 2015.

“foolish”, “childish” or “stupid.””⁸⁰ Sierra Leone expert Richard Fanthorpe thinks that: ‘Even the lower classes of Sierra Leonean society regard uninitiated indigenous women as an abomination fit only for the worst sort of sexual exploitation.’⁸¹

Even in countries that have outlawed FGM, for example Tanzania,⁸² the legislation may not be enforced and women may find that the police are unwilling to protect them, perhaps because they tolerate the practice,⁸³ or are unable to offer protection, perhaps due to prosecutions not being carried out effectively.⁸⁴ Other countries have no national legislation against FGM, for example Mali.⁸⁵

Still, refusing FGM is possible and women manage to do it, or parents manage to prevent their daughters from undergoing it. A strategy frequently employed by NGOs aiming to end FGM is replacing the practice with ‘alternative rite of passage program[mes].’⁸⁶ This works well in settings where FGM is performed as a transition into adulthood and is coupled with a knowledge transfer that can be completed without the cutting.⁸⁷ However, not every woman’s decision not to undergo FGM is influenced by (foreign) aid organisations. *The Guardian* tells the story of a Kenyan woman who as a 9-year-old chose to oppose the practice, thus managing to stay in school instead of getting ready for marriage. Though at the time she ‘sacrifice[d] her own social identity and acceptance,’ she later managed to marry and found a family, so in certain circumstances it may be possible for women to live with the repercussions of refusing FGM.⁸⁸

In addition, there are NGOs willing to protect girls and women from FGM, for example the NGO *Kamilika* in Northern Tanzania which sponsors a safe house for

⁸⁰ Tom Obara Bosire, *Politics of Female Genital Cutting (FGC), Human Rights and the Sierra Leone State: A Case of Bondo Secret Society* (Cambridge Scholars Publishing 2013) 57.

⁸¹ *K and Fornah* (n 2) [6].

⁸² Equality Now, ‘Submission to Office of the United Nations High Commissioner for Human Rights for the Upcoming Report of Good Practices and Major Challenges in Preventing and Eliminating Female Genital Mutilation’ (*Equality Now*, 8 December 2014) <www.ohchr.org/Documents/Issues/Women/WRGS/FGM/NGOs/EqualityNow2.pdf> accessed 15 May 2015, 16.

⁸³ Hathaway and Foster, *The Law of Refugee Status* (n 71) 298.

⁸⁴ *ibid* 312.

⁸⁵ 28 Too Many, ‘Country Profile: FGM in Mali’ (28 Too Many, September 2014) <www.28toomany.org/media/uploads/mali_final.pdf> accessed 12 May 2015, 55.

⁸⁶ Asha Mohamud, Samson Radeny and Karen Ringheim, ‘Community-Based Efforts to End Female Genital Mutilation in Kenya: Raising Awareness and Organizing Alternative Rites of Passage’ in Rogaia Mustafa Abusharaf (ed), *Female Circumcision: Multicultural Perspectives* (University of Pennsylvania Press 2006) 87.

⁸⁷ *ibid* 88.

⁸⁸ Miriam Jerotich, ‘My Mother’s Refusal to Undergo FGM Has Given Me Licence to Dream’ (*The Guardian*, 6 February 2015) <www.theguardian.com/global-development/2015/feb/06/female-genital-mutilation-kenya-international-zero-day-of-tolerance-fgm> accessed 11 May 2015.

girls.⁸⁹ Churches may also be able to offer protection,⁹⁰ however, under international refugee law such ‘non-state entities’ cannot be considered as relevant in providing protection to a woman fleeing FGM.⁹¹

Even though some non-state entities effectively protect women, protection should in principle be provided by the state.⁹² State protection is available in few countries with affected resident communities; for example in Ethiopia there have been several prosecutions since the practice was made illegal in 2005.⁹³ Geoffrey Care, however, states that in his experience ‘the state could or would rarely afford any protection.’⁹⁴ If no such protection is available, women may be able to move to a different part of their country, especially to urban areas where FGM is less prevalent.⁹⁵

To summarise, where there are no aid organisations or churches able to protect women, where the police are reluctant to prosecute perpetrators of FGM in affected resident communities, where societal pressure and repercussions of not getting cut are too great and where women have difficulties relocating to do with their societal status, it is impossible to avoid FGM.

In illustrating the cultural context of FGM, this chapter has shown that FGM is more than a private or family issue; it is not solely the decision of a girl’s parents or immediate family whether she should undergo FGM. Rather, it is an extended family issue, as grandmothers or other relatives may demand that a girl be cut; it is also a community issue as societal pressures, such as the pressure to find a husband, may force a woman to undergo FGM even if her family is not in favour of the practice.

Women who find themselves unable to avoid FGM may decide to leave their countries and claim asylum. The next chapters set out the international and UK domestic law on FGM and then turn to the UK’s asylum and appeal systems, in order to provide an overview of the basis, context and system underlying the process of gaining protection from FGM in the UK as a refugee.

⁸⁹ Humankind Foundation, ‘Kamilika: Stop FGM’ (*Humankind Foundation* 2009) <www.humankindfoundation.org/Kamilika.htm> accessed 15 May 2015.

⁹⁰ *FK (Kenya) v SSHD* [2008] EWCA Civ 119, [2008] 152(9) SJLB 28 [2].

⁹¹ Hathaway and Foster, *The Law of Refugee Status* (n 71) 292.

⁹² *ibid* 289.

⁹³ 28 Too Many, ‘Country Profile: FGM in Ethiopia’ (28 Too Many, October 2013)

<www.28toomany.org/media/uploads/ethiopiafinal.pdf> accessed 12 May 2015, 55.

⁹⁴ GC, question 15.

⁹⁵ JM (Sufficiency of protection - IFA - FGM) Kenya [2005] UKIAT 00050 [33].

2. FGM IN INTERNATIONAL AND UK DOMESTIC LAW

FGM is not only a cultural issue but becomes a legal issue when legislation outlawing it is passed or when, where no effective protection through legislation is available, women who fear FGM flee in order to seek protection in another country.

This chapter first discusses international instruments which categorise FGM as a human rights violation and thus provide a basis for domestic UK law outlawing the practice and for asylum claims based on FGM. The chapter then explains the protection against FGM which is afforded to citizens and residents under UK domestic law and examines whether this protection extends to affected asylum seekers.

Though this chapter touches on the protection of asylum seekers against FGM, this topic is only explored in detail in chapters three and four, so that, though this chapter is concerned with law on FGM, the most important source of law in relation to asylum claims, the case law from tribunals and courts, is introduced in the next chapter.

2.1. HUMAN RIGHTS AND INTERNATIONAL LAW

‘FGM is recognized internationally as a violation of the human rights of girls and women.’⁹⁶ The practice violates women’s and girls’ ‘rights to health, to be free from violence, to life and physical integrity, to non-discrimination, and to be free from cruel, inhuman, and degrading treatment.’⁹⁷

Several international instruments the UK is party to place FGM in a framework that allows interpreting the practice as a violation of human rights as described above. One of these instruments is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prohibiting, among other things, torture, inhuman or degrading treatment (IDT) in Article 3.⁹⁸ The ECHR was incorporated into UK domestic law with the Human Rights Act in 1998⁹⁹ and asylum seekers can invoke articles of the convention in their asylum claims. Article 3 is most

⁹⁶ WHO, ‘Female genital mutilation’ (n 11).

⁹⁷ Human Rights Watch (n 15).

⁹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.

⁹⁹ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 59.

often invoked,¹⁰⁰ sometimes in combination with other articles of the convention, and also in a number of FGM cases,¹⁰¹ and will be discussed in more detail in chapter three in the context of the asylum process.

While many of the instruments the UK is party to can be interpreted as condemning FGM as a human rights violation, only one specifically names the practice. Thus, in interpreting these instruments it must be kept in mind that ‘sex- and ethnically-based harms [are] at the core of, rather than peripheral to, human rights.’¹⁰²

The Universal Declaration of Human Rights (UDHR), a non-binding, yet influential and widely known instrument, speaks of sex¹⁰³ discrimination in Article 2 and of torture and IDT in Article 5 but does not define what constitutes either.¹⁰⁴ It has been argued that such unclear formulations lead to women’s experiences being omitted; for example, torture and IDT are frequently imagined to take place in the context of ‘interrogation, punishment or intimidation of a detainee’, even though practices such as FGM, which only women experience, should be termed torture as well.¹⁰⁵

For women, human rights abuses often take place in their own homes or remain otherwise unseen because violence against women is considered to be “private” as opposed to the “public” persecution men face, for example for political activism against a state.¹⁰⁶ This ‘gendered nature of international law’¹⁰⁷ can lead to ‘the use

¹⁰⁰ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 84.

¹⁰¹ For example, cases before the European Court of Human Rights (ECtHR): *Collins and Akaziebie v Sweden* App no 23944/05 (ECtHR, 8 March 2007); *Izevbekhai and others v Ireland* App no 43408/08 (ECtHR, 17 May 2011); *Ameh and others v UK* App no 4539/11 (ECtHR, 30 August 2011); *Mary Magdalene Omeredo v Austria* App no 8969/10 (ECtHR, 20 September 2011); *Sow v Belgium* App no 27081/13 (ECtHR, 22 April 2013); and cases before UK courts: *DI (IFA - FGM) Ivory Coast CG* [2002] UKIAT 04437; *RM (Sierra Leone – Female Genital Mutilation – membership of a particular Social Group) Sierra Leone* [2004] UKIAT 00108; *P v SSHD, M v SSHD* [2004] EWCA Civ 1640, [2005] Imm AR 84 (CA); *JM (n 95)*; *SK (FGM – ethnic groups) Liberia CG* [2007] UKAIT 00001; *CM (Kenya) v SSHD* [2007] EWCA Civ 312; *FM (FGM) Sudan v SSHD* [2007] UKAIT00060; *VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG* [2008] UKAIT 00049.

¹⁰² Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (Belknap Press of Harvard University Press 2006) 2.

¹⁰³ The term “sex” is often used synonymously with “gender” even though the former denotes the biological markers that identify a person as male or female, and the latter ‘refers to the social construction of power relations between women and men.’ It is important to understand that the persecution of women is frequently based on their ‘identity and status as women’ rather than their biological sex. [Crawley (n 22) 7.]

¹⁰⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) arts 2 and 5.

¹⁰⁵ Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights* (Routledge 2014)

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¹⁰⁶ Crawley (n 22) 17.

¹⁰⁷ Sifris (n 105) 13.

of “culture” to exclude women from protection under the Refugee Convention’ as is evident from the first quotation preceding the introduction to this paper where an adjudicator thought that FGM was not persecution because it is lawful and widely practised in Sierra Leone and therefore a part of women’s culture.¹⁰⁸

However, FGM may indeed constitute torture and IDT. Like the UDHR, the International Covenant on Civil and Political Rights (ICCPR) prohibits sex discrimination and torture.¹⁰⁹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹¹⁰

At first glance, FGM does not seem to fit this definition of torture, as it is not inflicted to obtain information or as a punishment, but is thought to be beneficial to the woman.¹¹¹ However, it can cause severe pain and is performed intentionally. As noted earlier, FGM may be practised with the consent of public officials if authorities refuse to help women who fear FGM. The European Court of Human Rights (ECtHR) applies the definition of torture used in CAT when deciding cases based on Article 3 of the ECHR, but it favours an ‘expansive interpretation’ of torture and recognizes that not only pain inflicted by authorities but also by private individuals can constitute torture.¹¹² Additionally, seeing as FGM is performed on women only, it is, as stated above, a form of gender discrimination, thus fulfilling the “discrimination” criterion of the CAT definition. Therefore, FGM may be interpreted as constituting torture.

Furthermore, FGM violates the human right of security of person, which is a broader concept than torture, encompassing the right to bodily integrity, as well as

¹⁰⁸ Crawley (n 22) 11.

¹⁰⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2 and 7.

¹¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 1(1).

¹¹¹ Anika Rahman and Nahid Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 26.

¹¹² Sifris (n 105) 40.

the right to be free from IDT¹¹³ and is mentioned in both the UDHR¹¹⁴ and the ICCPR.¹¹⁵ The distinction between torture, inhuman treatment and degrading treatment is often difficult to make and the concepts overlap rather than being distinct from one another.¹¹⁶ Since FGM is ‘most commonly performed without real consent and causes irreversible bodily changes’,¹¹⁷ it violates women’s bodily integrity and constitutes IDT, if not torture, in inflicting ‘severe pain or suffering’ on a person powerless to defend herself.¹¹⁸ The ECtHR has not called FGM “torture” but in *Collins and Akaziebie v Sweden* stated that ‘[i]t is not in dispute that subjecting a woman to female genital mutilation amounts to ill-treatment contrary to Article 3 of the [European] Convention [on Human Rights].’¹¹⁹

A different approach to categorising FGM as harmful emerges in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which demands the ‘highest attainable standard of physical and mental health.’¹²⁰ Though there is disagreement on how harmful the practice is, it is an invasive procedure that can potentially compromise women’s health.¹²¹ Similarly, the Convention on the Rights of the Child (CRC) asks to ‘protect the child from all forms of physical or mental violence, injury or abuse’, thus FGM also violates children’s rights.¹²² If FGM leads to the death of the affected woman or girl, the procedure violates the right to life established in the UDHR, the ECHR, the ICCPR and the CRC.¹²³

Other instruments specifically deal with women’s experiences: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) urges to eliminate ‘customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.’¹²⁴ Though not mentioned specifically, FGM is a violation of women’s human rights, as defined by CEDAW, as in many affected communities it serves to ensure women’s inferior status.¹²⁵

¹¹³ Rahman and Toubia (n 111) 23.

¹¹⁴ UDHR (n 104) art 3.

¹¹⁵ ICCPR (n 109) art 9.

¹¹⁶ Sifris (n 105) 232.

¹¹⁷ Hernlund and Shell-Duncan (n 46) 16.

¹¹⁸ Sifris (n 105) 240.

¹¹⁹ *Collins and Akaziebie* (n 101) 12.

¹²⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

¹²¹ Rahman and Toubia (n 111) 27.

¹²² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 19.

¹²³ UDHR (n 104) art 3; ECHR (n 98) art 2; ICCPR (n 109) art 6; CRC (n 122) art 6.

¹²⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 8 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 5.

¹²⁵ Rahman and Toubia (n 111) 21.

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) is the first and so far the only instrument the UK has signed to expressly mention FGM. It states that parties to the convention must ensure that ‘excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris’ as well as ‘inciting, coercing or procuring’ a woman or girl to undergo FGM is criminalised.¹²⁶

The international instruments introduced here make it clear that FGM is a violation of human rights and that the procedure constitutes IDT, even torture. This opinion may be imputed to the UK as a party to these instruments. The UK has, at the time of writing, signed but not ratified the Istanbul Convention, nor incorporated it into domestic law, thus this convention is not enforceable in the UK and women seeking protection from FGM cannot rely on it. However, the UK has already implemented the above-mentioned provisions on criminalising FGM, as well as taken some other steps in providing protection against the practice, which are set out in the next subchapter.

2.2. UK LAW AND POLICY

FGM has been a criminal offence in the UK since 1985. The Prohibition of Female Circumcision Act made it illegal ‘to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person’, as well as to ‘aid, abet, counsel or procure’¹²⁷ FGM being performed, while allowing for exceptions for medical reasons.¹²⁸

In 2003, the law was amended by the Female Genital Mutilation Act, adding the ‘[o]ffence of assisting a non-UK person to mutilate overseas a girl’s genitalia.’¹²⁹ The 2003 Act made it a criminal offence to perform FGM on ‘a United Kingdom national or permanent United Kingdom resident’¹³⁰ and it applied to UK nationals and permanent residents who perform the procedure inside or outside the UK,¹³¹ to

¹²⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) art 38.

¹²⁷ Prohibition of Female Circumcision Act 1985 (PFCA 1985), s 1(1)(a) and (b).

¹²⁸ *ibid*, s 2.

¹²⁹ Female Genital Mutilation Act 2003 (FGMA 2003), s 3.

¹³⁰ *ibid*, s 3(2)(a).

¹³¹ *ibid*, s 1(1) and s 4(1).

UK nationals and permanent residents who assist a woman or girl, regardless of her nationality, in mutilating her own genitalia,¹³² as well as UK nationals and permanent residents who arrange for another UK national or permanent resident to be cut abroad.¹³³ Under the 2003 Act, the maximum penalty for an offence is 14 years' imprisonment,¹³⁴ as opposed to 5 years' under the 1985 Act.¹³⁵ The 2003 Act does not extend to Scotland, where the 1985 Act was repealed in 2005 by the Prohibition of Female Genital Mutilation (Scotland) Act, which introduced similar to identical extraterritoriality clauses and penalties as the 2003 Act.¹³⁶

Both the 2003 and 2005 Acts were amended in March 2015 by the Serious Crime Act to the effect that anyone habitually (as opposed to permanently) resident in the UK can be prosecuted for offences under the Acts and that women and girls habitually resident in the UK are protected by the Acts.¹³⁷ The relevance of this provision for affected asylum seekers will be discussed in the next subchapter.

The Serious Crime Act 2015 further introduced the '[o]ffence of failing to protect girl [sic] from risk of genital mutilation',¹³⁸ and as well as 'FGM protection order[s]',¹³⁹ (FGMPOs) which can be made to protect girls from undergoing FGM or girls who have undergone the procedure.¹⁴⁰ Such orders have already been used to prevent girls who were deemed to be at risk of FGM from travelling to countries with affected resident communities during the summer holidays.¹⁴¹ Other possible measures include the power to 'remand people in custody, order mandatory medical checks and instruct girls believed to be at risk of the practice to live at a particular address.'¹⁴² These orders will also be further discussed in the next subchapter. Further, the 2015 Act introduced the '[d]uty to notify police of female genital mutilation' for anyone working 'in a regulated profession in England and Wales', eg teachers and healthcare professionals who know or suspect that FGM has been performed on a girl under eighteen years old.¹⁴³

¹³² *ibid*, s 2.

¹³³ *ibid*, s 3(1).

¹³⁴ *ibid*, s 5(a).

¹³⁵ PFCA 1985 (n 127), s 1(2)(a).

¹³⁶ Prohibition of Female Genital Mutilation (Scotland) Act 2005, ss 4 and 5.

¹³⁷ Serious Crime Act 2015 (SCA 2015), s 70(1)(c) and (2)(c).

¹³⁸ *ibid*, s 72.

¹³⁹ *ibid*, s 73.

¹⁴⁰ *ibid*, s 73(2).

¹⁴¹ Kevin Rawlinson, 'Police Obtain First FGM Protection Order' (*The Guardian*, 17 July 2015)

<www.theguardian.com/society/2015/jul/17/police-obtain-first-fgm-protection-order> accessed 18 July 2015.

¹⁴² *ibid*.

¹⁴³ SCA 2015 (n 137), s 74.

These recent legislative changes were made in order to better protect against FGM but also to facilitate prosecuting perpetrators of FGM.¹⁴⁴ Even though FGM was outlawed in the UK 30 years ago, there has not yet been a successful prosecution.¹⁴⁵ The legislative changes are part of a government commitment to combat FGM in line with its policy regarding violence against women and girls.¹⁴⁶ A study estimates that ‘137,000 women and girls with FGM born in countries where FGM is practised, were permanently resident in England and Wales in 2011.’¹⁴⁷ The UK government declares itself ‘absolutely committed to preventing and ending this extremely harmful form of violence’,¹⁴⁸ and Prime Minister David Cameron announced that ‘instead of just signing declarations, instead of just passing laws, we actually commit to do everything we can, in our own countries and globally, to outlaw these practices forever.’¹⁴⁹ Home Secretary Theresa May, likewise, suggested the UK government should ‘prevent these harmful practices ever happening in the first place’ and has promised to ‘protect those at risk.’¹⁵⁰

The UK government published so-called ‘multi-agency practice guidelines’ on FGM in 2011 (updated in 2014), which are to assist ‘frontline professionals’ such as ‘NHS staff [...], police officers, children’s social care workers, and teachers’ in

¹⁴⁴ Ministry of Justice/Home Office, ‘Serious Crime Act 2015: Factsheet – Female Genital Mutilation’ (*Ministry of Justice/Home Office*, March 2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/416323/Fact_sheet_-_FGM_-_Act.pdf> accessed 27 June 2015, nos 7 and 24.

¹⁴⁵ In 2000 Dr Abdul Baten Jalal Ahmed was banned from practising medicine as he had offered to perform FGM in the UK in 1997 (*Ahmed v General Medical Council* [2001] UKPC 49, [2002] 66 BMLR 52); In 2015 Dr Dhanuson Dharmasena, while delivering the baby of a woman who had been infibulated as a child, deinfibulated her and after the delivery redid one stitch to stop the bleeding. He and Mr Hosan Mohamed, who had assisted him, were prosecuted under the Female Genital Mutilation Act 2003 for having performed FGM (reinfibulation); both men were found not guilty. (Jonathan Rogers, ‘The First Prosecution for FGM’ (2015) 179(9) *Criminal Law and Justice Weekly* <www.criminallawandjustice.co.uk/features/First-Prosecution-FGM> accessed 8 June 2015).

¹⁴⁶ Home Office, ‘2010 to 2015 Government Policy: Violence Against Women and Girls’ (*Home Office*, 8 May 2015) <www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk/supporting-pages/female-genital-mutilation> accessed 9 June 2015.

¹⁴⁷ Alison Macfarlane and Efua Dorkenoo, ‘Female Genital Mutilation in England and Wales: Updated Statistical Estimates of the Numbers of Affected Women Living in England and Wales and Girls at Risk: Interim Report on Provisional Estimates’ (*City University London* 2014) <www.equalitynow.org/sites/default/files/FGM%20EN%20City%20Estimates.pdf> accessed 6 April 2015, 3.

¹⁴⁸ HM Government, ‘6 February 2014 - International Day of Zero Tolerance to Female Genital Mutilation’ (*HM Government*, 6 February 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/295056/HMG_FGM_Declaration.pdf> accessed 9 June 2015.

¹⁴⁹ Prime Minister's Office, ‘Girl Summit 2014: David Cameron's Speech’ (*Prime Minister's Office*, 22 July 2014) <www.gov.uk/government/speeches/girl-summit-2014-david-camerons-speech> accessed 10 June 2015.

¹⁵⁰ Home Office, ‘Home Secretary Speech at Girl Summit 2014’ (*Home Office*, 22 July 2014) <www.gov.uk/government/speeches/home-secretary-speech-at-girl-summit-2014> accessed 10 June 2015.

safeguarding children and protecting adults from FGM¹⁵¹ by explaining the cultural context of FGM¹⁵² and by listing criteria to identify who might be at risk of FGM.¹⁵³ The criteria state that at-risk girls will, inter alia, be members of affected resident communities and possibly ‘less integrated into British society’ and that there may be other females with FGM in their families.¹⁵⁴ Indicators that FGM is imminent are, among other things, a visit from ‘a female family elder’ or ‘a long holiday’ in a country with affected resident communities.¹⁵⁵

In spite of the UK’s firm stance on FGM and efforts to combat the practice, there is one issue that never appears in legislation, government policy or speeches on FGM, even though it directly enables the UK to “protect those at risk.” Women who fear FGM in their home countries can, and do, claim asylum in the UK, yet nowhere in the government publications on FGM is asylum mentioned as a possible way of protecting women and girls from the practice.

Unlike women from affected migrant communities in the UK who are evidently reluctant to go to the police (none of the attempts to prosecute acts of FGM was initiated by an affected woman¹⁵⁶) about having undergone FGM or fearing it, there are affected asylum seekers who actively seek the protection the UK can provide. Before turning to the next chapter on asylum as a means of protection against FGM, the following subsection examines whether asylum seekers might benefit from the now quite extensive protection measures against FGM afforded to UK residents.

2.3. EXTENDING PROTECTION TO ASYLUM SEEKERS?

As explained above, the Female Genital Mutilation Act 2003 and the Female Genital Mutilation (Scotland) Act 2005 were amended by the Serious Crime Act 2015 to the

¹⁵¹ HM Government, ‘Multi-Agency Practice Guidelines: Female Genital Mutilation’ (*HM Government* 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/380125/MultiAgencyPracticeGuidelinesNov14.pdf> accessed 10 June 2015, 6.

¹⁵² *ibid* 11f.

¹⁵³ *ibid* 16f.

¹⁵⁴ *ibid* 16.

¹⁵⁵ *ibid* 16f.

¹⁵⁶ In the case of Dr Abdul Baten Jalal Ahmed, journalists making a TV documentary about FGM in the UK uncovered his willingness to preform the procedure. (*Ahmed* (n 145) [3]); In the case against Dr Dhanuson Dharmasena and Mr Hosan Mohamed, the ‘woman at the centre of the case did not support the prosecution.’ (Sandra Laville, ‘Doctor Found Not Guilty of FGM on Patient at London Hospital’ (*The Gaurdian*, 4 February 2015) <www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena> accessed 8 August 2015.)

effect that the Acts now protect habitual UK residents. Permanent residence implies living somewhere “‘for an unlimited time,’”¹⁵⁷ an intention asylum seekers who have to wait for their claims to be determined cannot establish since, if unsuccessful, may be sent back to their countries of origin.

Perhaps, however, asylum seekers can be termed habitual residents. The 2015 Act gives no definition of habitual resident and the House of Lords, where the bill started, did not fix its meaning further than ‘those who are not permanently resident’ in the UK.¹⁵⁸ However, during the Committee stage of the Serious Crime Bill in the House of Commons, the question arose ‘whether the new provisions [on FGM] catch offences committed by asylum seekers or people who are [in the UK] unlawfully.’¹⁵⁹ The ‘answer is potentially yes’ since ‘[s]omeone could be habitually resident in the UK while their asylum application was being considered’, but the question ‘whether a person is habitually resident in the UK will be determined on the facts of a given case.’¹⁶⁰

However, one requirement for acquiring habitual residence in the UK is that the person has taken up this residence ‘voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.’¹⁶¹ The requirement of residing in the UK voluntarily, as in ordinary residence, means ‘not by virtue of kidnapping or imprisonment;’¹⁶² “settled purposes” means having the intention to remain in the UK, not necessarily forever but for a certain period of time.¹⁶³ More requirements include that the person be physically present, not necessarily ‘at all times,’¹⁶⁴ but for ‘an appreciable period of time’ and some time will pass before a person acquires habitual residence in a country where she newly arrives.¹⁶⁵ Considering that it should take six months to decide an asylum claim¹⁶⁶ but can in reality take several years (16 years in extreme cases),¹⁶⁷ it is safe to say that “some time” will have passed before the person has to leave the UK if claims are

¹⁵⁷ James Fawcett, Janeen M Carruthers and Peter North (eds), *Cheshire, North and Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 159.

¹⁵⁸ HL Deb 16 June 2014, vol 754, col 674.

¹⁵⁹ Serious Crime Bill Deb 20 January 2015, col 125.

¹⁶⁰ *ibid.*

¹⁶¹ Fawcett, Carruthers and North (n 157) 185.

¹⁶² *ibid* 183.

¹⁶³ *ibid* 189.

¹⁶⁴ *ibid* 186.

¹⁶⁵ *ibid* 187.

¹⁶⁶ GOV.UK, ‘Claim Asylum in the UK’ (*GOV.UK*, 21 July 2015) <www.gov.uk/claim-asylum/overview> accessed 8 August 2015.

¹⁶⁷ The Guardian, ‘Asylum Claimants Wait for Years in Unacceptable Conditions, MPs Say’ (*The Guardian*, 11 October 2013) <www.theguardian.com/uk-news/2013/oct/11/asylum-claimants-delays-housing-unacceptable-report> accessed 10 June 2015.

refused. Whether or not an asylum seeker could be deemed to be habitually resident in the UK is arguable, for one because asylum seekers cannot be said to have left their countries voluntarily as they are fleeing persecution, but neither were they kidnapped from them. On the other hand, asylum seekers are likely to plan on settling in the UK if they receive refugee status and to be present in the UK while awaiting the decision of their claim.

If asylum seekers were held to be habitual residents of the UK, the Female Genital Mutilation Act 2003 would apply to them, including the new provisions introduced by the Serious Crime Act 2015. There are at least two ways in which affected asylum seekers might benefit from this protection.

Firstly, they would be able to apply for FGMPOs. FGMPOs must be applied for before a family court¹⁶⁸ where the standard of proof is the balance of probabilities; this asks whether it more likely than not that the woman will undergo FGM,¹⁶⁹ a standard higher than that in asylum and human rights claims where women have to show it is reasonably likely that they will be cut.¹⁷⁰ Thus, it is easier to meet the standard of proof in asylum or human rights claims than that for an FGMPO. However, in asylum and human rights claims women must show that they will be harmed ‘in the *future*.’¹⁷¹ Thus, FGM survivors will not be able to establish that they need international protection unless they can show that they will be cut again.¹⁷² It is this group of women which may be able to benefit from FGMPOs which can also be applied for by those who have already undergone FGM.¹⁷³ In this case, the standard of proof could easily be met by submitting a medical report. Since courts in deciding whether to grant an FGMPO and what provisions to make ‘must have regard to all the circumstances, including the need to secure the health, safety and well-being of the girl’,¹⁷⁴ a woman could be protected by such an order to the effect that she should be able to access appropriate health care, perhaps even reconstructive surgery. If women were to receive reconstructive surgery in the UK and were thus once again

¹⁶⁸ SCA 2015 (n 137), s 73(2).

¹⁶⁹ Home Office, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (Version 9.0, Home Office, 6 January 2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf> accessed 14 May 2015, 11.

¹⁷⁰ Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford University Press 2014) 235.

¹⁷¹ Home Office, ‘Asylum Policy Instruction’ (n 169) 20; emphasis added.

¹⁷² Fadela Novak-Irons, ‘Female Genital Mutilation: A Case for Asylum in Europe’ (May 2015) 49 Forced Migration Review <www.fmreview.org/en/climatechange-disasters.pdf> accessed 5 June 2015, 78.

¹⁷³ SCA 2015 (n 137), s 73(2).

¹⁷⁴ *ibid.*

intact, they might have an international protection claim on grounds of fear of undergoing FGM. Some LRs interviewed thought such a scenario could give rise to an asylum claim.¹⁷⁵

Another provision in the Female Genital Mutilation Act 2003 which may protect affected asylum seekers is the section stating that it is a criminal offence to aid or abet ‘a non-UK person to mutilate overseas a girl’s genitalia.’¹⁷⁶ Theoretically, the UK or, more specifically, anyone refusing and removing an affected asylum seeker, may be said to have committed an offence under the 2003 Act where women’s asylum claims based on a fear of FGM are refused and they are subsequently returned to their countries of origin and consequently undergo FGM. One question is whether, even if women were habitual UK residents before being returned, once returned they still are habitual UK residents. Possibly, they still would be because ‘there may be a gap between habitual residence in one state and acquisition of habitual residence in another.’¹⁷⁷

Another question is whether the person ordering a removal or participating in it is criminally liable at all. In order to be criminally liable the person who commits a criminal act has to have a *mens rea*, ie ‘a specified mental state towards’ the crime.¹⁷⁸ Both the ‘immediate perpetrator’ of FGM but also others who ‘participate[...] in the commission of the crime’ must have a *mens rea* when committing the offence.¹⁷⁹ Aiding, abetting counselling and procuring a crime fall into the latter category, called ‘secondary liability.’¹⁸⁰ It is not necessary ‘that the assistance should take place at the scene of the offence’¹⁸¹ – the person refusing or removing an asylum seeker will do this in the UK while FGM will be performed in the country of return - but there must be a ‘sufficient degree of connection between [the secondary party’s] conduct’ and the principal offence.¹⁸² This condition, it may be argued, is fulfilled as FGM would not have been performed on the asylum seeker but for her being removed. Further, it may be an offence to fail to prevent a crime when the secondary party ‘has a duty to do so and/or a power of control over [...] the

¹⁷⁵ LR A, question 37; KC, question 32; LR C, question 37.

¹⁷⁶ FGMA 2003 (n 129), s 3.

¹⁷⁷ Fawcett, Carruthers and North (n 157) 187.

¹⁷⁸ AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (5th edn, Hart 2013) 125.

¹⁷⁹ *ibid* 201f.

¹⁸⁰ *ibid* 208.

¹⁸¹ *ibid*.

¹⁸² *ibid* 213.

victim'¹⁸³ which the UK arguably has, as the UK has the power to allow an asylum seeker to remain or to remove her.

However, as mentioned above, there has to be a *mens rea*; the *mens rea* required for secondary participation in a crime is intention.¹⁸⁴ Thus, someone in the UK refusing a protection claim made on grounds of FGM or removing a refused asylum seeker would have to 'intend to participate in the crime' of FGM committed by someone in the country of return.¹⁸⁵ Further, a secondary party must 'have no substantial doubt' that the crime will be committed.¹⁸⁶ Considering that a person will be regarded to have had knowledge of the fact that a crime was going to be committed if they foresee a "real or serious risk"¹⁸⁷ and seeing as in deciding asylum claims decision makers if believing that there is a real risk of serious harm to an applicant must grant protection,¹⁸⁸ a decision maker cannot have knowledge of the risk and still refuse the applicant, unless they act with 'wilful blindness.'¹⁸⁹ IJs and LRs interviewed agreed that it would be difficult, if not impossible, for a woman to prove such conduct and to bring a case against the UK or the person refusing the woman's protection claim.¹⁹⁰

The question whether as habitual residents refused asylum seekers might have a claim against the UK or specific actors in the asylum system is complicated. Considering the facts above, it does not seem likely that such a claim could be established. Furthermore, even if a woman had a claim against the UK, the fact remains that FGM is not reversible and thus there would be no great benefit for such a woman other than financial compensation if she had a claim in tort.¹⁹¹

However, in addition to providing individual women with compensation, if several cases were to come to light in which refused asylum seekers are subjected to FGM upon return, this might lead to a more careful consideration of FGM asylum claims. The fate of returned asylum seekers is not usually monitored,¹⁹² however,

¹⁸³ *ibid* 214.

¹⁸⁴ *ibid* 218

¹⁸⁵ *ibid*.

¹⁸⁶ *ibid* 225.

¹⁸⁷ *ibid* 226.

¹⁸⁸ Clayton (n 170) 235.

¹⁸⁹ Simester and others (n 178) 225.

¹⁹⁰ IJ A, question 43; GC, question 38; KC, question 30; LR A, question 34; LR B, question 29; LR C, question 34.

¹⁹¹ Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (5th edn, Oxford University Press 2013) 847.

¹⁹² Leana Podeszfa and Friederike Vetter, 'Post-Deportation Monitoring: Why, How and by Whom?' (September 2013) 44 *Forced Migration Review* <www.fmreview.org/en/detention.pdf> accessed 19 July 2015, 68.

there is evidence, for example the Democratic Republic of the Congo and Eritrea, that mistakes in assessing asylum applications are made and refused applicants suffer IDT or torture.¹⁹³ None of the LRs interviewed were aware of any former clients who suffered FGM upon return,¹⁹⁴ however Kathryn Cronin is ‘sure there are cases.’¹⁹⁵ If returned women who then suffer FGM were to sue the UK, future applicants might benefit from better decision making.

While it is theoretically possible that affected asylum seekers are able to benefit from the protection afforded by UK domestic law on FGM, there are many uncertainties beginning with whether asylum seekers are habitual UK residents and extending to whether they can access reconstructive surgery via an FGMPO and whether refusing and removing an asylum seeker can be a criminal offence of aiding and abetting FGM. Since at the time of writing the passing of the Serious Crime Act 2015 is so recent that there appear to be no reports of affected asylum seekers trying to claim protection under the Act, it is but speculation to what extent the UK has extended the protection against FGM to asylum seekers. It is not within the scope of this paper to analyse the possibility in its entirety and this section merely touches on the issues that would have to be considered in the analysis. Possible measures of protection discussed above would have to be tested in the courts and the analysis would provide material for a paper of its own.

The question whether protection against FGM afforded by UK domestic law extends to asylum seekers requires that there are asylum seekers who come to the UK because they fear FGM. This is indeed the case, though these asylum seekers do not come to the UK because of the extensive protection against FGM under the country’s domestic law but because, as the name suggests, they wish to apply for asylum. The next chapter outlines the asylum process and appeals procedure asylum seekers will encounter in the UK and introduces some of the existing UK case law on FGM-based protection claims.

¹⁹³ *ibid* 69.

¹⁹⁴ LR A, question 36; LR B, question 31; KC, question 31; LR C, question 36.

¹⁹⁵ KC, question 31.

3. FGM AND ASYLUM IN THE UK

This chapter introduces the UK's asylum and appeals systems in order to clarify the processes underlying decision making in asylum cases. The UK asylum system is governed by a complex set of international, EU and domestic law, guidelines and regulations and even though asylum decision making is primarily an administrative task,¹⁹⁶ the process is fraught with legal terms. Deciding who is entitled to refugee status requires a detailed analysis of various factors. Such an analysis is made in chapter four, while this chapter lays the foundations for understanding the terminology and procedures involved in asylum decision making.

When making asylum decisions, the Home Office initially and the tribunals on appeal apply 'the same substantive rules.'¹⁹⁷ The appeals process is designed to challenge decisions and to provide remedies for flawed determinations, as well as to ensure the quality of initial decisions.¹⁹⁸ It, too, is a complex system that has changed and evolved over the years and since cases introduced in the third subchapter span 14 years, changes particularly in terminology but also in the structure of tribunal adjudication need to be examined.

The third subchapter, finally, looks at the most important source of law in relation to FGM asylum claims: case law from different tribunals and courts, more specifically refused asylum/human rights claims overturned on appeal which were made based on a fear of FGM. Of course, there are also unsuccessful appeals to asylum refusals in FGM cases, some of which are mentioned briefly in the course of chapter four; however, the analysis concentrates on successful appeals since these point out mistakes made by previous decision makers, thus highlighting areas in which decision making must be improved. In assessing the requirements for refugee status, the Home Office, tribunals and courts often make the same mistakes, thus incorrectly determining whether someone is entitled to protection. The first subchapter looks at how this question is first approached.

¹⁹⁶ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) 17.

¹⁹⁷ *ibid* 6.

¹⁹⁸ *ibid* 3.

3.1. THE ASYLUM SYSTEM

Women from affected resident communities may flee from their countries of origin because those who campaign against FGM can be perceived as threatening (religious) traditions and may be persecuted due to their political opinion, some women or parents with their daughters flee because of a fear of (the daughter) being subjected to FGM against their will, other women have already undergone the practice and flee because they fear being cut again before marrying or giving birth, some FGM survivors have undergone reconstructive surgery and fear being subjected to FGM a second time if they return to their communities and some women flee in order to avoid becoming cutters.¹⁹⁹

These women and girls (or their parents) can ask for protection in the UK based on the 1951 Convention Relating to the Status of Refugees (hereinafter “Refugee Convention” or “the Convention”) and/or the ECHR. These instruments came into force in 1954, and 1998 respectively,²⁰⁰ but the UK set down in law a right to protection for people seeking to ‘avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb on account of religious belief’ as early as 1905 in the Aliens Act.²⁰¹

However, with the beginning of World War I, the provision was removed²⁰² and the right to asylum was not set down in UK domestic law again until 1993 when the Asylum and Immigration Appeals Act was passed.²⁰³ Before that date, the UK nevertheless granted refugee status, regulated by ‘procedural Immigration Rules.’²⁰⁴ Before 1993, refugees in the UK already had most of the rights guaranteed by the Refugee Convention, though these rights were ‘interpreted fairly narrowly.’²⁰⁵ Although not incorporating the 1951 Convention itself,²⁰⁶ the 1993 Act defined an

¹⁹⁹ Novak-Irons (n 172) 78.

²⁰⁰ United Nations, ‘United Nations Treaty Collection: Chapter V: Refugees and Stateless Persons’ (United Nations 2015) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-1&chapter=5&lang=en> accessed 15 May 2015; Bogdanor (n 99) 59.

²⁰¹ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (May 2014) 32(2) *Law and History Review* <<http://dx.doi.org/10.1017/S0738248014000029>> accessed 30 May 2015, 311.

²⁰² *ibid* 338.

²⁰³ Liza Schuster and John Solomos, ‘Asylum, Refuge and Public Policy: Current Trends and Future Dilemmas in the UK’ (2001) 6(1) *Sociological Research Online* <<http://openaccess.city.ac.uk/2537>> accessed 30 May 2015, 4.

²⁰⁴ *ibid* 3f.

²⁰⁵ *ibid* 4.

²⁰⁶ Mark Symes and Peter Jorro, *Asylum Law and Practice* (2nd edn, Bloomsbury Professional 2010) 641.

asylum claim as ‘a claim made by a person [...] that it would be contrary to the United Kingdom’s obligations under the Convention [and its 1967 Protocol] for her to be removed from, or required to leave, the United Kingdom.’²⁰⁷

The obligations arising from the 1993 Act refer to the principle of *non-refoulement*, ie the obligation not to ‘expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”²⁰⁸ The 1951 Convention (as amended by the 1967 Protocol²⁰⁹ to which the UK acceded in 1968²¹⁰) defines a refugee as a person who

owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²¹¹

A Home Office official determines on behalf of the Secretary of State for the Home Department (SSHD) whether an asylum seeker is a refugee as defined by the Convention;²¹² while the decision is pending, asylum seekers are allowed to remain in the UK, however, they may be detained.²¹³ A successful asylum claim results in refugee status, ie leave to remain for five years as well as the right to work, welfare, free movement and many other rights.²¹⁴ The elements of the refugee definition, their interpretation and the requirements to be fulfilled in FGM cases will be discussed in more detail in chapter four. Suffice it to say for now that Convention reasons are one possible ground on which a person can be granted international protection in the UK; another is human rights grounds.

Just like Convention grounds, human rights grounds are based on a convention, this one incorporated into UK domestic law in 1998,²¹⁵ though ratified in 1951:²¹⁶ the

²⁰⁷ Asylum and Immigration Appeals Act 1993 (AIAA 1993), s 1.

²⁰⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.

²⁰⁹ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

²¹⁰ UNHCR, ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ (UNHCR, April 2015) <www.unhcr.org/3b73b0d63.html> accessed 31 May 2015.

²¹¹ Refugee Convention (n 208), art 1(A)(2).

²¹² Symes and Jorro (n 206) 660.

²¹³ *ibid* 645.

²¹⁴ *ibid* 677.

²¹⁵ *ibid* 545.

ECHR. The Human Rights Act 1998 incorporated Articles 2 to 12 and Article 14 of the ECHR into UK domestic law²¹⁷ and provides that public authorities, for example the Home Office when evaluating an asylum claim, or a judge in a court or tribunal deciding an appeal, must act in accordance with the rights laid down in the ECHR.²¹⁸ A human rights claim ‘can be made at any stage of the asylum process’ and applicants may or may not explicitly state certain articles of the ECHR that would be breached if they were to be returned to their country of origin.²¹⁹ Since under the Human Rights Act the Home Office must take human rights into consideration regardless of whether or not the applicant wishes to rely on them, human rights grounds are ‘inherent in [an asylum] claim.’²²⁰

As shown in chapter two, FGM can constitute torture and IDT and thus Article 3 ECHR is particularly relevant in FGM cases. Even if somebody does not qualify for refugee status on Convention grounds, she may qualify on human rights grounds, as in this case the harm feared need not be due to one of the Convention reasons.²²¹ However, women who fear FGM can usually claim membership of a PSG.²²² Nevertheless, as will become clear in the case law discussed below, there have been cases where women who feared FGM did not qualify as Convention refugees but succeeded on human rights grounds alone. In this case they will be granted subsidiary protection, called humanitarian protection in the UK.

Humanitarian protection results in the same grant of leave and many of the same rights as conferred by refugee status.²²³ In order to qualify, a person has to ‘face a real risk of serious harm’ if returned, serious harm being defined as ‘death penalty or execution’, torture or IDT and any other ‘serious and individual threat to a civilian’s

²¹⁶ Council of Europe, ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ (*Council of Europe* 2015) <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>> accessed 23 June 2015.

²¹⁷ Symes and Jorro (n 206) 546.

²¹⁸ *ibid* 548.

²¹⁹ UK Visas and Immigration, ‘Considering Human Rights Claims: Instruction’ (*UK Visas and Immigration*, 27 October 2009) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257425/consideringhrclaims.pdf> accessed 21 June 2015, 10.

²²⁰ *ibid* 3.

²²¹ Nuala Mole and Catherine Meredith, ‘Asylum and the European Convention on Human Rights’ (*Council of Europe* 2010) <www.refworld.org/pdfid/4ee9b0972.pdf> accessed 25 June 2015, 25.

²²² Elise Petitpas and Johanna Nelles, ‘The Istanbul Convention: New Treaty, New Tool’ (May 2015) 49 *Forced Migration Review* <www.fmreview.org/en/climatechange-disasters.pdf> accessed 5 June 2015, 84.

²²³ *Right to Remain, Campaigning Toolkit: An Aid to Understanding the Asylum and Immigration System in the UK, and to Campaigning for the Right to Remain* (2nd edn, Right to Remain 2013) 50.

life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’²²⁴

It is also possible not to qualify for refugee status or humanitarian protection and still have a valid claim under Art 3 ECHR which results in discretionary leave to remain for six months.²²⁵ The difference between a claim for humanitarian protection and one for discretionary leave is that the first protects ‘applicants who have a well-founded fear of serious harm emanating from other persons in the country of return’ and the second is most often applied ‘in relation to serious medical conditions’ for which no adequate treatment is available in the country of return.²²⁶ The Home Office treats all asylum claims ‘as containing an implied claim for Humanitarian Protection [...] and/or a claim for Discretionary Leave.’²²⁷

In addition to the provisions introduced by the ECHR, UK legislation regarding asylum is influenced further by EU law as judgements by the Court of Justice of the European Union on asylum matters are binding for member states²²⁸ and because the UK is part of the Common European Asylum System (CEAS).²²⁹

The CEAS provides for common asylum procedures in member states,²³⁰ *inter alia* setting out the definition of “refugee” in the European Union Asylum Qualification Directive which was adopted in 2004 and recast in 2011; the UK chose to opt out of the recast version and continues to apply the 2004 version.²³¹ The 2004 Qualification Directive ‘was transposed into UK law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the Immigration Rules.’²³² The 2004 and 2011 Qualification Directives use the same refugee definition as the 1951 Convention, adding that only ‘a third country national’ can qualify as a refugee, thereby precluding EU-nationals from seeking asylum in other EU countries.²³³ While not being bound by the 2011 version makes no difference regarding the refugee definition, there is one new obligation particularly important in the context of FGM asylum claims, which the UK is not bound by: the

²²⁴ Clayton (n 170) 401.

²²⁵ UK Visas and Immigration, ‘Considering Human Rights Claims’ (n 219) 5.

²²⁶ Symes and Jorro (n 206) 518.

²²⁷ UK Visas and Immigration, ‘Considering Human Rights Claims’ (n 219) 13.

²²⁸ Clayton (n 170) 417.

²²⁹ *ibid* 138.

²³⁰ *ibid* 153f.

²³¹ *ibid* 150.

²³² Home Office, ‘Asylum Policy Instruction’ (n 169) 6.

²³³ Council Directive (EC) 2004/83 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (Qualification Directive) arts 2(c) and (d).

2011 version obliges member states, when assessing the reasons for persecution, to give ‘due consideration’ to ‘[g]ender related aspects’ when determining membership or characteristics of a PSG.²³⁴

In addition to the Qualification Directive, the procedure for considering asylum claims is set out in the Immigration Rules, the Asylum Policy Instructions (APIs)²³⁵ and other guidance documents.²³⁶ There is, for example, an API on ‘Gender issues in the asylum claim.’²³⁷ Thus, in spite of not being bound by the 2011 Qualification Directive, the UK has its own policy on gender in asylum claims, yet there appears to be a reluctance to be bound by EU law on the subject, since, as mentioned in chapter two, the UK is also not bound by the Istanbul Convention which calls parties to interpret the Refugee Convention grounds in a gender-sensitive manner.²³⁸ The Istanbul Convention also states that

victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where [...] they might be subjected to torture or inhuman or degrading treatment or punishment.²³⁹

However, LRs interviewed did not think that ratifying the convention would improve the protection of asylum seekers against FGM²⁴⁰ unless the qualification “who are in need of protection” were to be removed as ‘this places the evidential burden back on the woman.’²⁴¹

To return to the procedure of claiming asylum in the UK, in order to do so one must be inside the country²⁴² and the process begins with a screening interview to ascertain the basic facts of the claim.²⁴³ The next step is the substantive interview during which the asylum seeker tells her story and the interviewer, the so-called case owner, clarifies and evaluates the facts of the claim.²⁴⁴

²³⁴ *ibid*, art 10(1)(d).

²³⁵ Clayton (n 170) 366.

²³⁶ *ibid* 34f.

²³⁷ UK Visas and Immigration, ‘Gender Issues in the Asylum Claim: Process’ (*UK Visas and Immigration*, 29 September 2010) <www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process> accessed 26 June 2015.

²³⁸ Istanbul Convention (n 126) arts 60(1) and 60(2).

²³⁹ *ibid*, art 61(2).

²⁴⁰ LR A, question 32; LR B, question 27.

²⁴¹ LR C, question 32.

²⁴² Clayton (n 170) 384.

²⁴³ *ibid* 366.

²⁴⁴ *ibid* 368.

If an application for asylum is refused, the applicant can try to submit a fresh claim, ie present new evidence which has come to light while the original claim was being considered,²⁴⁵ or she can appeal the Home Office decision.

3.2. THE APPEALS PROCESS

The asylum appeals process is regulated by legislation which has been changed several times since the Aliens Act 1905 which not only provided for a right to asylum but also for the right to appeal a negative decision.²⁴⁶ However, as the Act was repealed in 1914 and no legislation regarding appeals on immigration decisions was put in its place, people given negative decisions had no remedy until 1969 when the Immigration Appeals Act was passed.²⁴⁷

Although the earliest case discussed in the next subchapter was decided in 2000 and the most recent one in 2014, this section gives an overview of the development of legislation since 1969 leading up to the appeals process used today. ‘No other tribunal system has been as frequently reformed as the asylum appeal process’;²⁴⁸ in the years between 2000 and 2014 alone, three different tribunal systems were in operation. This section provides a terminological and contextual basis for the discussion of the case law.

The Immigration Appeals Act 1969 introduced a right of appeal against decisions made by the Home Office regarding immigration matters,²⁴⁹ including deportation and removal directions,²⁵⁰ and established a tribunal system, consisting of adjudicators and an Immigration Appeal Tribunal (IAT)²⁵¹ called the Immigration Appellate Authority (IAA).²⁵²

The 1969 Act was soon repealed but in accordance with the Immigration Act 1971 there continued to be an IAT, as well as adjudicators to resolve appeals.²⁵³ Asylum seekers refused by the Home Office could appeal against the decision to deport them to an adjudicator, and either party, ie the asylum seeker or the Home

²⁴⁵ *ibid* 404.

²⁴⁶ *Care, Migrants and the Courts* (n 100) 4.

²⁴⁷ *ibid* 12f.

²⁴⁸ *Thomas* (n 196) v.

²⁴⁹ Immigration Appeals Act 1969 (IAA 1969), s 2(1).

²⁵⁰ *ibid*, ss 4(1) and (5)(1).

²⁵¹ *ibid*, s 1(1).

²⁵² *Care, Migrants and the Courts* (n 100) 14.

²⁵³ Immigration Act 1971 (IA 1971), s 12.

Office, could appeal to the IAT, with the tribunal's permission, against the adjudicator's decision.²⁵⁴ However, asylum seekers could only appeal from outside the UK after having been returned to their countries of origin²⁵⁵ and in practice asylum appeals were a rarity.²⁵⁶ The IAT's decision would be binding unless quashed in judicial review.²⁵⁷ Appeal rights were limited in the Immigration Act 1988, for example by restricting the right of appeal against an order to deport.²⁵⁸

The Asylum and Immigration Appeals Act 1993 introduced an in-country right of appeal²⁵⁹ as well as asylum grounds, ie treatment contrary to the 1951 Convention, as a ground of appeal²⁶⁰ so that for the first time asylum seekers refused refugee status had a specific right of appeal.²⁶¹ However, the appeal could not be, and today still is not, brought against the refusal of asylum but against the decision to remove the refused applicant from the UK.²⁶² In spite of this technicality, even judges sometimes call proceedings "appeals against the refusal of asylum."²⁶³ The 1993 Act retained the IAT and introduced an onward right of appeal to the Court of Appeal or the Court of Session in Scotland.²⁶⁴

The Asylum and Immigration Act 1996 restricted the right to appeal for asylum seekers who, among other things, came from a country in which in the SSHD's estimation there was 'no serious risk of persecution', who had entered the UK without a passport or with an invalid one, who were unable to show a fear of persecution or this fear was 'manifestly unfounded.'²⁶⁵

The Immigration and Asylum Act 1999 introduced an appeal on Human Rights grounds²⁶⁶ and the Nationality, Immigration and Asylum Act 2002, retained human rights and the UK's obligations under the 1951 Convention as grounds of appeal,²⁶⁷

²⁵⁴ Care, *Migrants and the Courts* (n 100) 19.

²⁵⁵ *ibid* 22.

²⁵⁶ Geoffrey Care, 'The Judiciary, the State, and the Refugee: The Evolution of Judicial Protection in Asylum – A UK Perspective' (2004) 28(5) *Fordham International Law Journal* <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1991&context=ilj>> accessed 13 June 2015, 1431.

²⁵⁷ Care, *Migrants and the Courts* (n 100) 19f.

²⁵⁸ *ibid* 51.

²⁵⁹ *ibid* 22.

²⁶⁰ AIAA 1993 (n 207), s 8(1).

²⁶¹ Care, *Migrants and the Courts* (n 100) 24.

²⁶² Thomas (n 196) 61.

²⁶³ See, for example, *MH and others (Article 3-FGM) Sudan CG* [2002] UKIAT 02691 [1] and *P and M* (n 101), p 1. This simplification will also be employed in the case law summaries in the next subchapter.

²⁶⁴ AIAA 1993 (n 207), s 9.

²⁶⁵ Asylum and Immigration Act 1996 (AIA 1996), s 1.

²⁶⁶ Immigration and Asylum Act 1999 (IAA 1999), s 65.

²⁶⁷ Nationality, Immigration and Asylum Act 2002 (NIAA 2002), s 84(1)(c) and (g).

as well as adjudicators²⁶⁸ and the IAT.²⁶⁹ In the Act it was decided that appeals to the IAT could only be made on a point of law,²⁷⁰ as opposed to an error regarding the facts of the case which could be raised before an adjudicator.²⁷¹ Similarly, the Act provided for a right of appeal to the High Court or the Court of Session in Scotland, only ‘on the ground that the tribunal made an error of law’²⁷² and to the Court of Appeal or Scottish Court of Session with the same restriction.²⁷³

The 2002 Act was amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The Act abolished the two-tier appeal system consisting of adjudicators and IAT, making the latter the only tier of appeal and renaming it Asylum and Immigration Tribunal (AIT).²⁷⁴ However, the AIT could reconsider appeals if permission to do so was given by the High Court in England and Wales, the Court of Session (Outer House) in Scotland or the High Court in Northern Ireland due to an error of law made by the AIT.²⁷⁵ After reconsideration, an appeal could be made to the Court of Appeal in England and Wales, the Court of Session (Inner House) in Scotland or the Court of Appeal in Northern Ireland also on a point of law.²⁷⁶ Originally, it had been intended that the Act should ‘exclude[...] the courts from jurisdiction over [AIT] decisions’, this, however, was amended.²⁷⁷

The Tribunals, Courts and Enforcement Act 2007 abolished the AIT and ‘created a unified Tribunal structure, to encompass all areas of law.’²⁷⁸ This also applied to the areas of immigration and asylum law and thus the new tribunal, which at the time of writing is still in place and again operates as a two-tier system, has an Immigration and Asylum Chamber (IAC), both in the First Tier Tribunal (FTT) and in the Upper Tribunal (UT).²⁷⁹ The FTT can review its own decisions on application of either party to the case or on its own initiative and re-decide the case or refer it to the UT.²⁸⁰ While the FTT can consider anew the facts of the case,²⁸¹ appeals to the UT

²⁶⁸ *ibid*, s 81.

²⁶⁹ *ibid*, s 100(1).

²⁷⁰ *ibid*, s 101(1).

²⁷¹ *ibid*, s 85(4).

²⁷² *ibid*, s 101(2).

²⁷³ *ibid*, s 103(1).

²⁷⁴ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (AITOC 2004), s 26.

²⁷⁵ *ibid*, s 26(6).

²⁷⁶ *ibid*.

²⁷⁷ *Bogdanor* (n 99) 70.

²⁷⁸ *Clayton* (n 170) 212.

²⁷⁹ *ibid* 212.

²⁸⁰ Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), s 9(1), (2) and (5).

²⁸¹ *ibid*, s 9(8).

can only be made with permission of the FTT or UT on a point of law.²⁸² The UT may make a decision itself or remit a case back to the FTT for rehearing.²⁸³ The UT can also review its own decisions, on application of either party or on its own initiative.²⁸⁴ An appeal to the Court of Appeal in England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland is possible with permission of the UT or the relevant court if either considers ‘that the proposed appeal would raise some important point of principle or practice’ or ‘that there is some other compelling reason’ for the appeal.²⁸⁵ The Court of Appeal/Court of Session must, if it finds an error of law, either remit the case back to the UT for rehearing or re-decide the case.²⁸⁶

The section on appeals in the Immigration Act 2014 restricts the grounds of appeal to cases where a removal from the UK would be contrary to the Refugee Convention or the ECHR or where it would breach the UK’s ‘obligations in relation to persons eligible for a grant of humanitarian protection.’²⁸⁷ All other appeal rights set down in the Nationality, Immigration and Asylum Act 2002, which is amended by the relevant section of the 2014 Act, such as the refusal of leave to enter the UK or the decision to remove a person unlawfully in the UK,²⁸⁸ have been removed.

Once all appeal rights are exhausted, an asylum seeker can apply for judicial review, a procedure concerned with ‘the application of law or policy’ that can determine whether in reaching a decision the tribunal or court followed the correct procedures and can thus lead to a decision having to be determined anew if, for example, the claimant did not receive a fair hearing.²⁸⁹ The decision reviewed will not be remade but only set aside²⁹⁰ and no new evidence can be considered, while in an appeal new evidence can be introduced and the decision can be remade.²⁹¹ The strength of asylum appeals lies in the fact that they are ‘forward looking’; tribunals and courts must consider all evidence available at the time of the hearing, thus making it possible to take into account changes of conditions in the country of origin that have occurred between the original decision and the hearing of the appeal.²⁹²

²⁸² *ibid*, s 11(1) and (4).

²⁸³ *ibid*, s 12(2).

²⁸⁴ *ibid*, s 10(1) and (2).

²⁸⁵ *ibid*, s 13(4) and (6).

²⁸⁶ *ibid*, s 14(2).

²⁸⁷ Immigration Act 2014 (IA 2014), s 15(4).

²⁸⁸ NIAA 2002 (n 267), s 82(2).

²⁸⁹ Clayton (n 170) 239f.

²⁹⁰ *ibid* 239.

²⁹¹ Jonathan Law, *A Dictionary of Law* (Oxford University Press 2015) 40.

²⁹² Clayton (n 170) 233.

If an appeal is allowed on asylum or human rights grounds, the Home Office not only has to refrain from removing the claimant from the UK but also has to grant refugee status²⁹³ or humanitarian protection,²⁹⁴ respectively. The following subchapter looks at such successful appeals.

3.3. CASE LAW

Even though the tribunal system has undergone several reforms, the way appeals are handled and the ‘nature of the decision-making task’ have remained the same, especially during the change from the AIT to the FTT/UT.²⁹⁵ Therefore, case law from between 2000 and 2014 can be compared without having to allow for any changes in these processes.

In addition to tribunal decisions, four judgements by the Court of Appeal and one by the House of Lords are discussed below. The four decisions that came before the Court of Appeal are appeals from the IAT or AIT, ie they were made under the old system before the introduction of the FTT and UT. Under the old system there was a ‘generous test governing permission to appeal’, namely ‘an arguable error of law with a real prospect of success’, whereas under the new system there has to be ‘an important point of principle of practice’ or some ‘other compelling reason.’²⁹⁶ Thus, the Court of Appeal decisions discussed below do not necessarily raise a particularly important point and deal with questions which under the new system would be resolved by the UT.²⁹⁷

While case law from superior courts creates binding precedents,²⁹⁸ the ‘intention of Tribunal case law was that it would not be binding in the way that the decisions of higher courts are.’²⁹⁹ Nevertheless, the UT, as it exists at the time of writing, is a ‘court of record’ and thus intended to have greater authority ‘explicitly equal in the court hierarchy with the High Court.’³⁰⁰ However, it is difficult to create precedents

²⁹³ *ibid.*

²⁹⁴ Mark Henderson and Alison Pickup, ‘Best Practice Guide to Asylum and Human Rights Appeals’ (*Electronic Immigration Network* 2015) <www.ein.org.uk/bpg/contents> accessed 20 June 2015, s 41.18.

²⁹⁵ Thomas (n 196) vi.

²⁹⁶ *ibid* 252.

²⁹⁷ *ibid* 253.

²⁹⁸ Law (n 291) 470.

²⁹⁹ Clayton (n 170) 36.

³⁰⁰ *ibid.*

in asylum and human rights cases because hardly ever are the facts of two cases the same.³⁰¹

Published FGM case law is not extensive. There are eight successful appeals for claims based on a fear of FGM freely available from the databases Westlaw, LexisNexis, the British and Irish Legal Information Institute (BAILII), Refworld and the UK government's online database for Tribunal decisions.³⁰² Not all tribunal decisions are reported³⁰³ and the Tribunal database only lists unreported decision made after 1 June 2013. Older unreported decisions can be requested by email, however upon enquiring after such decisions containing the search terms "Female Genital Mutilation," "Female Genital Cutting," "Female Circumcision," "FGM" and/or "FGC", the Ministry of Justice was unwilling to share all existing decisions (over 200) as this was 'not [...] practical'³⁰⁴ and did not react to repeated requests for a randomly selected number of these decisions that might be practical to send. Likewise, the Home Office was contacted via two separate Freedom of Information requests, as well as in a general enquiry for appeal decisions, all of which brought no results.

Therefore, this analysis will have to contend with the publicly available case law, though in addition to the eight cases mentioned above, three more successful appeals were obtained, since it is possible to request specific decisions from the Tribunal database if the date of the decisions and claimant's name (or initials) are known.³⁰⁵ Furthermore, with the kind permission of Dr Barbara Harrell-Bond of the *Rights In Exile Programme*,³⁰⁶ an unpublished case will be analysed.³⁰⁷ This makes a total number of twelve cases, however, in one judgement two cases were dealt with simultaneously.

It is difficult to say what percentage of all asylum claims made in the UK are based on FGM because 'the basis of claim for asylum is not centrally recorded' by

³⁰¹ Thomas (n 196) 138.

³⁰² All decisions discussed here are available from one or more of these databases. The Tribunal database can be found at <http://tribunalsdecisions.service.gov.uk>.

³⁰³ Clayton (n 170) 36.

³⁰⁴ Email from Tribunal database to author (29 May 2015).

³⁰⁵ These decisions have to be requested from utiacdecisions@hmcts.gsi.gov.uk. Since anyone can make such as request, these decisions are treated as publicly available and are therefore not reproduced in the appendix to this paper. Where a decision has to be requested, this is indicated in the footnote which first mentions the decision.

³⁰⁶ Dr Harrell-Bond writes expert reports for FGM cases and helps claimants to write their witness statements.

³⁰⁷ This is a FTT decisions; FTT decisions are not usually published and cannot be requested from the Tribunal database. The decision can be found in the appendix to this paper.

the Home Office.³⁰⁸ Around 600 women from countries affected by FGM are granted protection in the UK each year,³⁰⁹ a number which includes around 125 girls aged 14 or younger.³¹⁰ It is estimated that in the UK around 360 initial asylum claims per year relate to FGM.³¹¹ Regarding appeals, all professionals interviewed who were able to estimate what percentage of all female asylum seekers' claims they dealt with was related to FGM thought that FGM cases constituted a small percentage of claims.³¹² However, in the professionals' experience, those asylum seekers whose claims were refused at first instance were generally able to have the decision overturned on appeal.³¹³

Since not enough decisions are available for a quantitative analysis, this paper is confined to a qualitative analysis, though this, too, is constrained by the limited number of decisions. Below, the available cases will be summarised and reasons for overturning the decisions will be established. These reasons were identified by analysing the judgements as to whether the claimant's representatives identified an error on grounds of which they appealed and whether the (immigration) judge(s) explicitly referred to errors made by the previous decision maker or made findings contrary to those made by the previous decision maker (the previous judgement is often quoted in part).

The reasons for overturning decisions were categorised to reflect requirements used in the assessment of eligibility for refugee status (and, save the Convention reason, for humanitarian protection), more specifically the requirement to establish a "real risk" of persecution, the requirement to establish a Convention ground and the requirement to prove that the risk is not confined to the claimant's home area. A detailed explanation of these requirements as well as an analysis of each of the cases summarised follows in the next chapter. The cases are listed in chronological order:

*Yake v SSHD*³¹⁴ is the earliest decision that could be obtained for the purpose of this research; it was heard before the IAT in 1999 and decided in 2000. A woman from

³⁰⁸ HC Deb 19 Mar 2014, vol 577, col 605W.

³⁰⁹ UNHCR, 'Too Much Pain: Female Genital Mutilation & Asylum in the European Union: A Statistical Overview' (*UNHCR*, February 2013) <www.unhcr.org/531880249.html> accessed 16 May 2015, 15.

³¹⁰ *ibid* 29.

³¹¹ *ibid* 31.

³¹² IJ A, question 11; KC, question 8; LR C, question 8.

³¹³ IJ A, question 12; GC, question 11; LR B, question 7; KC, question 9.

³¹⁴ (UKIAT 19 January 2000); The decision can be requested from the Tribunal database.

the Ivory Coast who feared FGM upon marriage,³¹⁵ appealed against the refusal of her asylum claim, which an adjudicator had dismissed because she found the woman was not credible.³¹⁶ The adjudicator gave no reasons for finding so and the Home Office conceded that it was a flawed finding.³¹⁷

The IAT found the woman's story to be credible,³¹⁸ they recognised that FGM is a form of persecution³¹⁹ and held that the woman belonged to a PSG, namely "a Yopougou woman who may be subjected to FGM."³²⁰ The judges then found that no state protection was available in the Ivory Coast³²¹ and that internal relocation was not possible for her.³²²

The decision was overturned due to a flawed assessment of the risk of undergoing FGM, which had been made due to an adverse credibility finding.

In *MH and others (Article 3-FGM) Sudan CG*,³²³ heard before the IAT in 2002, a Sudanese family appealed against an adjudicator's decision to refuse their appeal against the SSHD's refusal of asylum. The family consisted of the parents and four children, one of whom was a girl 'of an age that if she were returned to Sudan, she would face being forcibly circumcised.'³²⁴ It was accepted by the adjudicator that FGM constituted degrading treatment, but he did not believe that the girl would undergo FGM because he did not accept that the parents 'would be powerless to prevent' it from happening.³²⁵

While the tribunal was not able to identify a PSG, they found that the daughter's rights under Article 3 of the ECHR would be breached were she returned.³²⁶ The tribunal accepted evidence that internal relocation was impossible and that state protection was not forthcoming.³²⁷ It was held that it was 'an almost impossible task for the [parents] to protect their daughter, at all times, from being taken by her relatives and FGM performed upon her.'³²⁸

³¹⁵ *ibid* p 3.

³¹⁶ *ibid* p 4.

³¹⁷ *ibid*.

³¹⁸ *ibid*.

³¹⁹ *ibid* p 9.

³²⁰ *ibid* p 10.

³²¹ *ibid* p 11.

³²² *ibid* p 12.

³²³ *MH and others* (n 263).

³²⁴ *ibid* [5].

³²⁵ *ibid* [7].

³²⁶ *ibid* [13] and [14].

³²⁷ *ibid* [20].

³²⁸ *ibid* [22].

The decision was overturned due to a flawed assessment of the risk of undergoing FGM, which had been made due to an adverse credibility finding about the ability of the parents to protect their daughter.

In *P and M v SSHD*,³²⁹ heard before the Court of Appeal in 2004, an 18-year-old woman (claimant M) from Kenya appealed against the decision of the IAT to refuse her claim for asylum. The IAT had reversed an adjudicator's decision to grant asylum, which the adjudicator had justified by stating that the woman belonged to a PSG.³³⁰ The claimant's father had joined the Mungiki sect in Kenya, a movement in favour of FGM, and performed FGM on the woman's mother and sister.³³¹ The adjudicator identified the social group as consisting of women in Kenya,

particularly Kikuyu women [...] who have immutable characteristics of age and sex which exist independently of persecution and can be identified by reference to their being compelled to undergo FGM, particularly if they are members of or related to members of the Mungiki sect.³³²

The SSHD claimed, and the IAT held, that the group as identified by the adjudicator did not form a social group for the purpose of the 1951 Convention; however the Court of Appeal held that the adjudicator's decision had been 'plainly right' and thus allowed the appeal.³³³

The decision was overturned due to a flawed determination regarding membership of a PSG.

In *VNM v SSHD*,³³⁴ heard before the Court of Appeal in 2006, a 31-year-old woman from Kenya appealed against the decision of the IAT to refuse her claim for asylum. The IAT had reversed an adjudicator's decision to grant asylum, taking the view that the claimant could relocate within Kenya and thus escape FGM, which the adjudicator had considered impossible.³³⁵ The claimant feared being subjected to FGM by her boyfriend who was a member of the Mungiki sect.³³⁶ While the adjudicator had argued that the claimant would not be able to avoid the Mungiki who

³²⁹ *P and M* (n 101).

³³⁰ *ibid* [41].

³³¹ *ibid* [40].

³³² *ibid* [41].

³³³ *ibid* [48] - [49].

³³⁴ [2006] EWCA Civ 47.

³³⁵ *ibid* [1].

³³⁶ *ibid* [4]-[5].

are spread all over Kenya and mostly of the same tribe as the claimant (Kikuyu),³³⁷ the IAT held that the Mungiki would have no knowledge of the claimant's return, nor would they be able to find her in a country as large as Kenya.³³⁸ While the Court of Appeal agreed that the Mungiki would not be likely to discover the claimant's return, it held that the IAT had not engaged with the question whether or not it would be reasonable for the claimant to relocate within Kenya. The Court of Appeal set aside the IAT's decision and remitted the case back to it for a fresh hearing.³³⁹

The case was re-decided in *VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG*,³⁴⁰ heard in 2007 and 2008 by the AIT, as it was by then. The tribunal found that 'a Gikuyu woman in Kenyan society is expected to look for protection to her own husband or [...] to members of her tribe' and that 'a woman in the Appellant's position would have to look to precisely those groups [...] despite the fact that this would also carry a risk of eventual discovery by her potential persecutors.'³⁴¹ The tribunal decided that there was 'no reasonable internal relocation alternative.'³⁴²

It was due to a flawed finding regarding this alternative that the original IAT decision was overturned.

*Fornah v SSHD*³⁴³ is the best-known case regarding FGM asylum claims in the UK. It was heard before the House of Lords in 2006, the highest court in the UK at the time. The claimant, Zainab Esther Fornah, a national of Sierra Leone, was 15 years old when she first claimed asylum in the UK.³⁴⁴ A lengthy litigation began which turned on the question whether or not Fornah belonged to a PSG, a claim refused by the SSHD, allowed by an adjudicator, dismissed by the IAT, with the Court of Appeal upholding the IAT's decision,³⁴⁵ but finally allowed in the House of Lords.

Lord Bingham thought it 'clear that women in Sierra Leone are a group of persons sharing a common characteristic [...] namely a position of social inferiority as compared with men' and that 'FGM is an extreme and very cruel expression of male dominance.'³⁴⁶ Thus he found 'no difficulty in recognising women in Sierra Leone as a particular social group,' either defined by their inferiority compared to

³³⁷ *ibid* [10].

³³⁸ *ibid* [11].

³³⁹ *ibid* [26].

³⁴⁰ *VM* (n 101).

³⁴¹ *ibid* [199].

³⁴² *ibid* [222].

³⁴³ *K and Fornah* (n 2).

³⁴⁴ *ibid* [4].

³⁴⁵ *ibid* [9].

³⁴⁶ *ibid* [31].

men or by the narrower ‘common characteristic of intactness’ shared by all women who have not yet been subjected to FGM.³⁴⁷

The decision was overturned due to a flawed determination regarding membership of a PSG.

In *CM (Kenya) v SSHD*,³⁴⁸ heard before the Court of Appeal in 2007, a 20-year-old Kenyan woman appealed against the decision of the AIT to refuse her asylum claim. The AIT accepted that she had fled her home area (Meru) because her father wanted her to undergo FGM and that there was no sufficient state protection available. However, the AIT found that she could safely relocate to Nairobi³⁴⁹ and that this would ‘not be unreasonable or unduly harsh.’³⁵⁰

The Court of Appeal held that in determining this, the AIT had failed to consider expert evidence detailing that for a single woman who opposes FGM life in Nairobi would be unsafe.³⁵¹ The Court accepted said evidence and allowed the appeal.³⁵²

The decision was overturned due to a flawed determination regarding the feasibility of internal relocation.

In *FM (FGM) Sudan CG*³⁵³ heard before the AIT in 2007, a Sudanese woman appealed against an adjudicator’s decision (her claim had started when there still was a two-tier system of adjudicator and IAT) to refuse her and her four children leave to remain in the UK. The woman feared that her two daughters would be subjected to FGM if returned.³⁵⁴ The adjudicator had discounted evidence by the woman dealing with the ‘real risk to the [daughters] of being compelled to undergo [...] FGM’³⁵⁵ and the risk to the mother³⁵⁶ who had campaigned against FGM while outside Sudan.³⁵⁷ The AIT decided to take into consideration fresh evidence by an expert in

³⁴⁷ *ibid.*

³⁴⁸ *CM* (n 101).

³⁴⁹ *ibid* [5].

³⁵⁰ *ibid* [8].

³⁵¹ *ibid* [11].

³⁵² *ibid* [12]-[13].

³⁵³ *FM* (n 101).

³⁵⁴ *ibid* [1].

³⁵⁵ *ibid* [2].

³⁵⁶ *ibid* [3].

³⁵⁷ *ibid* [12].

order to come to a decision.³⁵⁸ The expert considered ‘the risk [to the daughters] to be “very real”’³⁵⁹ and that the mother’s activities put her at risk as well.³⁶⁰

The tribunal found that the daughters were ‘at real risk on return of treatment that would be contrary to article 3 of the ECHR’³⁶¹ and that they belonged to a PSG.³⁶² Further, it was held that the mother was ‘at real risk of persecution for a Refugee Convention reason’, not because of her political opinion but because due to her ‘abhorrence of FGM, any infliction of it upon either of her daughters is [...] reasonably likely to have so profound an effect upon [her] as to amount to the infliction on her of persecutory harm.’³⁶³ The AIT also found that state protection and internal relocation were not an option.³⁶⁴

The decision was overturned due to a flawed assessment of the risk of undergoing FGM made due to a dismissal of evidence.

In *FK (Kenya) v SSHD*,³⁶⁵ heard before the Court of Appeal in 2007, a Kenyan woman appealed against a decision by the AIT stating that she could relocate within Kenya in order to avoid FGM for herself and her daughter.³⁶⁶ The 42-year-old Kikuyu woman and her 19-year-old daughter feared being subjected to FGM by the Mungiki sect, which the woman’s father-in-law had joined and members of which had killed the woman’s husband when the family refused to join the sect.³⁶⁷ The Court of Appeal found that the woman was at risk in her home area but that the AIT had not considered the ‘reasonableness and safety’ of internal relocation.³⁶⁸ The case was remitted back to the AIT so that this issue could be determined.³⁶⁹

The AIT reconsidered the case in 2008³⁷⁰ and found that the women would have to live in a Kikuyu community as they were not accompanied by a male relative and tribal membership provides support in the absence of such company. Since ‘wherever there are Kikuyu there are likely to be some Mungiki’ and as the women’s

³⁵⁸ *ibid* [5].

³⁵⁹ *ibid* [6].

³⁶⁰ *ibid* [12].

³⁶¹ *ibid* [163].

³⁶² *ibid* [145].

³⁶³ *ibid* [161].

³⁶⁴ *ibid* [160] and [164].

³⁶⁵ *FK (CA)* (n 90).

³⁶⁶ *ibid* [3].

³⁶⁷ *ibid* [2].

³⁶⁸ *ibid* [29].

³⁶⁹ *ibid* [30].

³⁷⁰ The decision can be requested from the Tribunal database. The decision has been anonymised but will be cited as *FK v SSHD* (UKAIT, 21 November 2008).

accents betrayed their home area, the news of their return could reach her father-in-law.³⁷¹ It was found that the women were ‘at risk throughout Kenya.’³⁷²

The appeal was allowed due an impossibility of internal relocation.

In *S E-A v SSHD*,³⁷³ heard before the UT in 2012, an Egyptian woman appealed to the UT against the decision of the FTT to dismiss her appeal against removal directions issued by the SSHD following the refusal of her asylum claim based on a fear of FGM, forced marriage and persecution as a lesbian in Egypt.³⁷⁴ The appeal to the UT only addressed the risk of FGM and the woman’s sexual orientation.³⁷⁵

The UT found that she was at risk as a lesbian in Egypt³⁷⁶ as well as of undergoing FGM³⁷⁷ and that the FTT judge, with respect to both, had reached a wrong conclusion regarding the real risk of persecution or harm to the appellant because he had failed to have ‘proper regard’ to the expert report submitted on behalf of the claimant and alleged, but gave no reasons why, that in the absence of state protection the claimant’s mother ‘would be able to protect [her] from the risk of FGM.’³⁷⁸

The decision was overturned due to a flawed assessment of the risk of undergoing FGM, which had been made due to an adverse credibility finding about the ability of the mother to protect her daughter and due to a dismissal of evidence.

In *K and others (FGM) The Gambia CG*,³⁷⁹ heard before the UT in 2012, the tribunal dealt with two cases that raised similar issues. One was the appeal of a Gambian couple against the rejection of their appeal against a decision to refuse asylum. They feared that their young daughter, Miss K, would be subjected to FGM upon return to the Gambia.³⁸⁰ The AIT, as it still was when the claimants first appealed, found that ‘the risk of FGM for [Miss K] was remote in time, and could be avoided through relocation’, a determination the UT disagreed with, finding that the ‘risk to Miss K

³⁷¹ *ibid* [56].

³⁷² *ibid* [58].

³⁷³ (UT IAC, 3 June 2013).

³⁷⁴ *ibid* [2] and [4].

³⁷⁵ *ibid* [7].

³⁷⁶ *ibid* [22].

³⁷⁷ *ibid* [30].

³⁷⁸ *ibid* [29].

³⁷⁹ [2013] UKUT 00062(IAC).

³⁸⁰ *ibid* [2] and [4].

exists in the reasonably foreseeable future’ and that it ‘cannot be avoided by relocating.’³⁸¹

The second case concerned another woman from the Gambia, AS, who feared FGM and whose appeal against refusing asylum had been successful in the FTT on grounds that internal relocation was impossible. The SSHD appealed against this finding to the UT.³⁸² The UT found that the FTT’s decision had been correct and that ‘the risk[...] cannot be avoided by internal relocation.’³⁸³

The second case confirmed a correct decision of the FTT, the first case overturned a flawed determination regarding the possibility of internal relocation.

In *OJ v SSHD*,³⁸⁴ heard before the FTT (IAC) in 2013, a Sierra Leonean woman appealed the decision of the SSHD to refuse asylum on grounds of fear of FGM to herself and her daughter.³⁸⁵ The woman and her partner were Krio Christians, the only tribe in Sierra Leone not practising FGM, however her partner’s mother was Mende; an ethnic group affected by FGM.³⁸⁶ The woman feared that her partner’s mother would force her and her daughter to undergo FGM.³⁸⁷ In her refusal letter the SSHD claimed that the woman and daughter would be sufficiently protected by her Krio family and thus not at risk of FGM because it was ‘not credible’ that the mother of the woman’s partner would force them to undergo FGM.³⁸⁸

The FTT judge found that there was a real risk to the daughter due to her grandmother’s membership of a tribe affected by FGM,³⁸⁹ as well as to the woman herself.³⁹⁰ Both had a well-founded fear of persecution.³⁹¹

The decision was overturned due to a flawed assessment of the risk of undergoing FGM, which had been made due to an adverse credibility finding about the ability of the parents to protect their daughter.

In *AF v SSHD*,³⁹² heard before the UT (IAC) in 2013, a Sierra Leonean woman, her partner and their two daughters appealed against a decision of the FTT refusing their

³⁸¹ *ibid* [130].

³⁸² *ibid* [3] and [5].

³⁸³ *ibid* [131].

³⁸⁴ (FTT IAC, 8 October 2013); unpublished; made available by Dr Harrell-Bond, see appendix.

³⁸⁵ *ibid* [17].

³⁸⁶ *ibid* [19] and [42].

³⁸⁷ *ibid* [30].

³⁸⁸ *ibid* [83] - [85].

³⁸⁹ *ibid* [116].

³⁹⁰ *ibid* [117].

³⁹¹ *ibid* [118].

claim for asylum on grounds of the fear that the two daughters would be subjected to FGM upon return to Sierra Leone.³⁹³ The FTT judge found the claim that the daughters would be at risk of FGM ‘totally spurious’ because the woman and her husband were ‘very much against’³⁹⁴ FGM and could ‘protect their daughter[s].’³⁹⁵

The UT judge accepted that the woman herself had undergone FGM and her family was in favour of it.³⁹⁶ While the FTT found that even if it were accepted that the daughters were at risk of FGM, the parents could protect them from undergoing the practice, for example by relocating,³⁹⁷ the UT held that the daughters are members of a PSG and at real risk of FGM upon return to Sierra Leone against which the parents cannot protect them, neither by relocating nor by any other means.³⁹⁸

The decision was overturned due to a flawed assessment of the risk of undergoing FGM, which had been made due to an adverse credibility finding about the ability of the parents to protect their daughters.

In summary, of the twelve cases discussed here, six decisions to refuse asylum were overturned because of a flawed assessment of the risk of undergoing FGM, two because of a wrong determination regarding membership of a PSG and four because of an incorrect finding that internal relocation was available.

These three issues will be examined in detail in the next chapter in order to identify why such mistakes are made and what can be done to avoid them.

³⁹² (UT IAC, 31 January 2014); This decision can be requested from the Tribunal database.

³⁹³ *ibid* [11] and [13].

³⁹⁴ *AF and others v SSHD* (FTT IAC, 18 January 2013) [56]; unpublished; made available by Dr Harrell-Bond, see appendix.

³⁹⁵ *ibid* [57].

³⁹⁶ *AF* (UT) (n 392) [44].

³⁹⁷ *AF* (FTT) (n 394) [57] and [58].

³⁹⁸ *AF* (UT) (n 392) [46] and [47].

4. FGM ASYLUM CLAIMS: IMPROVED DECISION MAKING

As announced in chapter three, this chapter will deal with the elements of the refugee definition, their interpretation and the requirements to be fulfilled in FGM cases. More specifically, it will discuss those elements in particular detail which, from looking at the case law in the previous chapter, can be identified as having been the source of errors in Home Office, tribunal and court decisions. The twelve successful appeals summarised above do not constitute a representative sample, but only a glimpse of the reasons why decisions to refuse asylum in FGM cases were overturned on appeal. Despite the small sample, a qualitative analysis of why women's legitimate asylum claims were refused is possible and the reasons for overturning the decision are remarkably similar throughout the different courts and tribunals in different years.

The premise of this analysis is that a successful appeal, unless overturned again by the next-higher tribunal or court, indicates that an error was made in deciding a case at a lower level. However, with regard to asylum appeals against the initial decision by the Home Office this approach to analysing errors has been criticised. It has been claimed that a successful appeal does not indicate whether the initial decision was flawed, nor that it is 'the purpose of the appeal process to identify errors in initial decisions.'³⁹⁹ This, it is argued, is because the first appeal determines the facts of a case afresh and thus two decision makers may easily arrive at different conclusions, be it because they interpret facts differently, because conditions in the country of origin have changed by the date of the appeal or because new evidence comes to light.⁴⁰⁰ However, it has been conceded that an appeal may 'uncover[...] errors in initial decisions', even if this is said to happen only 'occasionally' and is usually 'incidental.'⁴⁰¹

This criticism is contradicted by the existence of studies that have done just that: evaluating of the accuracy of first decisions in asylum cases based on the outcome of appeals, as well as determining errors made by decision makers. While not relying solely on the outcome of appeals, an *Asylum Aid* report analysing first decisions by the Home Office in women's asylum claims found that appeal outcomes were 'useful

³⁹⁹ Thomas (n 196) 71.

⁴⁰⁰ *ibid* 71f.

⁴⁰¹ *ibid* 71.

and relevant' when determining the quality of a decision.⁴⁰² Another report by *Amnesty International* and *Still Human Still Here* relied on appeal determinations to find out why Home Office decisions to refuse asylum were overturned.⁴⁰³ The report recognises the problem that different decision makers may reach different conclusions and therefore 'distinguish[es] between appeals which were allowed because the initial decision was flawed and those where [the Home Office's] decision was reasonable, but the IJ reached a different conclusion.'⁴⁰⁴

However, these considerations are theoretically only relevant for one of the cases summarised in the section above (*OJ*) which was decided at the FTT and thus considers the facts of the case anew; all other cases were decided in second-stage tribunal hearings or at higher courts and thus on points of law rather than fact.⁴⁰⁵

On the other hand, errors of law and errors of fact in asylum appeals are 'not always easy to distinguish'⁴⁰⁶ and even though this distinction exists, tribunals and courts still consider all evidence available at the time of the hearing.⁴⁰⁷ However, new 'evidence usually contributes to a finding of fact rather than law'⁴⁰⁸ and 'an error of law must be more than a disagreement on the facts.'⁴⁰⁹ In practice, tribunals and courts are 'flexible'⁴¹⁰ in defining errors of law so that 'a mistake as to fact may [...] amount to an error of law.'⁴¹¹ In *Nixon (permission to appeal: grounds)*⁴¹² Justice McCloskey stated that in addition to the failure to consider 'obvious points arising under the Refugee Convention or ECHR'⁴¹³ errors of law

may take a number of forms. Inexhaustively, these include a failure to have regard to material evidence; taking into account and being influenced by immaterial evidence; inadequate reasons; unfair procedure; misunderstanding or misconstruction of the law; disregarding a relevant

⁴⁰² Helen Muggeridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims' (*Asylum Aid*, January 2011) <<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>> accessed 2 June 2015, 27.

⁴⁰³ Jan Shaw and Mike Kaye, 'A Question of Credibility: Why So Many Initial Asylum Decisions Are Overturned on Appeal in the UK' (*Amnesty International* and *Still Human Still Here*, April 2013) <www.amnesty.org.uk/sites/default/files/a_question_of_credibility_final_0.pdf> accessed 2 June 2015, 10.

⁴⁰⁴ *ibid.*

⁴⁰⁵ Clayton (n 170) 234.

⁴⁰⁶ *ibid* 216.

⁴⁰⁷ *ibid* 233.

⁴⁰⁸ *ibid* 234.

⁴⁰⁹ *ibid* 212.

⁴¹⁰ *ibid* 217.

⁴¹¹ *ibid* 234.

⁴¹² [2014] UKUT 00368 (IAC).

⁴¹³ *ibid*, p 1.

statutory provision; failing to give effect to a binding decision of a superior court; and irrationality.⁴¹⁴

In *R (Iran) and others v SSHD*,⁴¹⁵ Brooke LJ made essentially the same statement in a more elaborate form,⁴¹⁶ adding that the error of law must make ‘a material difference to the outcome.’⁴¹⁷

To simplify this categorisation, another classification of errors of law may be employed; it was developed by Craig, Fletcher and Goodall in their ‘research into onward appeals and reconsiderations from immigration and asylum appeals determined by the Asylum and Immigration Tribunal in Scotland.’⁴¹⁸ Their classification of errors of law is broader and encompasses ‘substantive errors of law’, ‘errors arising from unfair procedures’ and ‘errors arising from inadequate decisions.’⁴¹⁹

Substantive errors of law are those where the Refugee Convention or ECHR is misapplied, eg by ‘misinterpreting the meaning of “political opinion” or “particular social group.”’⁴²⁰ An error arising from unfair procedures can, for example, be ‘a failure to hear both sides of a case fully, or a failure to grant an adjournment to allow further evidence to be adduced,’ and an error arising from inadequate decisions is present where ‘clear and adequate reasoning for material conclusions [cannot] be found in a decision.’⁴²¹ This last error may be combined with procedural errors or other errors such as the judge basing ‘his/her reasons on speculation.’⁴²²

These categories will be helpful when analysing the case law on FGM. They also explain the apparent difficulty in distinguishing between errors of fact and errors of law. Where judges do not consider “material evidence” – a procedural error, ie an error of law – failing to do so will also result in an error of fact because, as mentioned earlier, evidence contributes to findings of fact.

Therefore, the argument that different decision makers will determine alleged or established facts differently, is a valid one, not only in first-instance appeals but also in appeals made on a point of law. Still, it is useful to distinguish between error of

⁴¹⁴ *ibid* [10].

⁴¹⁵ [2005] EWCA Civ 982, [2005] Imm AR 535.

⁴¹⁶ *ibid* [9].

⁴¹⁷ *ibid* [10].

⁴¹⁸ Sarah Craig, Maria Fletcher and Kay Goodall, ‘Challenging Asylum and Immigration Tribunal Decisions in Scotland - An Evaluation of Onward Appeals and Reconsiderations’ (*University of Glasgow/University of Stirling* 2008) < <http://hdl.handle.net/1905/763> > accessed 5 July 2015, 6.

⁴¹⁹ *ibid* 43.

⁴²⁰ *ibid*.

⁴²¹ *ibid* 45.

⁴²² *ibid* 46.

fact and errors of law as not every point that is disbelieved by one decision maker should be able to be re-evaluated by another as this would result in an endless series of appeals.⁴²³

Regarding objections to the use of appeal outcomes as indicators of the quality of previous decisions, the argument that appeals may have a different outcome because tribunals and courts consider all evidence available at the time of the hearing and thus changed country conditions are taken into account, is not particularly relevant in FGM cases since, as explained in chapter one, people affected by FGM have most often been so affected for a long time, as FGM is a traditional practice.

Another point of critique is the fact that there is no way of knowing whether appeals have been decided correctly, nor whether first decisions are accurate.⁴²⁴ Where refugee status is granted, it will never be known how claimants would have been treated on return to their home country, likewise when unsuccessful applicants are returned, their fate is not usually monitored.⁴²⁵

In spite of these difficulties, the closest definition of a correct decision is ‘one which has not been subsequently reversed on error of law grounds.’⁴²⁶ The appeals system tries to ensure that ‘correct decisions’ are made through ‘correct[ing] errors by the trial judge[s].’⁴²⁷ Such errors are both distressing for the asylum seekers and costly and time-consuming for the UK government,⁴²⁸ thus it is worth examining why they arise and how they may be avoided.

The summaries of FGM case law already mentioned three reasons for overturning decisions to refuse asylum in FGM cases. To recap, these were a flawed assessment of risk, wrongly concluding that an affected asylum seeker was not a member of a PSG and incorrectly assuming that an asylum seeker could safely relocate within her country of origin.

In the following, this chapter deals with these three mistakes by placing each of them in one of the categories of error of law advanced by Craig, Fletcher and Goodall’s broad definition, as well as one of the narrower categories summarised by Justice McCloskey, and by examining the shape they take in each of the twelve cases

⁴²³ Thomas (n 196) 139.

⁴²⁴ *ibid* 72.

⁴²⁵ *ibid* 70.

⁴²⁶ *ibid* 73.

⁴²⁷ Courts and Tribunals Judiciary, ‘The Right to Appeal’ (*Courts and Tribunals Judiciary* 2015) <www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal> accessed 27 July 2015.

⁴²⁸ Shaw and Kaye (n 304) 8.

summarised above. The mistakes will be discussed in detail in order to determine why they have come about and how they can be prevented.

The chapter aims to establish whether the errors identified in the FGM case law are typical for and specific to asylum claims based on FGM and what can be done to improve decision making in FGM asylum cases. Though every case is different and ‘turns on its own individual facts,’⁴²⁹ there are some issues FGM cases have in common.

4.1. ESTABLISHING A “REAL RISK” AND CREDIBILITY

In order to qualify for refugee status or humanitarian protection, an asylum seeker who fears being subjected to FGM has to satisfy the criteria of the Refugee Convention or show that upon return she will suffer IDT. Accordingly, asylum seekers must first establish a well-founded fear of persecution or serious harm. Briefly, this requirement is made up of the subjective fear of the persecution and its ‘well-foundedness’,⁴³⁰ ie the fear must be ‘consistent with available information on conditions in the state of origin.’⁴³¹ The “subjective fear” element of the definition has been criticised,⁴³² but as in none of the case law discussed in the following it was alleged that a claimant did not have a subjective fear of FGM, this aspect will not be discussed any further.

The standard of proof for both asylum and human rights claims is ‘a reasonable degree of likelihood or a “real risk” [...] that the feared persecution will come about’, this standard must be met both for the original claim and in asylum appeals.⁴³³ For human rights claims the well-founded fear need not be for reasons of a Convention ground but the remaining criteria for the “real risk” of serious harm to be accepted are the same as in asylum claims.⁴³⁴

‘While the ultimate focus of asylum adjudication may be on assessing risk on return, credibility provides the principal factual basis on which that assessment is

⁴²⁹ Thomas (n 196) 138.

⁴³⁰ Hathaway and Foster, *The Law of Refugee Status* (n 71) 71.

⁴³¹ *ibid* 91.

⁴³² Hathaway and Foster find that requiring the applicant to show subjective fear is problematic, *inter alia* because this fear may be equated with credibility and a person who does not appear to be fearful, perhaps due to cultural differences in expressing emotions, may be deemed not to be credible. [*ibid* 100ff.]

⁴³³ Clayton (n 170) 235.

⁴³⁴ Mole and Meredith (n 221) 25.

undertaken.⁴³⁵ The factual basis of a claim is assessed by taking into account both the applicant's oral evidence and evidence on country conditions.⁴³⁶ Especially in FGM cases, country information 'should [...] include a gender dimension', however, if no information can be found to support the claimant's account, 'this cannot in itself challenge the claimant's overall credibility.'⁴³⁷ The applicant's own testimony is most important and even though she should try to produce corroborative evidence, there are circumstances where this will not be possible.⁴³⁸ An example for this in FGM cases can be 're-excision (re-cutting at a later date)' since to many women this is 'an even more taboo subject than the initial FGM' and thus it is likely that little information will exist.⁴³⁹

The applicant's account and the evidence produced to support it must be plausible and consistent⁴⁴⁰ for example with COI; further, a claim will be deemed credible if it is detailed and specific.⁴⁴¹ Especially where the assessment of risk rests primarily on the applicant's own account of events, the issue of credibility comes into play.⁴⁴² Even though credibility not is mentioned by the Refugee Convention, the Home Office API on 'Assessing Credibility and Refugee Status' strongly emphasises its importance, as becomes clear from it being placed even before the term "refugee status" in the title.⁴⁴³ The UNHCR handbook, which is intended as a guide to determining refugee status, also finds that credibility assessment is 'indispensable.'⁴⁴⁴ However, this emphasis on credibility has been criticised as it may lead to genuine claims being refused due the claimant not having knowledge of certain aspects in their home country, which the decision maker uses to test their credibility,⁴⁴⁵ or because there are small inconsistencies in the applicant's

⁴³⁵ Thomas (n 196) 134.

⁴³⁶ Home Office, 'Asylum Policy Instruction' (n 169) 12.

⁴³⁷ Christine Flamand, 'FGM: Challenges for Asylum Applicants and Officials' (May 2015) 49
Forced Migration Review <www.fmreview.org/en/climatechange-disasters.pdf> accessed 5 June 2015, 81.

⁴³⁸ Hathaway and Foster, *The Law of Refugee Status* (n 71) 154f.

⁴³⁹ Flamand (n 437) 81.

⁴⁴⁰ Thomas (n 196) 140.

⁴⁴¹ Home Office, 'Asylum Policy Instruction' (n 169) 13.

⁴⁴² Hathaway and Foster, *The Law of Refugee Status* (n 71) 138.

⁴⁴³ Home Office, 'Asylum Policy Instruction' (n 169), title page.

⁴⁴⁴ UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR 1979, reissued 2011) <www.unhcr.org/3d58e13b4.html> accessed 7 July 2015, para 41.

⁴⁴⁵ Hathaway and Foster, *The Law of Refugee Status* (n 71) 140.

testimony.⁴⁴⁶ In the UK, the ‘majority of asylum claims which are lost are lost precisely because the decision maker does not believe the applicant.’⁴⁴⁷

When looking at the case law, six of the twelve decisions were overturned on appeal due to an incorrect assessment of “real risk.” A closer look at the mistakes made by lower-level decision makers in these cases reveals why the cases can be grouped together in the category of incorrect risk assessment. In *FM* the adjudicator who heard the first appeal discounted evidence ‘to the effect that the [appellant’s] daughters were at risk of forcible circumcision if returned.’⁴⁴⁸ This ‘erroneous approach infected the entirety of the determination’⁴⁴⁹ though it is not specified what exactly the evidence discounted contained. Fresh evidence was used to decide the claim.⁴⁵⁰

In *S-E-A* the FTT judge had reached a decision ‘without proper regard being had to the expert report’ which was ‘sufficient to undermine the Judge’s finding as to the risk to the appellant.’⁴⁵¹ Further, the judge speculated that the claimant’s mother ‘would be able to protect [her daughter] from the risk of FGM.’⁴⁵²

In *MH and others* the adjudicator also did not properly consider evidence to the effect that the girl’s parents would not be able to protect her. The girl’s mother submitted a statement detailing that she herself had undergone FGM while her father, who opposed the practice and wished to protect her against it, was travelling.⁴⁵³ Instead, the adjudicator speculated that the parents would be ‘able to protect their daughter at all times.’⁴⁵⁴

These three cases can be grouped in the narrower category of failure to have regard to material evidence and in the broader category of procedural errors. In *MH and others* and in *S E-A* an additional mistake can be identified: the use of speculative arguments.

Similarly, in *OJ* the SSHD did not find it plausible that the woman’s partner’s mother would be able to make the woman’s daughter (and the woman herself) undergo FGM because the woman’s Krio family could protect both of them.⁴⁵⁵ It was not explained how the woman’s family could protect her and her daughter,

⁴⁴⁶ *ibid* 144.

⁴⁴⁷ Clayton (n 170) 373.

⁴⁴⁸ *FM* (n 101) [3].

⁴⁴⁹ *ibid*.

⁴⁵⁰ *ibid* [5].

⁴⁵¹ *S E-A* (n 373) [29].

⁴⁵² *ibid*.

⁴⁵³ *MH and others* (n 263) [18].

⁴⁵⁴ *ibid* [19].

⁴⁵⁵ *OJ* (n 384) [84] and [85].

nevertheless the SSHD thought there was ‘a sufficiency of protection.’⁴⁵⁶ In *AF*, too, the parents’ opposition to FGM was claimed to avert the risk to the daughters. The parents both opposed FGM,⁴⁵⁷ however, they were both from tribes affected by the practice⁴⁵⁸ and *AF* feared the husband’s mother would force the two girls to undergo FGM.⁴⁵⁹ The FTT judge speculated that the parents could ‘protect their daughter[s]’ and therefore concluded the claim that they were at real risk of persecution was ‘totally spurious.’⁴⁶⁰

These speculations can be categorised broadly as errors arising from inadequate decisions or narrowly as the giving of inadequate reasons, specifically reasons based on speculation. The sixth case overturned due to a flawed assertion that the claimant was not credible, *Yake v SSHD*, cannot be properly analysed as the adjudicator gave no reasons for her decision to disbelieve the claimant⁴⁶¹ and neither does the IAT engage further with what lead the adjudicator to commit this error.

Nevertheless, *Yake* is grouped with the other five cases because in all of them adverse findings of credibility led to a flawed assessment of risk. As explained earlier, credibility, ie the combined findings drawn from an applicant’s subjective account and the supporting evidence produced, provides the factual basis on which risk is assessed. Therefore, a correct risk assessment depends upon a consideration of all of the available evidence. When a judge does not take evidence into consideration, she cannot properly assess credibility and therefore cannot judge whether there is a real risk to the applicant. Likewise, when a judge speculates instead of basing conclusions on evidence, the risk to the claimant has not been properly assessed.

The two errors identified, speculating and disregarding evidence, are not as such specific to FGM cases. The quality of decision making in asylum cases has been analysed in different studies, usually with regard to the first decision made by the Home Office, and disregarding evidence and speculating are among the mistakes listed in several reports.

Asylum Aid showed ‘that many people with valid reasons for seeking the UK’s protection were refused asylum on the basis of cursory and careless examination’ of

⁴⁵⁶ *ibid* [86].

⁴⁵⁷ *AF* (FTT) (n 394) [56].

⁴⁵⁸ *AF* (UT) (n 392) [27].

⁴⁵⁹ *AF* (FTT) (n 394) [57].

⁴⁶⁰ *ibid*.

⁴⁶¹ *Yake* (n 314) p 4.

evidence or because ‘inaccurate or incomplete country information’ was used.⁴⁶² The NGO also found that in the Home Office there is ‘a pervasive and profoundly adversarial “culture of disbelief.”’⁴⁶³

The UNHCR raised similar concerns in different reports over several years. Issues included rejection of evidence on ‘speculative or illogical arguments,’⁴⁶⁴ an ‘incorrect approach to credibility assessment’ and to the assessment of gender-specific issues.⁴⁶⁵

Amnesty International and *Still Human Still Here* found that negative asylum decisions were most often overturned on appeal because the ‘case owner had wrongly made a negative assessment of the applicant’s credibility.’⁴⁶⁶ More specifically, the report lists, among other things, ‘the use of speculative arguments or unreasonable plausibility findings’ and ‘not properly considering the available evidence’ as mistakes that lead to these negative credibility assessments.⁴⁶⁷

While not unique to FGM claims, both the mistake of not considering evidence and that of speculating appear to be prevalent in FGM cases. LRs and IJs interviewed agree that both issues come up frequently.⁴⁶⁸ The fact that these mistakes are made repeatedly begs the question why this happens and how it might be prevented. With regard to not properly considering evidence, Kathryn Cronin offers the explanation that ‘some judges are just bigoted’ and ‘persistent refusers’,⁴⁶⁹ and IJ A thinks it is ‘pressure of work.’⁴⁷⁰ LR C thinks that both disregarding evidence and speculation are the result of ‘a general tendency to take a cultural relativistic approach’⁴⁷¹ to FGM cases and IJ A finds that judges speculate because they ‘still [do] not hav[e] a

⁴⁶² Asylum Aid, ‘Still No Reason At All’ (*Asylum Aid* 1999) <www.asylumaid.org.uk/wp-content/uploads/2013/02/Still_No_Reason_At_All.pdf> accessed 2 June 2015, 1.

⁴⁶³ Asylum Aid, ‘Right First Time’ (*Asylum Aid* 2013) <http://d356gh0apz9rk0.cloudfront.net/wp-content/uploads/2013/02/RightFirstTime_V3.pdf> accessed 2 June 2015, 3.

⁴⁶⁴ UNHCR, ‘Quality Initiative Project: Second Report to the Minister’ (*UNHCR* 2005) <www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Second_Report.pdf> accessed 28 June 2015, 1.

⁴⁶⁵ UNHCR, ‘Quality Initiative Project: Third Report to the Minister’ (*UNHCR* 2008) <www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Fifth_Report.pdf> accessed 28 June 2015, vii.

⁴⁶⁶ Shaw and Kaye (n 304) 4.

⁴⁶⁷ *ibid* 13.

⁴⁶⁸ IJ A, questions 29 and 35, LR A, question 18; LR B, question 15; KC, questions 14 and 15; LR C, question 20.

⁴⁶⁹ KC, question 15.

⁴⁷⁰ IJ A, question 35.

⁴⁷¹ LR C, question 19. Cultural relativism is an approach that aims not to impose “Western” values and beliefs on other cultures, eg the belief that FGM is a human rights violation. Cultural relativists see themselves as defenders of the right to self-determination and therefore completely accept cultural values. [Gruenbaum, *The Female Circumcision Controversy* (n 35) 26.] In the context of asylum decision making, such a stance may lead to the opinion that ‘FGM is not a problem for [affected] women because it is part of their culture.’ [Novak-Irons (n 172) 78.]

worked out methodology of how to assess the credibility of an individual.’⁴⁷² Geoffrey Care thinks a remedy for this mistake is ‘education’⁴⁷³ of judges and IJ A believes that such behaviour can be prevented through ‘training and peer support.’⁴⁷⁴

Disregarding evidence is a procedural mistake a trained decision maker ought not to make. Claimants and LR’s cannot force a judge to consider evidence, but they can try to make it easier for the judge to take all of the evidence into account by providing ‘a summary on the front of the [appellant’s] bundle highlighting the key passages’⁴⁷⁵ they want a judge to consider.

Turning to the issue of speculation, while it is not specific to FGM cases as such, the particular assertion that a woman’s family can protect her is repeated particularly in FGM cases. Kathryn Cronin says the issue ‘where the parents are held to be able to protect their daughters is a very common one’⁴⁷⁶ and IJ A and LR’s B and C state that this claim comes up ‘a lot.’⁴⁷⁷ However, both IJs agree that this is not a valid argument. Geoffrey Care thinks this argument is ‘rubbish’ and states that he ‘would not expect it even to be made without more elaboration since FGM exists among extended family life, not nuclear families’⁴⁷⁸ and adds that he ‘would not allow it.’⁴⁷⁹ IJ A says that ‘[p]arents aren’t actors of protection under refugee law’ and that she does not find this argument ‘persuasive.’⁴⁸⁰

While a woman’s family may function as actor of persecution (under the label ‘non-State actors’),⁴⁸¹ actors of protection are defined as ‘parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.’⁴⁸² This definition can include clans or tribes,⁴⁸³ but individual families or parents are not mentioned. In *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG*⁴⁸⁴ the UT stated that

[u]nless the parents are from a socio-economic background that is likely to distance them from mainstream social attitudes, [...] the fact of parental opposition may well as a general matter be incapable of

⁴⁷² IJ A, question 34.

⁴⁷³ GC, question 32.

⁴⁷⁴ IJ A, question 36.

⁴⁷⁵ *ibid*, question 22.

⁴⁷⁶ KC, question 14.

⁴⁷⁷ IJ A, question 29 LR B, question 15; LR C, question 20.

⁴⁷⁸ GC, question 33.

⁴⁷⁹ *ibid*, question 34.

⁴⁸⁰ IJ A, question 29.

⁴⁸¹ Qualification Directive (n 233) art 6(c).

⁴⁸² *ibid*, art 7(1)(b).

⁴⁸³ Clayton (n 170) 441f.

⁴⁸⁴ [2011] UKUT 00445 (IAC).

eliminating the real risk to the daughter that others (particularly relatives) will at some point inflict FGM on her.⁴⁸⁵

Interestingly, while both IJs rejected the argument that parents can protect their daughters against FGM outright, LRs seemed less sure that it could not be advanced. IJ A dismissed the assertion that parents can protect their daughters from FGM as the ‘kind[...] of argument[...] that [isn]’t related to the law or the Refugee Convention.’⁴⁸⁶ She believes that LRs should ‘argue that it is an error of law’ to use this argument and would ‘be very likely successful’ if they did.⁴⁸⁷ One LR, Kathryn Cronin, agreed that this argument could be refuted by ‘explain[ing] the social norms’ to a judge that make it impossible for parents to protect their daughter.⁴⁸⁸ Two other representatives, however, tried to explain why the argument that parents could protect their daughters was a valid one. LR A thought that it was part of the assessment of ‘what is likely to happen in the country of return’ and that this assessment, when including parents’ ability to protect, could result in ‘a finding that the harm is not going to happen.’⁴⁸⁹ Similarly, LR B thought it was an issue of ‘the parents [...] standing up against [...] [o]ther parents’ rather than against ‘persecution organised by the state’ and that this was why they might be able to protect their daughters.⁴⁹⁰

As explained in chapter one, FGM is more than a family issue, it is an extended family and a community issue. It is this conclusion which Kathryn Cronin thinks is ‘the most significant insight [LRs] have to assist the court to arrive at.’⁴⁹¹ Thus, the questions why judges speculate as to parents’ ability to protect their daughters and how this type of speculation can be prevented, can be resolved with the same answer: ‘evidence.’⁴⁹² LR A finds that judges cannot ‘engage in speculation that is not properly based on facts’,⁴⁹³ thus if a lack of evidence leaves room for speculation, then carefully prepared evidence to ‘explain the social norms’⁴⁹⁴ should assist the

⁴⁸⁵ *ibid* [560].

⁴⁸⁶ IJ A, question 30.

⁴⁸⁷ *ibid*, question 31.

⁴⁸⁸ KC, question 17.

⁴⁸⁹ LR A, question 20.

⁴⁹⁰ LR B, question 16.

⁴⁹¹ KC, question 14.

⁴⁹² *ibid*.

⁴⁹³ LR A, question 21.

⁴⁹⁴ KC, question 17.

judge to understand ‘the way in which a community works’⁴⁹⁵ and to reach the conclusion that parents cannot usually protect their daughters against FGM.

In theory then, both mistakes identified in the case law regarding the assessment of credibility and risk can be prevented and challenged as errors of law. The mistake of not properly considering evidence can be prevented by providing a good summary of all evidence for the judge and can be challenged as a procedural error. The mistake of speculating as to parents’ ability to protect their daughters from FGM can be prevented by creating ‘a better understanding of the practice of FGM in its social and cultural context by judges and legal representatives’⁴⁹⁶ and can be challenged as an error arising from an inadequate decision.

The task of assessing credibility and risk in FGM cases depends on the ability of the existing evidence to set out the practice of FGM in its social and cultural context. Where such evidence is made available to judges in such a manner that they will be able to properly consider it, there will be no need for them to speculate and they should be able to assess credibility and risk correctly. However, being at risk of undergoing FGM is not sufficient to be granted refugee status; further requirements are set out below.

4.2. CONVENTION REASONS

Once it has been established that a woman faces a real risk of FGM upon return to her country of origin, the affected asylum seeker has to show that the treatment she fears amounts to persecution which she will suffer for a Convention reason. For human rights claims it is enough to show that the harm constitutes torture or IDT, a Convention reason must only be engaged for asylum claims. There is no exact definition of persecution but criteria for a certain treatment to amount to persecution are that it will cause harm which is “sufficiently serious” and “a severe violation of basic human rights.”⁴⁹⁷ Since human rights violations point to a failure of the state to protect the victims against these violations,⁴⁹⁸ ‘persecution = serious harm + failure of state protection.’⁴⁹⁹

⁴⁹⁵ *ibid*, question 24.

⁴⁹⁶ *ibid*, question 27.

⁴⁹⁷ Clayton (n 170) 424-25.

⁴⁹⁸ *ibid* 426.

⁴⁹⁹ *ibid* 425.

In the UK, case law on FGM ‘went in all directions’ until in the judgement in *P and M* it was accepted that forced FGM was ‘severe ill-treatment’ which, where no state protection is available, amounts to persecution.⁵⁰⁰ As established in chapter two, it is accepted that FGM is a human rights violation and, as discussed in chapter one, state protection is scarcely available, thus FGM amounts to persecution under the Refugee Convention. The quotation at the beginning of this paper shows that this was not universally accepted in the UK as recently as 2003, but the second quotation makes clear that this has changed since 2006.

The judgement cited in the second quotation is that of *Fornah*, the first and only FGM case to reach the highest court in the UK. It was concerned with the question whether women who fear FGM can be members of a PSG. Before *Fornah*, some FGM asylum claims failed or were allowed on human rights rather than Convention grounds because no Convention reason could be identified.⁵⁰¹ The well-founded fear of persecution must be connected to a Convention reason; this connection must exist in the form of a ‘causal link’, also called ‘nexus’,⁵⁰² or as the Refugee Convention formulates it, persecution must occur “for reasons of” a Convention ground. To recap, the Convention reasons are: race, religion, nationality, membership of a PSG and political opinion, though the grounds often overlap.⁵⁰³ FGM is both a gender-specific and gender-related form of persecution;⁵⁰⁴ however, gender is not one of the criteria mentioned in the refugee definition. Nevertheless, any of the Convention grounds may be employed in an FGM asylum claim.⁵⁰⁵

Since race includes ‘membership of a particular ethnic group’,⁵⁰⁶ it may be said that the persecution happens for reasons of belonging to an ethnic group affected by FGM.⁵⁰⁷ Similarly, nationality includes not only citizenship but also ‘membership of a group determined by its cultural [or] ethnic [...] identity’⁵⁰⁸ and women can employ this Convention ground in countries where FGM affects all ethnic groups.⁵⁰⁹

⁵⁰⁰ *ibid* 431.

⁵⁰¹ For example, *RM* (n 101) [16], a failed claim, and *MH and others* (n 263) [13], allowed on human rights grounds.

⁵⁰² Clayton (n 170) 449.

⁵⁰³ UNHCR, ‘Handbook’ (n 444) para 67.

⁵⁰⁴ Gender-specific persecution ‘refers to forms of serious harm which are specific to women’ – for example FGM, a harm which cannot be inflicted upon a man – and gender-related persecution ‘refers to the experiences of women who are persecuted *because* they are women.’ [Crawley (n 22) 7.]

⁵⁰⁵ Crawley (n 22) 193.

⁵⁰⁶ Qualification Directive (n 233) art 10(1)(a).

⁵⁰⁷ Crawley (n 22) 193f.

⁵⁰⁸ Qualification Directive (n 233) art 10(1)(c).

⁵⁰⁹ Crawley (n 22) 194.

Religion includes ‘participation in, or abstention from’ ‘theistic, non-theistic and atheistic beliefs’,⁵¹⁰ and thus, where FGM is considered a religious duty, women may have a claim because they do not wish to follow this religious tradition, or, where women have (adopted) a religion that does not condone FGM, their claims may be based in wishing to follow their religion’s teachings.⁵¹¹

Political opinion includes ‘an opinion, thought or belief on a matter related to the potential actors of persecution [...] and to their policies or methods.’⁵¹² Political opposition to FGM can, for example, be based on a belief in ‘the equality of the sexes or feminism’ or in wishing to exercise rights such as the right to remain physically unharmed.⁵¹³ Parents who are opposed to their daughters undergoing FGM may be able to claim persecution for reasons of a political opinion,⁵¹⁴ as may those who have campaigned against FGM inside or outside their country of origin.⁵¹⁵

In spite of the possibility of advancing the grounds above, ‘there is a trend to consider FGM as falling within the grounds of membership of a particular social group and to overlook other grounds.’⁵¹⁶ This is perhaps unsurprising since, as mentioned above, Convention grounds frequently overlap and membership of a PSG comprises elements also found in the Convention grounds race, nationality and religion.⁵¹⁷ Members of a PSG

share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.⁵¹⁸

This definition already existed at the time the judgement in *Fornah* was made and it is cited in the decision.

⁵¹⁰ Qualification Directive (n 233) art 10(1)(b).

⁵¹¹ *Crawley* (n 22) 194.

⁵¹² Qualification Directive (n 233) art 10(1)(e).

⁵¹³ *Crawley* (n 22) 194.

⁵¹⁴ *Petitpas and Nelles* (n 222) 84.

⁵¹⁵ This was, for example, discussed in *FM* (n 101) at [147]-[151], though in this case, the woman was not found to be at real risk due to her political activities against FGM. However, it was held that ‘any infliction of it upon either of her daughters is [...] reasonably likely to have so profound an effect upon the first appellant as to amount to the infliction on her of persecutory harm.’ [161].

⁵¹⁶ *Petitpas and Nelles* (n 222) 84.

⁵¹⁷ UNHCR, ‘Handbook’ (n 444) para 77.

⁵¹⁸ Qualification Directive (n 233) art 10(1)(d).

Claiming that someone is not a member of a PSG, even though they are, is a point arising under the Refugee Convention, a substantive error of law⁵¹⁹ that was only conclusively resolved in 2006, a time when other jurisdictions had recognised women fearing FGM as members of a PSG for many years.⁵²⁰

The main difficulty in determining whether or not women who fear FGM could claim membership of a PSG was the requirement that a PSG must ‘be defined without reference to the feared persecution.’⁵²¹ In practice, this means that fearing FGM does not make women members of a PSG as this would result in circular reasoning to the effect that any group of people fearing persecution would automatically come within the scope of a PSG, which, in turn, would ‘render the nexus clause superfluous.’⁵²²

This has been an argument employed when finding that there was no identifiable social group in FGM cases.⁵²³ However, in *P and M* the adjudicator who first heard the case defined the PSG without reference to the persecution when she stated that claimant M belonged to the group of

Kikuyu women under the age of 65 [...] who have immutable characteristics of age and sex which exist independently of persecution and can be identified by reference to their being compelled to undergo FGM, particularly if they are members of or related to members of the Mungiki sect.⁵²⁴

However, the IAT still was ‘not satisfied that the social group identified by the adjudicator could properly be regarded as “a particular social group” within the meaning of the Refugee Convention.’⁵²⁵

The Court of Appeal thought that the ‘case did not require and should not have engaged such a sophisticated analysis of the technical requirements of the Refugee Convention.’⁵²⁶ IJ Geoffrey Care explains that when an in-country appeal on asylum grounds was first introduced in 1993, adjudicators and judges were trained ‘on asylum generally’ but were not used to ‘going into great detail’ in questions of

⁵¹⁹ Craig, Fletcher and Goodall (n 418) 43.

⁵²⁰ Crawley (n 22) 196f.

⁵²¹ Clayton (n 170) 456.

⁵²² Hathaway and Foster, *The Law of Refugee Status* (n 71) 424.

⁵²³ For example, *RM* (n 101) [15].

⁵²⁴ *P and M* (n 101) [41].

⁵²⁵ *ibid* [43].

⁵²⁶ *ibid* [49].

asylum law.⁵²⁷ ‘Especially the meaning of PSG was a mystery; no one told [judges] what it was, no one knew what was in it.’⁵²⁸

The leading case on the meaning of PSG, *Shah and Islam*, was heard only in 1999 and dealt with Pakistani women fleeing domestic violence.⁵²⁹ The House of Lords found that “‘women in Pakistan’” constituted a PSG which was defined by the fact that women in general were discriminated against.⁵³⁰ In *P and M* the judgement in *Shah and Islam* was referred to in explaining why the adjudicator’s decision had been correct.⁵³¹ The adjudicator’s decision was restored but it was not explained how to arrive at the correct definition of a PSG in FGM cases.

This, however, was done in *Fornah*, where Lord Bingham applied points made in *Shah and Islam* to identifying a PSG in FGM cases. He stated that in identifying a PSG ‘the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination’ and that ‘to identify a social group one must first identify the society of which it forms part’ adding that ‘a social group need not be cohesive to be recognised as such,’ and then advanced the criterion already mentioned above that a PSG must ‘exist[...] independently of the persecution to which it is subject.’⁵³² He went on to say that ‘members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it’ and that such a ‘group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’, thus following that recommendations of the 2004 Qualification Directive for identifying a PSG.⁵³³

Lord Bingham explained that the claimant met this definition because an innate characteristic shared by women (in Sierra Leone) is ‘a position of social inferiority as compared with men’ and that they are therefore ‘perceived by society as inferior.’⁵³⁴ He went on to say that this definition shows that the PSG exists independently of the persecution feared because women’s position would still be inferior ‘even if FGM

⁵²⁷ GC, question 7.

⁵²⁸ *ibid.*

⁵²⁹ *R v Secretary of State for the Home Department Ex p. Shah, Islam v Immigration Appeal Tribunal Ex p. Shah* [1999] 2 AC 629, [1999] 2 WLR 1015.

⁵³⁰ Clayton (n 170) 454f.

⁵³¹ *P and M* (n 101) [37].

⁵³² *K and Fornah* (n 2) [13].

⁵³³ *ibid* [16].

⁵³⁴ *ibid* [31].

were not practised.’⁵³⁵ He stated that ‘FGM is an extreme expression of the discrimination’ which ‘ensure[s] a young woman's acceptance in Sierra Leonean society.’⁵³⁶ Alternatively, he accepted the PSG of ‘intact women in Sierra Leone’ as they, too, are perceived as different by society.⁵³⁷ Lady Hale found that

[e]ven if the group is reduced to those who are currently intact, its members share many characteristics which are independent of the persecution - their gender, their nationality, their ethnicity. It is those characteristics which lead to the persecution, not the persecution itself which leads to those characteristics. But there is no need to reduce the group to those at risk. It is well settled that not all members of the group need be at risk.⁵³⁸

This last point dealt with the statement that a PSG need not be cohesive as this can mean that ‘members of it voluntarily associate, or that every member of the group is at risk of persecution.’⁵³⁹

With regard to the nexus requirement, Lord Bingham stated that the ‘persecutory treatment need not be motivated by enmity [...] on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution’, the real reason being the inferiority of women in society.⁵⁴⁰

Fornah is not the first or the only judgement in which a PSG has been defined for women who fear FGM. The definition in *P and M* has already been mentioned; in *Yake* the PSG was found to be ‘Yopougou wom[e]n who may be subjected to FGM’,⁵⁴¹ in *FM* the PSG identified was ‘women in Sudan’,⁵⁴² in *FK* it was ‘women in Kenya at risk of FGM’⁵⁴³ and in *VM* it was ‘women in Kenya.’⁵⁴⁴ In *SK (FGM – ethnic groups) Liberia CG* the social group was defined as ‘women in Liberia belonging to those ethnic groups where FGM is practised.’⁵⁴⁵

All interviewees who responded to the question whether after the judgement in *Fornah* it was ever alleged again that women who feared FGM did not belong to a PSG, agreed that this issue has been resolved and that the mistake of claiming that

⁵³⁵ *ibid.*

⁵³⁶ *ibid.*

⁵³⁷ *ibid.*

⁵³⁸ *ibid* [113].

⁵³⁹ *ibid* [100].

⁵⁴⁰ *ibid* [17].

⁵⁴¹ *Yake* (n 314) p 10.

⁵⁴² *FM* (n 101) [145].

⁵⁴³ *FK* (UKAIT) (n 370) [57].

⁵⁴⁴ *VM* (n 101) [212].

⁵⁴⁵ *SK* (n 101) [53].

someone is not a member of a PSG even though they are is no longer made in cases where women fear FGM.⁵⁴⁶

Though the issue of membership of a PSG has been resolved for these cases, another issue which was identified as a source of decisional mistakes in the case law remains: a wrong assessment of the feasibility of internal relocation, which is dealt with in the next subchapter.

4.3. INTERNAL RELOCATION

Though it may seem as if internal relocation should be part of the risk assessment discussed above, it is in fact ‘an independent requirement of refugee status’ that must be determined in the context of the availability of state protection.⁵⁴⁷ ‘The fact that protection is available in a different region does not mean that the original well-founded fear does not exist.’⁵⁴⁸ Decision makers must first understand ‘the conditions to which the safe region is said to be a suitable alternative.’⁵⁴⁹ Further, while in proving the existence of a real risk, the burden of proof is on the appellant, if the Home Office allege that a claimant can relocate internally, they should suggest a concrete place of relocation and explain why this is reasonable,⁵⁵⁰ though in practice, this does not always happen.⁵⁵¹ The 2004 Qualification Directive states that ‘if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country’,⁵⁵² there is an internal relocation alternative, meaning that the asylum seekers who is at risk in her home area can move somewhere else where she is not at risk and is thus not entitled to refugee status.⁵⁵³

While in the Qualification Directive and in UK courts the question whether internal relocation is possible is being discussed in terms of whether it is ‘reasonable’ or ‘unduly harsh’ for a person to relocate, Hathaway and Foster criticise this

⁵⁴⁶ IJ A, question 40; LR A, question 26; LR B, question 21; KC, question 21; LR C, question 25.

⁵⁴⁷ Hathaway and Foster, *The Law of Refugee Status* (n 71) 333.

⁵⁴⁸ *ibid* 336.

⁵⁴⁹ James C Hathaway and Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 371.

⁵⁵⁰ Hathaway and Foster, *The Law of Refugee Status* (n 71) 341.

⁵⁵¹ LR A, question 25.

⁵⁵² Qualification Directive (n 233) art 8.

⁵⁵³ Clayton (n 170) 442.

approach.⁵⁵⁴ They suggest that determining whether internal relocation is feasible warrants a more detailed examination that takes several factors into account. Firstly, it has to be possible to access the area practically, safely and legally,⁵⁵⁵ then it must be assured that the applicant is neither at risk of the persecution feared in their home area,⁵⁵⁶ nor at risk of any other harm linked to a Convention ground, or harm which does not amount to persecution but leads to the applicant having to return to their home area (this is called ‘indirect *refoulement*’).⁵⁵⁷ Furthermore, there has to be ‘a minimum standard of affirmative State protection available’ in the place of relocation.⁵⁵⁸

Particularly in cases of gender-related persecution the internal relocation alternative is often considered to be a possibility as this type of persecution is usually committed by non-state actors and may therefore not exist in the whole of a country.⁵⁵⁹ Thus, the issue of internal relocation can be said to be specific to FGM cases insofar as they are always cases of gender-related persecution. Professionals interviewed identified a flawed assessment of the feasibility of internal relocation as a major issue in FGM cases.⁵⁶⁰

In the four appeals summarised above that were allowed due to flawed assessments of the feasibility of internal relocation, three claimants were from Kenya and two (though dealt with in one appeal) were from the Gambia. The case of the Gambian claimants, *K and others*, functions as country guidance and states that ‘ethnic groups are thoroughly interspersed, the country is small and ethnic groups in different parts of the country are highly interconnected’⁵⁶¹ so that internal relocation is not feasible. This settles the question for this country as all subsequent cases based on the same facts have to adhere to the assessment of country conditions made in the decision until any new information to the contrary emerges and new country guidance is issued.⁵⁶²

⁵⁵⁴ Hathaway and Foster, *The Law of Refugee Status* (n 71) 350ff.

⁵⁵⁵ Hathaway and Foster, ‘Internal protection’ (n 549) 389.

⁵⁵⁶ *ibid.*

⁵⁵⁷ *ibid.*

⁵⁵⁸ *ibid.*; This point requires that there are ‘legal rights’ available to the person who relocates internally (*ibid* 405); Hathaway and Foster propose that in assessing whether such rights are available decision makers should consider whether the rights and freedoms set out in the Refugee Convention will be met in the place of relocation (*ibid* 408ff).

⁵⁵⁹ Rebecca Wallace, ‘Internal Relocation Alternative in Refugee Status Determination: Is the Risk/Protection Dichotomy Reality or Myth? A Gendered Analysis’ in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar 2013) 297.

⁵⁶⁰ IJ A, question 38; LR A, question 17; LR B, question 14, LR C, question 16.

⁵⁶¹ *K and others* (n 379) [128].

⁵⁶² Care, *Migrants and the Courts* (n 100) 116.

In the three cases involving claimants from Kenya, no such universal observation was made. In *VM*, another country guidance case, the AIT found that ‘a Gikuyu woman in Kenyan society is expected to look for protection to her own husband or [...] to members of her tribe’ and that ‘a woman in the Appellant’s position would have to look to precisely those groups [...] despite the fact that this would also carry a risk of eventual discovery by her potential persecutors.’⁵⁶³ *VM*’s boyfriend was a member of the Mungiki sect and wanted her to have FGM. The claimants in *FK* were of the same tribe as the woman in *VM* and it was held that that the women would have to live in a Gikuyu community as they were not accompanied by a male relative and tribal membership provides support in the absence of such company. Since ‘wherever there are Kikuyu there are likely to be some Mungiki’, the news of their return could reach *VM*’s father-in-law, a member of the Mungiki sect who demanded they undergo FGM.⁵⁶⁴ It was found that the women were ‘at risk throughout Kenya.’⁵⁶⁵

In *K and others*, *VM* and *FK* the requirement that the claimant must not be at risk of persecution in the proposed area of relocation was not fulfilled. While in *K and others* this was held to be due to the small size of the country, in *VM* and *FK* the status of women in Kenyan society played a key role. In *CM* the status of women in society was also significant as it was found that the proposed site of relocation (Nairobi) was not a safe place for a single woman because she would be at risk of ‘sexual assault’ and ‘witch hunts.’⁵⁶⁶ Thus there was no guarantee that she would not suffer harm linked to a Convention ground, as both accusations of witchcraft⁵⁶⁷ and sexual violence⁵⁶⁸ can amount to persecution on grounds of membership of a PSG. Even if these types of harm were found not to amount to persecution, they might force her to return to her region of origin, thus leading to indirect *refoulement*.

Professionals interviewed thought that the two issues identified in the case law – that her persecutors will find the woman or that she will not be able to live in a different place by herself – were common issues in FGM cases.⁵⁶⁹ However, Kathryn

⁵⁶³ *VM* (n 101) [199].

⁵⁶⁴ *FK* (UKAIT) (n 370) [56].

⁵⁶⁵ *ibid* [58].

⁵⁶⁶ *CM* (n 101) [12].

⁵⁶⁷ Kingsley Jesuorobo and Jean La Fontaine, ‘Victims of Accusations of Witchcraft’ (*Rights In Exile Programme*, undated) <www.refugeelegalaidinformation.org/victims-accusations-witchcraft> accessed 3 August 2015.

⁵⁶⁸ *Crawley* (n 22) 42 and 63.

⁵⁶⁹ *IJ A*, question 41; *LR A*, question 25; *LR C*, question 24.

Cronin thinks that usually there is ‘a range of arguments’ why a woman cannot relocate rather than just one single reason.⁵⁷⁰

In terms of classifying mistakes related to a flawed assessment of the feasibility of internal relocation, Craig, Fletcher and Goodall suggest that this is a substantive error,⁵⁷¹ though, as with determining risk in the home area, different mistakes can lead to a flawed assessment as this is made on facts⁵⁷² and thus mistakes may include the use of speculative arguments or disregarding evidence. The latter mistake was made in *CM*,⁵⁷³ in *FK*⁵⁷⁴ and in *VM*; ⁵⁷⁵ in *K and others* both mistakes were made.⁵⁷⁶ *Asylum Aid* notes that Home Office decisions regarding internal relocation are also often ‘based on assumptions and not evidence.’⁵⁷⁷

All four cases show that the correct assessment of feasibility of internal relocation depends upon evidence about the society and culture of a country and the role of women in it, as is the case with risk assessment in the home area. *Asylum Aid* finds that ‘cultural constraints many women face in their country of origin are [...] not sufficiently understood by decision-makers.’⁵⁷⁸ Kathryn Cronin thinks that when women are mistakenly held to be able to relocate, this is because of ‘a misunderstanding of what puts [them] at risk’⁵⁷⁹ and adds that one reason why a woman cannot relocate ‘is just being a single woman’, more specifically the ‘way [she] would be perceived living alone, the difficulties [she] will have if [she is] away from family and community that would otherwise be [her] sole source of support.’⁵⁸⁰ *Asylum Aid* found that decision makers expect female asylum seekers to be able to cope on their own to an extent that ‘would not be applied to women in a UK context.’⁵⁸¹

In *VM* the tribunal found that ‘[i]n considering the issue of relocation it is important that the situation of the family and extended family be examined,

⁵⁷⁰ KC, question 20.

⁵⁷¹ Craig, Fletcher and Goodall (n 418) 43.

⁵⁷² The “real risk” test is, again, employed to assess whether there is a danger of being persecuted in the site of relocation. [Hathaway and Foster, ‘Internal Protection’ (n 549) 392].

⁵⁷³ *CM* (n 101) [13].

⁵⁷⁴ *FK* (UKAIT) (n 370) [10].

⁵⁷⁵ *VM* (n 101) [226].

⁵⁷⁶ *K and others* (n 379) [4] and [5].

⁵⁷⁷ Claire Bennett, ‘Relocation, Relocation: The Impact of Internal Relocation on Women Asylum Seekers’ (*Asylum Aid* 2008) <www.refworld.org/docid/4933cab72.html> accessed 10 August 2015,

⁵⁷⁸ *ibid* 26.

⁵⁷⁹ KC, question 19.

⁵⁸⁰ *ibid*, question 20.

⁵⁸¹ Bennett (n 577) 29.

particularly as to cultural context.⁵⁸² Regarding the role of the extended family, IJ A thinks an issue which is ‘hard to assess’ is ‘whether a woman might be found through tribal connections in the country of origin’⁵⁸³ and recommends getting an expert report to help the judge assess this issue. To test whether a woman will be safe from FGM in the proposed area of relocation, judges need to ask whether those who wish her to undergo FGM are ‘capable of pursuit’ and ‘likely to pursue’ her.⁵⁸⁴ In cases of gender-related persecution, decision makers may ‘make unrealistic assumptions’⁵⁸⁵ about the feasibility of internal relocation because often the conditions in the country of return ‘remain[...] terribly theoretical’, as IJ A puts it.⁵⁸⁶ An expert report can help to understand the ‘networks and means by which a private persecutor may trace the woman.’⁵⁸⁷

Geoffrey Care also believes that it is important to gain an ‘understanding [of] the country and its cultures and realities’ where questions of internal relocation are concerned.⁵⁸⁸ He thinks that women will generally be unable to relocate, but that this is also very difficult for families if the language and religion in the area of relocation are different from the home area or because the parents have to find work to sustain the family which may not be easy.⁵⁸⁹ As in the assessment of risk in the home area, a range of complex factors must be considered in order to come to a well-reasoned assessment of the feasibility of internal relocation.

The discussion above allows the preliminary conclusion that mistakes in determining the two issues which, as opposed to membership of a PSG, continue to arise in decision making in FGM cases, namely mistakes regarding risk assessment and feasibility of internal relocation, are caused mostly by a lack of knowledge about the cultural context of FGM and about women’s roles in affected societies. This conclusion warrants taking a brief look in the next subchapter at guidelines and training available to judges and legal representatives on the topic of FGM, as well as at the available evidence on FGM and the communities affected by it.

⁵⁸² *VM* (n 101) [242] (11).

⁵⁸³ IJ A, question 42.

⁵⁸⁴ Hathaway and Foster, ‘Internal Protection’ (n 549) 393.

⁵⁸⁵ Wallace (n 559) 303.

⁵⁸⁶ IJ A, question 44.

⁵⁸⁷ Clayton (n 170) 445.

⁵⁸⁸ GC, question 37.

⁵⁸⁹ *ibid*, question 28.

4.4. EVIDENCE, GUIDELINES AND TRAINING

Geoffrey Care states that '[i]t is impossible for all judges to be familiar with all cultures as well as all countries in a constantly changing world.'⁵⁹⁰ This, of course, is also true for LRs and the reason why information about the country of origin is important in asylum cases. Even though asylum seekers in theory need not produce corroborative evidence to support their account where this is impossible, such evidence is in fact necessary for Home Office case owners' and judges' decision making because they cannot be expected to know about FGM in all its complexities.

In fact '[m]any workers in the European asylum systems are not familiar with the practice' and misconceptions about FGM often lead to incorrect risk assessment.⁵⁹¹ Though both IJs interviewed, as well as LR B and Kathryn Cronin, were aware of the existence of FGM and the fact that it could form the basis for an asylum claim before they began working in asylum law,⁵⁹² LR A and LR C first came across it while already practising.⁵⁹³ In order to gain knowledge and to inform judges about FGM, LRs should submit COI which is 'both reliable and current'⁵⁹⁴ and can be produced by government and non-governmental sources.⁵⁹⁵ However, this information is often 'produced by organizations which do not have [the asylum seeker] or their case in mind.'⁵⁹⁶ In addition, there is expert evidence of varying quality,⁵⁹⁷ though IJ A states that 'a better solicitor and counsel would always have a good expert report' and that it was most helpful when experts came to the hearing to give testimony.⁵⁹⁸

Additionally, there are the country guidance cases which, however, may be 'based on obsolete material.'⁵⁹⁹ IJ A finds that COI reports and country guidance are 'usually lacking in specific information on women and children.'⁶⁰⁰ This is particularly problematic in the context of assessing the feasibility of internal relocation for women.

⁵⁹⁰ Care, *Migrants and the Courts* (n 100) 40.

⁵⁹¹ Novak-Irons (n 172) 78.

⁵⁹² IJ A, questions 8 and 9; GC, question 8; LR B, question 4; KC, questions 4 and 5.

⁵⁹³ LR A, questions 4 and 5; LR C, questions 4 and 5.

⁵⁹⁴ Thomas (n 196) 168.

⁵⁹⁵ Care, *Migrants and the Courts* (n 100) 114.

⁵⁹⁶ Clayton (n 170) 370.

⁵⁹⁷ KC, question 25; LR A, question 29.

⁵⁹⁸ IJ A, question 18.

⁵⁹⁹ Clayton (n 170) 371.

⁶⁰⁰ IJ A, question 17.

Further, judges may make use of their own knowledge but it is contested to what extent they should be able to rely on this.⁶⁰¹ Both IJs stated that they did gain knowledge, for example on how ‘tribes in certain countries treat[...] women and girls and [on] various beliefs of different religions’,⁶⁰² and that this was helpful when adjudicating cases.⁶⁰³

IJ A thinks that especially in assessing credibility ‘lack of supporting evidence’ is a problem,⁶⁰⁴ LR B emphasises the importance of getting ‘as much good country evidence as possible’⁶⁰⁵ and LRs A and C explain that obtaining evidence can be difficult, for example letters from a woman’s family detailing their attitudes on FGM will be found to be ‘self-serving.’⁶⁰⁶ While discussing all available forms of evidence in detail is beyond the scope of this paper, some recommendations by Dr Cronin who has never lost an FGM case will briefly be repeated here.⁶⁰⁷ She believes that there is ‘a massive amount of information’ on FGM, for example in reports by NGOs, UNICEF and the WHO, but that LRs have to ‘take the time to actually find it.’⁶⁰⁸ She further names the Electronic Immigration Network as a source of information,⁶⁰⁹ reports by *Amnesty International* and *Human Rights Watch*,⁶¹⁰ and suggests submitting other evidence such as a photograph of a woman’s family if this shows the family’s conservative stance, for example if they wear religious clothing.⁶¹¹

It was mentioned in chapter two that the UK government has published multi-agency practice guidelines on FGM aimed at ‘NHS staff and other health professionals, police officers, children’s social care workers, and teachers and other educational professionals’⁶¹² but not at workers in the asylum system. The guidelines contain a brief but concise summary of the prevalence of FGM, its cultural context and possible health consequences⁶¹³ and they will be made statutory by the end of

⁶⁰¹ Care, *Migrants and the Courts* (n 100) 118.

⁶⁰² IJ A, question 14.

⁶⁰³ IJ A, question 14; GC, question 17.

⁶⁰⁴ IJ A, question 28.

⁶⁰⁵ LR B, question 12.

⁶⁰⁶ LR A, question 23; LR C, question 23.

⁶⁰⁷ KC, question 9.

⁶⁰⁸ *ibid*, question 24.

⁶⁰⁹ *ibid*, question 28.

⁶¹⁰ *ibid*, question 24.

⁶¹¹ KC, question 29.

⁶¹² HM Government, *Multi-Agency Practice Guidelines* (n 151) 6.

⁶¹³ *ibid* 8ff.

2015.⁶¹⁴ The Serious Crime Act 2015 adds the provision to the to the Female Genital Mutilation Act 2003 that the SSHD ‘may issue guidance to whatever persons in England and Wales [she] considers appropriate about [...] matters relating to female genital mutilation’, however the SSHD is not permitted ‘to give guidance to any court or tribunal.’⁶¹⁵ While this is appropriate, as the SSHD must not influence the judiciary, it also means that from this source judges cannot receive specific guidelines on FGM cases. Both IJs state that there are no guidelines on FGM⁶¹⁶ which judges could consult. Existing practice directions⁶¹⁷ and guidance notes,⁶¹⁸ as well as the Tribunal Rules⁶¹⁹ are ‘procedural rather than substantive’⁶²⁰ – there is nothing in them about the content of (FGM) claims. LR C thinks that in addition to procedural guidelines ‘ongoing high quality multi-agency awareness raising among decision makers [...] and lawyers’ would improve the quality of decision making in FGM cases.⁶²¹

While the government cannot issue guidelines to judges, the fact that the intended audience of the multi-agency guidelines does not explicitly include Home Office case owners and legal representatives is an indication of the government’s reluctance to engage with FGM as an issue that affects women all over the world rather than just in the UK. If more LRs were aware of these guidelines they could submit extracts from them in appellants’ bundles and if case owners were made aware of them, perhaps this would lead to better first-instance decision making.

It is, of course, possible that IJs, LRs and case owners are already aware of the guidelines and that the government’s campaign will have an effect on asylum decision making even though it is not explicitly aimed at it. Kathryn Cronin suggests

⁶¹⁴ Home Office, ‘Consultation on Statutory Multi-Agency Guidance on Female Genital Mutilation’ (*Home Office*, 22 July 2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/447431/FGM_statutory_guidance_consultation_guidance_document_FINAL_v3_.pdf> accessed 12 August 2015, 4 and 8.

⁶¹⁵ SCA 2015 (n 137), s 75.

⁶¹⁶ IJ A, question 24; GC, question 22.

⁶¹⁷ Lord Justice Carnwath, ‘Child, Vulnerable Adult and Sensitive Witnesses’ (*Courts and Tribunals Judiciary* 2008) <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/Childvulnerableadultandsensitivewitnesses.pdf> accessed 10 August 2015.

⁶¹⁸ Justice Nicholas Blake and Elizabeth Arfon-Jones, ‘Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance’ (*Courts and Tribunals Judiciary* 2008) <www.judiciary.gov.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf> accessed 10 August 2015.

⁶¹⁹ Tribunal Procedure Committee, ‘The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014’ (*Tribunal Procedure Committee*, 6 January 2012) <www.gov.uk/government/publications/immigration-and-asylum-chamber-tribunal-procedure-rules> accessed 2 August 2015.

⁶²⁰ IJ A, question 21.

⁶²¹ LR C, question 31.

that this is already happening with respect to Home Office case owners.⁶²² Nevertheless, guidelines aimed specifically at workers in the asylum system could be drafted and distributed. The UNHCR's 'Guidance Note on Refugee Claims relating to Female Genital Mutilation'⁶²³ which deals briefly with some of the issues decision makers ought to take into account when deciding FGM cases, could be a model for such guidelines.

In the absence of guidelines detailing approaches to cases involving FGM and putting the practice in its cultural context, an additional means of raising awareness for the complexities surrounding FGM could be training. Though two of the LRs interviewed have undergone training on FGM,⁶²⁴ and Kathryn Cronin gives courses on the subject,⁶²⁵ LR A suspects that still there is 'a lack of sufficiently well experienced representatives to carry out [FGM] cases'⁶²⁶ and IJ A makes the same observation.⁶²⁷

The IJs interviewed have never had the benefit of undergoing training on FGM issues.⁶²⁸ IJ A emphasises the importance of training, saying that in order to improve decision making in FGM cases, it would be 'very good' to have 'a training session that focuses on FGM cases [where] we could have an expert come and actually speak to the judges and give the judges a chance to ask the expert questions.'⁶²⁹

Such training could also be beneficial for LRs and case owners. The organisation *United to End Female Genital Mutilation* provides basic training on FGM and asylum; a free four-module course covering FGM in its cultural and in the asylum context can be completed online.⁶³⁰ While this is useful, training and guidelines provided by an official body like the Home Office or the Ministry of Justice are likely to reach more people and thus to have a greater impact.

There are, of course, many other factors that influence the quality of decision making, for example case loads and time restrictions for judges,⁶³¹ cuts in legal

⁶²² KC, question 22.

⁶²³ UNHCR, 'Guidance Note on Refugee Claims Relating to Female Genital Mutilation' (UNHCR, May 2009) <www.refworld.org/pdfid/4a0c28492.pdf> accessed 10 August 2015.

⁶²⁴ LR B, question 3 and LR C, question 3.

⁶²⁵ KC, question 3.

⁶²⁶ LR A, question 14.

⁶²⁷ IJ A, question 27.

⁶²⁸ IJ A, question 5; GC, questions 5-7.

⁶²⁹ LR A, question 44.

⁶³⁰ United to End Female Genital Mutilation, 'The Course' (United to End Female Genital Mutilation 2012) <www.uefgm.org/Course.aspx?Language=EN> accessed 10 August 2015.

⁶³¹ IJ A, question 26; GC, question 23.

aid,⁶³² problems with interpreters⁶³³ and the quality of the substantive interview,⁶³⁴ to name but a few. However, the case law has shown that a lack of knowledge of FGM in its social and cultural context as well as a lack of understanding of women's lives in countries of origin in general lead to flawed decision making. This can be prevented by producing evidence but could be even better addressed with guidelines and training on FGM.

⁶³² LR B, question 26.

⁶³³ IJ A, question 25.

⁶³⁴ LR B, question 22.

CONCLUSION: MAKING THE CUT

Where their asylum claims are accepted, asylum seekers are protected against FGM in the UK; however, making the cut can be difficult. The fact that negative decisions are successfully appealed shows that mistakes are made in deciding FGM claims. Though the standard of proof for asylum and human rights claims is theoretically comparatively low, much depends on the available evidence, the competence of legal representatives, case owners and judges, and many other factors influencing decision making, though this is true for any asylum claim, not just those based on FGM.

What is striking about FGM claims is the fact that the harm they are based on has been identified by UK politics as a topic warranting much legislative and policy attention. There is a discrepancy between the measures the government has taken to protect UK nationals and residents who fear FGM and the reasons advanced for refusing protection to asylum seekers who have the same fear. If a UK citizen of Kenyan origin were to apply for an FGMPO in London, it would not likely be suggested that she could relocate to Edinburgh, even though this would be perfectly possible for a woman in Britain. A Kenyan asylum seeker, on the other hand, may be refused protection because it is alleged that she could relocate to Nairobi without taking into account the societal position of Kenyan women. Likewise, parents of Somali origin resident in the UK may not be able to take their daughter to visit relatives in Somalia over the summer holidays because it is feared she will be cut there, while a Somali family seeking asylum because they fear FGM for their daughter may be returned because it is found that her parents can protect her from undergoing the procedure.

Although, perhaps asylum seekers could also benefit from protection measures such as FGMPOs, this is a remote and untested possibility. Instead, they have to rely on the ability of decision makers in the asylum system to accurately assess whether they are at risk of FGM in their countries of origin. While the refugee status determination process in FGM cases has improved in so far that it has been accepted that FGM amounts to persecution and claimants are now considered to be members of a PSG, there still are flawed decisions. Most often incorrectly determined are the questions of the reality of the risk of undergoing FGM and the feasibility of internal relocation; this is due to a lack of knowledge on part of both representatives and decision makers about FGM as a community issue and the role women occupy in many affected societies.

Ultimately, all women affected by FGM originate from countries with affected resident communities and thus many of the rules of and reasons for performing FGM are the same in affected resident and migrant communities. Both in assessing whether women in the UK are at risk of FGM and in determining whether asylum seekers will be if returned to their countries of origin, the importance of understanding FGM in its social and cultural context has been recognised. Professionals who work with affected communities in the UK are informed about FGM in this context, but no such guidance is aimed at professionals who work with asylum seekers.

The UK, of course, has a right to control immigration and the requirements set out in the refugee definition allow for such control by limiting the circle of persons who deserve protection. Nevertheless, the UK could do more to ensure that those who meet the requirements of the definition are in fact identified. Since guidelines informing about FGM have been developed already, they could easily be adapted for and distributed to workers in the UK asylum system. The fact that this has not happened encourages the assumption that the UK, too, wishes to make a cut: a cut in successful asylum applications; immigration control at the expense of human rights.

As the case law on FGM shows, successful appeals against refusals of protection serve to uphold the human rights of women who fear FGM. However, greater awareness of the practice on the part of decision makers and representatives is needed in order to improve the protection of asylum seekers against FGM in the UK.

APPENDICES

INTERVIEWS

Immigration Judge A

Immigration Judge of the UK Upper Tribunal, Immigration and Asylum Chamber (London, UK, 22 July 2015)

1. Can you please state your title, job, and describe the daily responsibilities of your job?

My job title is Judge of the UT, Immigration and Asylum Chamber. This involves hearing appeals, granting or refusing leave to appeal and later we began to deal with judicial review which was passed from the High Court in the UK to us.

2. In which tribunals(s) and/or court(s) have you worked and for how long?

I started out in the FTT but we were called adjudicators, that was in 1992. I was what's called a fee-paid adjudicator for about four or five years before I became a judge. I moved to the second tier in 2004.

3. What was your job before you became an immigration judge?

I was a solicitor in private practice, mostly in legal aid practice, also a little slot for local authority in the north of England where I did child protection work. I also did asylum and immigration and mental health work as a lawyer.

4. Why did you decide to become an immigration judge?

I saw an advert. Obviously, I knew about the tribunal because I was involved with it in my work. It seemed as though perhaps there was a possibility of trying to do some good work, to make that a better decision-making forum.

5. What training did you receive before hearing your first case?

Well, it was a long time ago and the only thing that we had then was a sort of initiation training. If I recall rightly, it was a two-day course. Fortunately, I already knew immigration law. It must have been very difficult for anyone coming in from another field of law and who didn't have that background.

6. There used to be judges with no legal background?

Yes, it did happen. And it happened at that time that quite a lot of retired diplomats were brought in who didn't have a legal background but had some experience abroad. Obviously, people vary, so this was done with varying success. And you would have a period where you sat with another judge and observed them. So there wasn't a great deal of training looking back on it.

7. Has that changed today?

Yes, it has changed. I was heavily involved in the training of judges. Now there is a proper training committee, a judge responsible in the FTT, a judge responsible in the UT and an in-house training that goes on, as well as residential training, a one-day training. So, it has improved a great deal and then there's a judicial college now as well.

8. When did you first hear about the practice of FGM and in what context?

Probably in about 1969. I think probably in the course of reading various books on feminism.

9. When you began your career as an immigration judge, were you aware of what FGM was, where it was practiced and that it could potentially be a ground for seeking asylum in the UK?

I regarded it as such but it wasn't regarded as such in general. It took a long time for it to be seen as falling under PSG. I preferred to see it as an issue of political opinion as much as possible.

10. Have you adjudicated any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM or feared having to become a cutter?

Campaigned, no. Feared undergoing it, yes. Some who had had partial FGM or feared undergoing it again, yes. And fearing to become a cutter, also yes.

11. Can you estimate how many and can you recall what year the first FGM case came before you?

There are not a huge number of them and I don't know whether that's to do with women not saying what has happened to them, I suspect that it is. It would have been a handful each year and I think the first case must have been around the time of the Balkan wars, probably in the mid- to late nineties.

12. Can you estimate what percentages of FGM claims you allowed and refused?

I would have thought that they were mostly all allowed. Maybe no more than four or five of my cases when I was a FTT judge were ever successfully appealed.

13. Please describe your first FGM case regarding the availability of information.

I think the availability of information has improved to a degree. There wasn't much information available in country of origin reports, certainly not in UK ones. So you would have to look at Amnesty International or Human Rights Watch reports. But, no, it wasn't there in the way you would want it to be.

14. Please explain the impact of having heard several FGM cases on your performance when adjudicating such cases. In what areas did you gain knowledge and how were you able to apply it?

As the years went on and the reports improved and more lawyers would bring an expert report, medical reports and so on, that helped hugely in improving my knowledge and understanding of the issue. How various tribes in certain countries treated women and girls and various beliefs of different religions, so it helped hugely in that sense.

15. Since you just mentioned medical reports, in which circumstances would you need those?

Usually because it had been doubted by the SSHD that a woman had not had FGM, or that she had had it. Or not just the physical consequences, but also a psychological report of how that had affected her.

16. Were the circumstances of two or more FGM cases ever exactly the same?

Yes, there would be case where the circumstances are the same.

17. Please describe country of origin reports and country guidance submitted by the parties in FGM cases regarding relevance and currentness of data.

That hasn't always been very good. I don't know what they are like currently, I haven't seen one this year. But they would be usually lacking in specific information on women and children. Which is why, in my view, it is all the more important to get an expert witness report and a medical and psychological report.

18. Was an expert report submitted for every case and if not, would you have preferred to have one? What do you expect from an expert report?

No, not for every case. But the cases with a better solicitor and counsel would always have a good expert report. In addition, it was of real assistance if the writer of the report came to court to answer questions. I think experience is very key is being a good expert. By and large they tend to be anthropologists and as with any other profession, experts vary. Obviously, they need to be independent and not make findings of credibility that can give them an air of bias.

19. If both parties submitted reports as evidence but the two reports differed on an important issue, how did you determine on which report to rely?

In that case you would want the writer of the report there, both writers and get them to speak to each other. You would expect them to either concur in the end with one another or they feel they have a genuine argument and then you just listen to what each of them has to say and decide on the facts before you.

20. During the hearing (of FGM cases) did you take an interventionist approach? If yes, questions regarding which topics did you most frequently ask both parties?

No, I think I tended not to be interventionist at all. What I'd do, if I felt I had not understood correctly, I would say this to the legal representative and ask them to ask the witness more questions on a certain point.

21. There are many instructions and guidelines for Home Office officials on deciding asylum claims. Is this also true for immigration judges with regard to adjudicating asylum appeals and if yes, is it possible to be aware of, read and remember all of them? Are there any guidelines on gender-specific claims?

I worked with a group of lawyers and judges to prepare guidelines on vulnerable persons for the International Association of Refugee Law Judges. But they were never published and haven't ever been formally adopted. Guidelines are never binding but if you don't follow them you need to give good reasons why, otherwise your decision is open to review. So, the guidelines for the tribunal that come from the Tribunals Service, a representative would be able to mount a challenge if they hadn't been followed. They tend to be procedural, rather than substantive though.

22. How many judges do you think use the guidelines on vulnerable persons?

I think that most won't. Representatives will have to put them in. They need to put before the judge what they want the judge to take into account. The poor judges are so pressed, so busy, so they need to have it in the bundle. In their submissions also, representatives need to be very careful about what they put. And if it's something that is in a guideline, it needs to be highlighted and to be put simple for the judge to find. Most judges won't go and look up these guidelines themselves. The representative needs to put a summary on the front of the bundle highlighting the key passages.

23. Do you think representatives know these guidelines exist?

Probably the best representatives know and the rest don't.

24. Were you ever given any guidelines regarding FGM cases? If so, when and by whom were they issued?

No. I was involved in drafting the asylum gender guidelines, but I don't think there is any guidance specific to FGM cases.

25. If appellants did not speak English, was interpretation usually satisfactory? Were interpreters usually male or female and what effect did their sex seem to have on the claimant?

The quality of the interpretation varied greatly over the years I worked in the tribunal. In cases to do with FGM I would sometimes give a direction for a female interpreter.

26. What impact do case load and time restrictions have on decision making?

That became more and more difficult over time. I just heard yesterday that the current government wants another 40% cut in government departments, so I have real concern that there will be even more cuts in the Ministry of Justice than there have been. The pressure on judges in terms of the quality of work they are able to do and then the stress on them as human being seems to be ever increasing. This, inevitably will affect the quality of their work and therefore of the decisions for the individuals.

27. How skilled were the legal representatives?

They varied hugely. There is only a fairly small number of lawyers in the UK who do this kind of work. There have been some truly excellent lawyers but then there are others who frankly have just been trying to make money and have treated their clients appallingly.

28. Where assessing whether someone is at risk of persecution or serious harm largely rests on credibility, what are particular challenges to determining the risk?

It's usually lack of supporting evidence and if you've got somebody whose word has been doubted by previous decision makers and they don't have any independent support, that makes it really very difficult. It depends on the reasoning of the judge, how they have reached the conclusion that an individual was not credible. Whether they have taken into account irrelevancies or often they base their decision just on supposition or their own personal views about things rather than any of the evidence that was before them. Those are the kinds of issues I would try to tease out, but also I would say 'where is your expert report?' to deal with the issues that have been raised by the Home Secretary or by the FTT judge.

29. The available case law on FGM suggests that regarding risk and credibility one common problem is that judges use speculative arguments, particularly regarding the ability of parents to protect their daughters from FGM in countries of return. Please describe what relevance this issue has in your experience.

The issue of parents allegedly being able to protect their daughters does come up a lot, but it comes up specifically for children. Parents aren't actors of protection under refugee law so I would not find that persuasive as a reason.

30. As you said, the 2004 Qualification Directive does not list parents as actors of protection. Why then can parents' ability to provide protection even be considered?

It's the kind of argument that has been frequently used over the years in the UK's determination procedures. All kinds of arguments that aren't related to the law or the Refugee Convention have been used, certainly by the Home Office over the years. And then in turn by judges who followed those arguments.

31. So why, if the Qualification Directive is binding, isn't this always an error of law to argue that parents can protect their daughters?

I don't know why people don't argue that it is an error of law, because if they did, I think it would be very likely successful and it's difficult to see how somebody could succeed in law with the argument that parents are actors of protection. But very often you do find there is a fudging of issues that goes on in decision making, so it's said 'I don't believe you but even if it's true, your mum and dad can look after you' and it's perhaps a lazy way on the part of some judges of disposing of decisions, or perhaps Home Office decision makers, too. It avoids you having to look at the deep unpleasantness of the real issue. Some judges may be lazy or to them it's so deeply unpleasant that there is a desire, for example also in rape cases, not to go too deeply into it.

32. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I think that they have improved greatly over the years. I made some negative remarks just now, but there are some really good judges. It's a mix but I think with the training that has been instituted over the years, decisions have improved.

33. What area of the decision-making process in the tribunals is in your experience most prone to mistakes?

The credibility assessment is hugely problematic and the fact finding. Making a sufficient matrix of findings of primary fact and then drawing secondary facts from that and then applying it to the law. But I think quite often the first fact finding exercise is not done well and that sort of undermines the whole thing. And credibility assessment is a very problematic area.

34. What causes judges to speculate?

I think the speculating is part of some judges still not having a worked out methodology of how to assess the credibility of an individual. Perhaps they focus overly on credibility. When doing training I say to them they need to keep repeating to themselves 'how do I know what I think I know?' which will take you back to the evidence rather than basing a decision on your own perceived knowledge of the circumstances in another country.

35. The available case law on FGM suggests that regarding risk and credibility another common problem is that judges do not properly consider available evidence or disregard it. Does this happen often and can you explain why this happens?

Yes, it is a problem in many cases. It may be pressure of work.

36. How can speculating and disregarding evidence be prevented?

Training. Then again, there are some people who are resistant to training but that's also why you need to keep doing it. Some people just continue the same approach and don't learn, they don't realize what they're doing. So training, training, training and peer support. We have got a system of mentors, colleagues you can go to and chew things over with. And every few years there is an appraisal of your work and you are notified if most of your decisions are overturned on appeal.

37. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

They have improved. There's been a lot of research done and UNHCR has spent years working with the Home Office, so there has been improvement, but unfortunately they still fall into similar tracks of the errors we have already talked about, like the judges are making.

38. What area of the decision-making process in the Home Office is in your experience most prone to mistakes?

I think you have there the arguments that your family can protect you or that you can relocate but without examining the evidence, it's just said in a sentence.

39. Please comment on NGOs and churches as actors of protection in FGM cases.

That's the same really as what we were saying earlier about the parents. Churches or NGOs are not actors of protection. I don't think you could argue more than for an initial return the church would be there to receive you and then what after that?

40. When did you become familiar with the judgement in *Fornah*? Did you find it helpful for deciding whether a claimant belonged to a PSG? Did you ever have to overturn a decision because a woman was wrongly held not to be a member of a PSG after the judgement in *Fornah* was published?

*I read it right after it was published and it was helpful. I did have to overturn decisions after *Fornah* because we in the UT always get to see cases right after they are issued because we will need to apply them; the judges in the first tier don't have the same urgency. So for some time after *Fornah* the mistake was still made, but not nowadays, not anymore.*

41. Where women appealed asylum refusals that were justified by asserting a possibility of internal relocation, how successful were they if their argument rested on 1) an inaccessibility of the new area; 2) not being safe from FGM in the area; 3) indirect *refoulement* or a different type of persecution; 4) absence of affirmative state protection?

Usually because the proposed place of return was not safe for the woman, not necessarily because it would expose her to a real risk of FGM but because of

other unacceptable risks. Or it would be unreasonable in the sense that it was unduly harsh, she would not be able to survive economically.

42. Please explain whether the determination of reasonableness of internal relocation is particularly challenging in FGM cases as opposed to other cases, and if so, why?

It's hard to assess whether a woman might be found through tribal connections in the country of origin, so again you'll be relying on an expert report to tell you about that.

43. Does a woman who tried to claim asylum in the UK (on grounds of FGM) but is refused, returned and subsequently cut, have any remedy in law against the UK?

She might be able to use international mechanisms under various conventions, for example CEDAW, but I don't think she could do anything in the UK as our law stands. There have been cases where, if you've got good lawyers, if there's been an error of law in your case and it's being litigated through our court slowly, slowly, slowly, but in the course of that the Home Office deports the woman, so then the lawyers carry on with their arguing, saying that the Home Office has made a serious error of law in their arguing and say the woman should be brought back. If the woman still had good lawyers here and the proceedings were still ongoing or if she could somehow start a new challenge to proceedings, that would be a possibility. It would be difficult.

44. Please describe any recommendations on how decision making in FGM cases can be improved.

We have mentioned the training. Perhaps a training session that focuses on FGM cases and if we could have an expert come and actually speak to the judges and give the judges a chance to ask the expert questions. Perhaps a country expert, a psychologist and a medical doctor. That would be very good. Particularly a country expert to speak about the reality of life when you get back somewhere, otherwise it remains terribly theoretical. I think there is a lack of understanding of how difficult life can be for a woman on her own or a woman with small children trying to re-establish herself in life.

45. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

Probably anonymous, I think.

46. May I contact you again if any additional questions arise?

Yes, do.

Immigration Judge Geoffrey Care

**Chairman of the UK Immigration Appeal Tribunal, retired
(Odense, Denmark, 27 July 2015)**

1. Can you please state your name, title, former job, and describe the daily responsibilities of your former job?

My name is Geoffrey Care. 1982 - 1987 I was Deputy Chief Adjudicator and acting Chief Adjudicator from 1985-6. I was Chairman of the Immigration Appeal Tribunal from 1984-2003. Apart from sitting as an immigration judge I was responsible for establishing the appeals procedures for asylum appeals from 1988 onwards and for all administration of immigration appeals whilst acting Chief Adjudicator.

2. In which tribunals(s) and/or court(s) have you worked and for how long?

I did immigration appeals at the IAA from 1979-2003. First I worked as a full-time adjudicator then I became deputy Chief Adjudicator and later Chairman. I also worked in the Social Security Appeals Tribunals, 1990-1998 as a Chairman.

3. What was your job before you became an immigration judge?

I worked in London as a solicitor, before that I was Head of Department of the Law Faculty at the University Jos in Nigeria and before that I was a High Court Judge in Zambia.

4. Why did you decide to become an immigration judge?

I was desirous of a judicial appointment after retirement from High Court.

5. What training did you receive before hearing your first case?

There was some minimal induction and I was given basic materials to read as well as sitting in on a few cases.

6. What training(s) did you receive at later points in your career: on which topics and how often?

I was responsible for setting up the training and of course attended and participated in all seminars.

7. Any training on gender-specific issues?

No. There was no such thing. Basically, training began only with the introduction of the appeal on asylum in 1993. And then we did training on asylum generally but it was never a question of going into great detail. Especially the meaning of PSG was a mystery; no one told us what it was, no one knew what was in it.

8. When did you first hear about the practice of FGM and in what context?

I think I had an FGM case from Sierra Leone around 1996 and became familiar with decisions in other countries particularly one of Professor Roger Errera. But having spent most of my practising life in Africa I was not unaware of the existence of the practice.

9. Have you adjudicated any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM or feared having to become a cutter? If so, which of these?

I have adjudicated in several appeals involving allegations of a fear of FGM on return.

10. Can you estimate how many such cases you heard and can you recall what year the first FGM case came before you?

No more than two or three. I think it was that case in 1996, the first one.

11. Can you estimate what percentages of FGM claims you allowed/refused/remitted back for reconsideration?

I cannot recall for sure but I think I allowed all of them.

12. You were one of the judges in *Yake v SSHD*. Can you recall whether the adjudicator justified her decision that the claimant was not credible in any way?

I don't remember. We were up against alleged adverse credibility a lot, and we still are. Some people just didn't have any experience with adjudication and also no experience in foreign countries.

13. Please describe your first FGM case regarding the availability of information and your perception of your own performance.

I cannot at this distance of time.

14. Please explain the impact of having heard several FGM cases on your performance when adjudicating such cases. In what areas did you gain knowledge and how were you able to apply it?

Since I was already aware of the practice it had no special impact on me. The cases turned minimally on law in my view if there was a threat of FGM established to the required level, protection from return had to be granted.

15. Were the circumstances of two or more FGM cases ever exactly the same?

I doubt it – the facts differed in all appeals and appeals involving a threat of FGM differed. The law was sometimes rather different since the issue was to what extent there could be any protection from the state from this practice – and in my view the state could or would rarely afford any protection at all.

16. Please describe country of origin reports and country guidance submitted by the parties in FGM cases regarding relevance and currentness of data, particularly in respect to internal relocation and state protection.

In those days there was little available – in the UK at least. This was generally the position, which is why I spent a good deal of time in the early days trying to ensure that there was reliable factual information available.

17. If both parties submitted reports as evidence but the two reports differed on an important issue, how did you determine on which report to rely?

I did not have this situation in any FGM case as far as I recall. But if this happened in any case I would often fall back on my own experience. Remember I spent many years in Africa and I studied, taught and lived with African culture at a fairly grassroots level. This called into question the conflict in a judge's duty to be independent. I found I was able to handle this as did most of my colleagues with similar backgrounds. I'm afraid it presented more difficulties to those without such backgrounds. We tried to explain suitable approaches and some judges in the higher courts understood and supported us.

18. During the hearing (of FGM cases) did you take an interventionist approach? If yes, questions regarding which topics did you most frequently ask both parties?

I believe an immigration judge's role is inevitably interventionist and the present system is inherently flawed.

19. Please describe expert reports submitted on behalf of claimants regarding relevance and currentness of data. For what percentage of FGM cases was such a report provided?

None of them.

20. What do you expect from an expert report?

Have a look at the Medical Guidelines on the IARLJ website and the proposed Expert Evidence Guideline by the IARLJ Expert Evidence Working Party.

21. There are many instructions and guidelines for Home Office officials on deciding asylum claims. Is this also true for immigration judges with regard to adjudicating asylum appeals and if yes, is it possible to be aware of, read and remember all of them? Are there any guidelines on gender-specific claims?

I think this is better answered by judges closer to the present times in their experiences.

22. Were you ever given any guidelines regarding FGM cases? If so, when and by whom were they issued?

Not then.

23. What impact do case load and time restrictions have on decision making?

A profound impact – sometimes verging on the impossible. Adjudicators were so pressed, they found it hard to devote time to the facts of a case.

24. How skilled were the legal representatives? How familiar did they appear with representing FGM claims?

I cannot say.

25. Where assessing whether someone is at risk of persecution or serious harm largely rests on credibility, what are particular challenges to determining the risk? Are the assessment of risk and credibility in FGM cases different from the assessment in other cases? If so, how?

Basically little different. FGM claims were always fairly obvious to me. The only question that arose was that it wasn't state persecution. We were concerned with the facts rather than the law; and even though it wasn't state persecution, we knew on the facts she was at risk, so we didn't send her back. End of story.

26. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I don't know if it has improved. Home Office decision making has in my view been almost invariably deficient due to the very fact that it is inevitably negative oriented and makes putting it right verging on the impossible given the present law.

27. What area of the decision-making process in the Home Office is in your experience most prone to mistakes?

Especially credibility. There's a lack of understanding by the decision makers.

28. Where women appealed asylum refusals that were justified by asserting a possibility of internal relocation, how successful were they if their argument rested on 1) an inaccessibility of the new area; 2) not being safe from FGM in the area; 3) indirect *refoulement* or a different type of persecution; 4) absence of affirmative state protection? Please describe the challenges in evaluating the evidence provided in support of such claims.

Internal relocation is a topic of its own which depends on the degree of reliability of the evidence and the grasp the decision maker has of the realities of the situation in the country concerned. Any woman in Africa will have trouble moving to another part of her country. If she marries, she will move to where her husband is. And if they have children – girls – and it is a custom amongst her husband's people to practice FGM, she won't know what

to do. Her mother won't be able to take her and her daughters away, because she has to stay with her husband and she can't go. The woman herself won't have anywhere to go to. She won't be able to find a home somewhere else. She may be lucky and may be able to live with some other relative somewhere else, but in most African societies she would be returned to her parents, I would have thought, and then returned to her husband. Even if both parents were against it, they would have to move and that's difficult because the father would have to have a job, to make a living. Even in a country as big as Nigeria there are few places you can actually, practically go to. If you are a northerner, your language is Hausa, your religion is Islam. How can you move to the south where people speak another language and are Christian or pagan? Or if you move to a city, what do you do there? Go on the streets is about the only answer to that. I find it difficult to imagine a situation where a girl can relocate. Usually girls this happens to are not university educated, it's more the ordinary run of people.

29. There is a lot of research about the quality of decisions by the Home Office and several mistakes appear to occur often. However, FGM case law suggests that judges in the FTT (and formerly adjudicators) and also judges in the UT (and formerly the IAT/AIT) or the Court of Appeal make mistakes similar to those made by the Home Office. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I have not studied them so cannot usefully comment.

30. The available case law on FGM suggests that regarding risk and credibility common problems are that judges do not properly consider available evidence or use speculative arguments. However, the case law is not extensive and by no means representative. Please describe what relevance these two particular issues have in your experience.

I cannot comment on particular issues like these. I'm too far away from practising.

31. What causes judges to discard evidence without explaining why or to speculate?

They never should and a decision doing so should be overturned.

32. How can this be prevented?

Appeal and education.

33. The speculations referred to above concerned the assumption that girls could be protected by their parents against FGM. Can you comment on this type of speculation?

That of course is rubbish – and obvious rubbish as a stand-alone comment. I would not expect it even to be made without more elaboration since FGM exists among extended family life, not nuclear families.

34. The 2004 Qualification Directive lists possible actors of protection. While clans may count as such, parents (or families) do not. Why then can parents' ability to provide protection even be considered?

I would not allow it.

35. Please comment on NGOs and churches as actors of protection in FGM cases.

I cannot.

36. When did you become familiar with the judgement in *Fornah*? Do you find it helpful for deciding whether a claimant belonged to a PSG?

Of course it should be helpful.

37. Please explain whether the determination of reasonableness of internal relocation is particularly challenging in FGM cases as opposed to other cases, and if so, why?

It's difficult to identify any difference but one difference may lie in size of the country, but I doubt it since this is a family matter and escape seems to me to be virtually impossible if the girl is young and unmarried. Again, a close examination and understanding the country and its cultures and realities can rarely emerge from mere written background material.

38. Does a woman who tried to claim asylum in the UK (on grounds of FGM) but is refused, returned and subsequently cut, have any remedy in law against the UK?

I don't know, but since it's a judicial decision that was made, my initial reaction would be that there is no claim.

39. Please describe any recommendations on how decision making in FGM cases can be improved.

I don't think I can do more than I did in my book, but as I have said this type of tribunal seems inherently incompatible with the requirements of decision making sought in the UNHCR Handbook.

40. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

Yes, you can use my name.

41. May I contact you again if any additional questions arise?

Yes.

Legal Representative A (Barrister)

(Manchester, UK, 14 July 2015)

1. Can you please state your title, job, the area of law you specialise in and describe the daily responsibilities of your job?

I am a barrister and the work I choose to do is immigration and asylum work. Most of my job is representing people who have cases of an immigration or asylum nature, either in the immigration tribunal or in the higher courts, administrative court, Court of Appeal, etc.

2. Have you ever received any training in representing clients in gender-related asylum/human rights claims?

I'm sure I have. I know I've been to courses by Heaven Crawley. She has run courses on these issues.

3. Have you ever received any training in representing clients in FGM cases?

Not that I can recall. I've been to training provided by Freedom from Torture. It raised a lot of issues, also some concerning FGM.

4. When did you first hear about the practice of FGM and in what context?

I'm not sure I can remember. I have been doing the job for about 20 years. I couldn't tell you when I first came across it.

5. When you began your career as a legal representative, were you aware of what FGM was, where it was practiced and that it could potentially be a ground for seeking asylum in the UK? If so, how were you made aware?

I think that must be the context in which I first came across it.

6. Have you represented clients in any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM and feared being cut again or feared having to become a cutter? If so, which of these?

Yes, I have. I think almost exclusively my cases have been cases of people who feared FGM for themselves or for their daughters. That has included mothers and fathers. I don't recall ever having done a case for any campaigner or anyone who feared becoming a cutter. Many of my clients have already had FGM, most Somali women have had FGM, but this would not necessarily be a basis for their asylum claim, I never heard of them being afraid to be cut again.

7. Can you estimate how many FGM cases you have taken on and can you recall what year the first such client came to you?

I can only give very rough estimates. I would say several dozens. In terms of the first year, I'm afraid I couldn't say.

8. Can you estimate what percentage of all female clients' claims seeking to appeal their asylum decisions was related to FGM?

Not really, sorry.

9. Can you estimate what percentages of appeals of such clients who you represented were allowed and refused?

I really couldn't say.

10. Please describe your first FGM case regarding the availability of information and your perception of your own performance.

I don't remember.

11. Please explain the impact of having worked on several FGM cases on your performance when representing clients in FGM cases. In what areas did you gain knowledge and how were you able to apply it?

You become familiar with the issues and you become familiar with the background evidence in particular countries. I think it becomes slightly easier because if you know about the Mandinka tribe or a particular ethnic group because you've done four and five cases, you have that info at you finger tips.

12. Were the circumstances of two or more FGM cases ever exactly the same or extremely similar?

Yes. I have to say in a number of FGM cases you sometimes get cases which are very similar, sometimes suspiciously so.

13. If so, did they have the same or a different outcome?

I don't recall, sorry.

14. If clients do not speak English, is interpretation usually satisfactory? Are interpreters usually male or female and does their sex seem to have an effect on the client?

Often a female court is requested, but obviously if it is, I am not there. I guess you can ask for a female interpreter but that might raise a bit of an issue if the representative is male. I think that women who have been through FGM are frequently uncomfortable disclosing it, it's personal and can be very embarrassing frequently it's difficult for them to disclose it to a woman and perhaps even more difficult to disclose it to a man. Some representatives will not necessarily think about this. There's a lack of sufficiently well experienced representatives to carry out these cases.

15. Why is that?

Well, I mean nearly all these cases are done on legal aid which is not very generous. Work at these rates tends to be done by people who are relatively junior and relatively inexperienced. Some of them are very good but I believe it's not particularly easy to get an experienced representative because there aren't too many of them about and the remuneration is not very generous.

16. Where does the majority of your FGM clients come from?

Africa. Mostly West Africa. Nigeria, Cameroon, Gambia, Somalia.

17. Please describe your approach to preparing an appeal in an FGM case. What errors of fact/law do you most frequently find in the Home Office/FTT/UT decision? What issues does the appeal most frequently turn on?

Credibility and internal relocation are probably the two biggest issues, particularly in Nigerian cases because Nigeria is a very large, populous country. That was a number of questions... In terms of my approach, I'm not sure I have an approach. I approach all my cases in a thorough and professional way, or I try to. I normally get instructed at the end of the process, I don't prepare the cases. It is usual that I meet the client on the morning of the hearing. In terms of mistakes of fact and law, that's pretty broad. Obviously when I get a decision from the first tier and it is allowed, everybody is happy, if it is not allowed I have to look at it to see if it contains any errors of law, looking particularly at how they have assessed internal relocation. In all cases you have to look at the credibility assessment. It is difficult to go behind FTT judges' credibility assessment. What you often try to do is to see whether they have reached perverse conclusions that no one could properly reach on the evidence. That's the case in all appeals. It's not exclusive to FGM, but sometimes there's a late disclosure of FGM as an issue and the Home Office will typically say that that's because it is just made up or added on at the last minute. So there's a whole series of cases which deal with why people might disclose matters late, that's often an issue in FGM cases.

18. Since we're talking about credibility, can you pin down any particular aspect of FGM claimants' claims that are disbelieved?

In a lot of FGM claims you might have a woman who has had FGM herself and you can often get particular evidence to demonstrate that as a fact and there's often background evidence about the particular ethnic group which she claims to be from. Sometimes the Home Office will say that your claimant is from a different ethnic group than the one you argue. But if they accept that she is from a group with a high prevalence of FGM, then it can turn on issues of who's going to force you and what sort of power or independence you might be able to exert in order to overcome that, if you say you don't want your daughter or you don't want yourself to be subjected to FGM, there are often a lot of credibility issues around that, just peoples' account of what is likely to happen to them and what has happened to them in the past.

19. That is interesting, because I have been looking at the available case law on FGM, successful appeals specifically, but the case law is not very extensive.

So far I was only able to obtain 11 cases to analyse. But of those 11 I categorised five as having been overturned because of flawed credibility findings and in three of those five cases the judge just speculated that a girl's parents could protect her.

Yes, I think that's what I was saying. It's a question of the woman's, usually the mother's, social status. Sometimes they say it's my mother or my uncle, they've got some position of status so that they're going to enforce it, so it's an issue whether that claim is believable.

20. The 2004 Qualification Directive lists possible actors of protection. While clans may count as such, parents (or families) do not. Why can parents' ability to provide protection even be considered?

Good question. I'm not sure I know the answer off the top of my head but I think that judges will often be saying that the FGM just isn't going to happen. Which is slightly different than saying there is a sufficiency of protection. The sufficiency of protection is a legal concept but the judge has to make a decision about what is likely to happen in the country of return. For example, if the judge makes a finding that you're not a poor woman from a rural community, that in fact you are university educated, you can go to a big city, you can get a job and you can protect your child. I'm not sure this is a finding that there's sufficiency of protection, it's just a finding that the harm is not going to happen.

21. How can judges know whether a woman can protect her daughter?

Well, you can't. You can draw inferences from facts. You can't engage in speculation that is not properly based on facts. The refugee determination process is a forward-looking process, it determines whether there's a reasonable likelihood of persecution.

22. Can you comment on the argument that NGOs and churches can be actors of protection in FGM cases?

I'm a bit unprepared for that, but, I mean there is a number of cases which talk about who can be actors of protection. The cases which brought this to life were cases around the autonomous Kurdish areas in the 90s which talked about who was able to offer protection. Off the top of my head, have you seen the Nigerian country guidance case, PO, it's more about victims of trafficking but there are issues about the sufficiency of protection by shelters, etc.

23. Please comment on how legal representatives can obtain evidence regarding a woman's family's attitudes towards FGM.

It's very difficult because if you get a letter saying 'I want to perform FGM' from the grandmother, say, the tribunal will say it's self-serving. You can get letters, statements, affidavits, but you're likely to suffer from the accusation that it's self-serving. But what else can you do? Maybe if you can produce a particularly prominent person who has made some public pronouncement in a local newspaper or something, either pro FGM or against FGM, you can do that, but that doesn't happen very often. Yes, it is problematic. You don't

have to have evidence corroborating your account. It is perfectly possible to win an appeal, in theory, simply on the basis of what you say. But in reality it's difficult. Any unsupported assertion is difficult.

24. Where an FGM claim is rejected because internal relocation is deemed feasible, how is this usually justified and is supporting evidence produced?

The phrase they always use is 'insert country' is a big country and then they quote how many square miles it is and how many people live there, and then they quote four or five cities. It isn't really the point. I went to a course on internal relocation about year or so ago. Gina Clayton ran it. It was a good course. This idea that just because a country is big, it means you're safe or just because it's small you're not, isn't what internal relocation should be about. I guess if a town is a certain size, it provides a degree of anonymity, irrespective of whether the country is big or small. The Home Office are supposed to propose a site of internal relocation, so the appellant only has to deal with that proposed site of internal relocation. Typically if people fearing FGM say they are from a small village or a smaller area, the suggestion will be that they can go to a big town or city and achieve a degree of anonymity and where FGM is not as prevalent, in a country like Nigeria, those distances can be huge and they say 'nobody's going to know you there, nobody will know you arrived' and all the rest of it. But obviously you have got issues about society in these countries in terms of the fact that your tribal background is something you have to disclose on a regular basis.

25. Where women appealed asylum refusals that were justified by asserting a possibility of internal relocation, how successful were they if their argument rested on 1) an inaccessibility of the new area; 2) not being safe from FGM in the area; 3) indirect *refoulement* or a different type of persecution; 4) absence of affirmative state protection? Please describe the challenges in evaluating the evidence provided in support of such claims.

The SSHD is supposed to propose a site of internal relocation, but they don't always. In FGM cases, the argument that most people advance is that it is not in fact safe, that your persecutors would follow you there. That there are communication links, tribal links, people trading, it's a small country. That they would find you there and still perpetrate the harm, which is saying there is no viable internal flight alternative. The other one would be undue harshness and that is often because you're talking about a woman, particularly with a daughter, and there are issues of a lone woman, there are typical arguments that you wouldn't be able to lead a relatively normal life.

26. Nowadays, are there any FGM claims refused because the decision maker finds that a woman who fears FGM is not a member of a PSG or cannot identify another Convention ground? Has this changed since the judgement in *Fornah*?

Not these days, not that I know. It's generally accepted that FGM engages the Convention. Even for a mother to watch her daughter undergoing FGM is now accepted as engaging the Convention.

27. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

It goes up and down. They used to be really appalling and then they did get a lot better. I think generally they are better. Now they are just expanding, they are huge now. And the Immigration Rules around Article 8 in particular and private and family life are hugely complicated and it's becoming very difficult for a lay person to read them and to make any sense. But generally, they are better.

28. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I couldn't say they're getting better or getting worse. When judges start they're often quite liberal and that gets knocked out of them but in terms of the quality of their decisions, they tend to get slightly better, but then they retire and new people come in. I couldn't say they're getting any better, they're just too varied. Some judges always write good decisions, some judges nearly always write bad ones.

29. Can you comment on the quality of expert reports?

Expert reports vary enormously.

30. Is it usually necessary to submit a medical report detailing that the client has not had FGM?

It depends on whether it's accepted by the Home Office or not.

31. How do you think decision making in FGM cases could be improved?

I'm sure it could be. Sometimes FGM doesn't get picked up as an issue. For example in cases where the woman has some claim not related to FGM that is probably not going to succeed and since they've been in the UK they've had a daughter and no one has thought to argue what is going to happen to the daughter on return.

32. The UK has signed the Istanbul Convention which in Art 61(2) states that "Parties shall [...] ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where [...] they might be subjected to torture or inhuman or degrading treatment or punishment." Can you comment on the effect a ratification and incorporation of this convention into UK domestic law would have for (refused) asylum seekers who fear FGM?

I'm not sure it would add any other layers of protection that do not already exist.

33. If the Istanbul Convention were incorporated, the UK would be under an obligation to interpret Convention grounds in a gender-sensitive manner. Can you describe the impact a gender-sensitive interpretation of Convention grounds would have? Can you explain the difference it would make to have a claim under race/religion/nationality rather than PSG?

There already are gender guidelines and I'm not saying they are being implemented at all times and more could be done but they exist.

34. The Serious Crime Act 2015 amended the Female Genital Mutilation Act 2003 and 2005 Female Genital Mutilation (Scotland) Act to the effect that now habitual residents are protected under the Acts. It can be argued that asylum seekers are habitual UK residents. Since it is a criminal offence to aid or abet a non-UK person to mutilate overseas a girl's genitalia, the UK, or more specifically anyone ordering or participating in the removal of an asylum seekers from the UK, may be said to have committed an offence under the Acts where women's asylum claims based on a fear of FGM are refused and they are returned to their countries of origin and undergo FGM. However, in order to be criminally liable, someone would have to have had the intention to aid the crime of FGM. Can you comment on the possibility that there are decision makers who wilfully refuse a woman despite their better judgement and on the possibility of proving such conduct?

I would think and guess without professing any particular expertise that it would be extremely difficult to demonstrate that a Home Office official had acted in bad faith rather than had made a mistake. In case of judges... I don't know.

35. Does a woman who tried to claim asylum in the UK (on grounds of FGM) but is refused, returned and subsequently cut, have any remedy in law against the UK?

Again, that's a bit outside my area. In certain circumstances if you go to the British embassy in another country and claim asylum they will consider the claim. But it is extremely rare that this is granted. It happens very, very occasionally. If you went to the British embassy and told them you underwent FGM and say you tried claiming asylum because you were going to be subjected to it, I think you'd have a very good case, whether in terms of financial or other recompense. My gut feeling is you must be able to do something about that. That's a really terrible breach of the UK's international obligations.

36. Are you aware of any of your former clients who were returned because their protection claim failed and who were then subjected to FGM?

I very rarely stay in contact with clients. It's almost impossible to monitor. Personally, I am not aware of any woman this has happened to.

37. The Serious Crime Act 2015 also introduced FGMPOs which habitual residents can apply for before a family court. In deciding whether to grant an FGMPO courts "must have regard to all the circumstances, including the need to secure the health, safety and well-being" of the woman. Can you

comment on whether women who have already undergone FGM would benefit from this provision? Could they be granted health care such as reconstructive surgery and subsequently launch an asylum claim as they are one again 'intact'?

It removes the Home Office argument that you're not at risk of persecution because FGM is a one-time thing, which the way it is normally perceived. So, yes, obviously there is still credibility and internal relocation.

38. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

I prefer to remain anonymous.

39. May I contact you again if any additional questions arise?

Yes, you can.

Legal Representative B (Immigration Case Worker)

(Manchester, UK 15 July 2015)

1. Can you please state your title, job, the area of law you specialise in and describe the daily responsibilities of your job?

Until recently I worked in a law centre. It was legal aid exclusively. Law centres are charities that undertake legal aid work in civil cases. I worked in a law centre for seven years, in immigration and asylum. But I recently got a job at a private firm in Leeds. At the law centre I had conduct of mostly asylum cases. I am not a full solicitor yet, I'm a caseworker. It's someone who is a paralegal and has only a qualification to work in immigration and asylum. My responsibilities include advising people, making representations to the Home Office and to the court, going to court, advocating.

2. Have you ever received any training in representing clients in gender-related asylum/human rights claims?

There are several training courses that one takes before sitting the national exams to become an immigration caseworker. It's almost too many to mention, it's an ongoing thing.

3. Have you ever received any training in representing clients in FGM cases?

No, I have never had a legal training about how to represent an FGM case. I've been to training sessions about what FGM is and FGM in certain social contexts, but not in the context of an asylum claim.

4. When did you first hear about the practice of FGM and in what context?

1995, that was the first time I really heard of FGM. I went to quite an intensive training about it. Since then I've been to training sessions that really helped me understand it in the social context.

5. Have you represented clients in any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM or feared having to become a cutter? If so, which of the above?

Yes, to all of them.

6. Can you estimate how many FGM cases you have taken on and can you recall what year the first such client came to you?

Four. Three were appeals, one was a judicial review where the claim had been certified.

7. Were the four cases successful?

One of them I don't know because it was still ongoing when I left the law centre. The others were successful in a limited way. None of them got refugee status but they got discretionary leave. Leave outside the rules. That's not the best result. I always try to get them refugee status.

8. Can you tell me where the women were from?

I'm sorry I can't. I can't reveal client information. I can tell you they were from West African countries.

9. Please describe your first FGM case regarding the availability of information and your perception of your own performance.

When I was first qualified I took on a case and I was already familiar with it because I had assisted on the case. Regarding the availability of information, in that specific country there was a real paucity of information to support her account. The Home Office asked, can't you just say 'no thank you'? And the client explained to me, because I didn't know anything about that country, she said it goes so much deeper than that, I can't watch my daughter 24 hours a day, she's got other relatives, she goes to school, she'll have enormous pressure. It was a question of me taking her instruction and then trying to find some kind of evidence. Right around that time a colleague and I caught on to instructing experts and getting expert reports to support asylum claims. Jacqueline Knörr of the Max Planck Institute has supplied expert reports for two of my cases. They've been really supportive, really detailed and really explain the cultural context of FGM. I think there is something about being able to say the Max Planck Institute, I remember the judge was pretty impressed.

10. Please explain the impact of having worked on several FGM cases on your performance when representing clients in FGM cases. In what areas did you gain knowledge and how were you able to apply it?

It's helpful knowing the cases that are out there and it's helpful seeing how a judge will respond to submissions with that case. Sometimes you can put together really nice submissions but until you're actually in court, it's hard to know how a judge will see them.

11. Were the circumstances of two or more FGM cases ever exactly the same or extremely similar?

No, not at all.

12. Please describe your approach to preparing an appeal in an FGM case. What errors of fact/law do you most frequently find in the Home Office/FTT/UT decision? What issues does the appeal most frequently turn on?

Credibility is always the starting point. I always try to work back, especially if the case has been before other courts. If a judge has made an adverse finding of credibility that is so hard to combat. And sometimes, because people who are afraid sometimes lie, you do have a statement that has some inconsistencies. So there needs to be time spent with someone to make sure

we get everything out there. Sometimes they have not mentioned FGM before, because they are afraid or they are not sure if that's an asylum thing. Sometimes we have to explain why it hasn't come up before. Once you get the credibility sorted out, you get as much good country evidence as possible. I'm really into expert reports. The Home Office are very keen to say no to claims and if you can submit an expert report as early as possible, it helps the judge.

13. How easy or hard is it to obtain such a report?

It's not terribly hard. I would say there are enough experts out there. There is a database, the EIN database, but some experts are just a little more helpful and knowledgeable than others and it's sort of like word of mouth. I don't mean to say that an expert will necessarily help you because they are independent but often they are just very helpful.

14. Where a claim is rejected due to adverse credibility findings, which part of your clients' account is most frequently disbelieved?

Two things that are related I think. The first will be internal relocation. Very often you'll have the Home Office or judge saying they don't understand why a client can't move to the other side of the country. And then there are instances of family violence, where in-laws are going to force a woman to have it done. How are you going to prove that? It's so hard to prove.

15. The available case law on FGM suggests that regarding risk and credibility common problems are that judges use speculative arguments, particularly regarding the ability of parents to protect their daughters from FGM in countries of return. Can you please comment what relevance this issue has in your experience?

Yes, this happens a lot. I think that just comes down to the evidence. I would start by presenting the client with that and the judge says you should be able to just say 'no thank you' and why do you think that's not possible and what do you think specifically is going to happen? In my experience it's usually something along the lines of extended family and then there's the social pressure, so getting a statement from them explaining that and getting supporting evidence.

16. The 2004 Qualification Directive lists possible actors of protection. While clans may count as such, parents (or families) do not. Why can parents' ability to provide protection even be considered?

The thing that makes it difficult is that this isn't state persecution. Normally the way it's enacted is through the parents. I think that's the thing, the judge thinks instead of bringing a girl to be cut the parents can simply not bring her. If it were persecution organised by the state I think you could argue that bit from the Qualification Directive, because how can parents be expected to stand up against the state? But since it is not state persecution, the parents are standing up against whom, really? Other parents, members of the community.

17. Please comment on the argument that NGOs and churches can be actors of protection in FGM cases.

In K and others this is very specifically mentioned and then it is brushed aside. Because prior to that case what many judges would argue was there were reports from NGOs and churches about what a good job they are doing protecting girls from FGM. I think in that case this was really dismissed because the NGOs are doing as much as possible but their reports are for funders to see their progress and not for their role as actors of protection.

18. *K and others* was a country guidance case for the Gambia. So for the Gambia, the protection by NGOs and churches was dismissed. But does this also impact other countries?

I would cite it. I would say, yes, this case is country guidance for the Gambia, but this phenomenon is common to other countries. It might not be binding but it would be persuasive.

19. Please comment on how legal representatives can obtain evidence regarding a woman's family's attitudes towards FGM.

That's so hard. If my mum had disowned me or were angry with me, she would not provide an affidavit. A lot of family violence for various reasons is not reported to the police. It's really hard and that makes it all the more important to get good, consistent internal evidence from the actual client.

20. Where women appealed asylum refusals that were justified by asserting a possibility of internal relocation, how successful were they if their argument rested on 1) an inaccessibility of the new area; 2) not being safe from FGM in the area; 3) indirect *refoulement* or a different type of persecution; 4) absence of affirmative state protection? Please describe the challenges in evaluating the evidence provided in support of such claims.

Undue hardship is what I would argue. Others I haven't argued but maybe that's just due to the circumstances of the cases.

21. Nowadays, are there any FGM claims refused because the decision maker finds that a woman who fears FGM is not a member of a PSG or cannot identify another Convention ground? Has this changed since the judgement in *Fornah* in 2006?

I think that doesn't happen anymore. Not since Fornah.

22. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I have only been a caseworker for a couple of years and so I can't comment on trends, but in my opinion, it's clear that the Home Office are very keen to refuse initial asylum claims. Quite often they will pick at points of alleged credibility, because maybe someone in their screening interview spoke very briefly about family violence and then in their substantive interview expanded

on it and then the case owner will say she changed her story, so she's lying. This is easy to address as a representative but for the person making the claim it can be a real shock. You have some asylum case owners at the Home Office who are really conscientious and polite and then you get some where the claimant is not really allowed to speak at the interview.

23. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I think I don't have enough experience to comment.

24. You already mentioned the EIN database. Which other sources do you use where you wish to submit a country of origin report?

Sometimes I do a bit more research to see if there's something more specific on Human Rights Watch or Amnesty International.

25. Is it usually necessary to submit a medical report detailing that a woman has not had FGM?

I can't imagine anyone demanding that. They just take your word for it.

26. How do you think decision making in FGM cases could be improved?

I think that cuts to legal aid are a big problem. Some of the aspects of representing someone in an appeal after a refusal is not the most advanced legal work. Some of it is really basic procedural stuff. Just getting someone to the point where they appeal and don't get discouraged is really important. Without legal aid, for someone who applies and gets refused to get some good, independent, free advice is very difficult.

27. The UK has signed the Istanbul Convention which in Art 61(2) states that "Parties shall [...] ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where [...] they might be subjected to torture or inhuman or degrading treatment or punishment." Can you comment on the effect a ratification and incorporation of this convention into UK domestic law would have for (refused) asylum seekers who fear FGM?

I don't know enough to comment usefully. But my first instinct is that it wouldn't make much of a difference.

28. If the Istanbul Convention were incorporated, the UK would be under an obligation to interpret Convention grounds in a gender-sensitive manner. Can you describe the impact a gender-sensitive interpretation of Convention grounds would have? Can you explain the difference it would make to have a claim under race/religion/nationality rather than PSG?

There are the API on Gender Issues in the Asylum Claim, so claims should already be interpreted in a gender-sensitive manner.

29. The Serious Crime Act 2015 amended the Female Genital Mutilation Act 2003 and 2005 Female Genital Mutilation (Scotland) Act to the effect that now habitual residents are protected under the Acts. It can be argued that asylum seekers are habitual UK residents. Since it is a criminal offence to aid or abet a non-UK person to mutilate overseas a girl's genitalia, if the girl is an habitual UK resident, the UK, or more specifically anyone ordering or participating in the removal of an asylum seeker from the UK, may be said to have committed an offence under the Acts where women's asylum claims based on a fear of FGM are refused and they are subsequently returned to their countries of origin and consequently undergo FGM. However, in order to be criminally liable, someone would have to have had the intention to aid the crime of mutilating the woman. Can you comment on the possibility that there are decision makers who wilfully refuse and remove a woman despite their better judgement and on the possibility of proving such conduct?

In my view, you would not be able to prove that someone did it on purpose.

30. Does a woman who tried to claim asylum in the UK (on grounds of FGM) but is refused, returned and subsequently cut, have any remedy in law against the UK?

Someone could petition the Strasbourg Court. Beyond that I can't think of anything.

31. Are you aware of any of your former clients who were returned because their protection claim failed and who were then subjected to FGM?

I don't have any who were returned.

32. The Serious Crime Act 2015 also introduced FGM protection orders (FGMOPs) which habitual residents can apply for before a family court. In deciding whether to grant an FGMPO and what provisions to make courts "must have regard to all the circumstances, including the need to secure the health, safety and well-being" of the woman. Can you comment on whether women who have already undergone FGM would benefit from this provision? Could they be granted health care such as reconstructive surgery and subsequently launch an asylum claim as they are once again 'intact'?

That is so interesting. I'm afraid I don't know enough to comment. I wouldn't have thought of using that sort of argument in an asylum claim. It makes me want to read the Act in detail.

33. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

I think I'll just stay anonymous.

34. May I contact you again if any additional questions arise?

Yes, absolutely.

Dr Kathryn Cronin (Barrister)

(London, UK, 16 July 2015)

1. Can you please state your job title, the area of law you specialise in and describe the daily responsibilities of your job?

I'm a barrister, I practice in immigration, asylum and human rights law.

2. Have you ever received any training in representing clients in gender-related asylum/human rights claims?

I've been doing this job for 35 years, so my training was probably a long way away, but I certainly feel trained now.

3. Have you done any courses in representing clients in FGM cases?

I give courses on FGM.

4. When did you first hear about the practice of FGM and in what context?

I've always known about FGM, I cannot imagine a time when I didn't know.

5. When you began your career as a legal representative, were you aware of what FGM was, where it was practiced and that it could potentially be a ground for seeking asylum in the UK? If so, how were you made aware?

I was an academic before I was a barrister. I did a PhD on race discrimination and women's issues. I knew of it a long time before I started to practice.

6. Have you represented clients in any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM or feared having to become a cutter? If so, which of these?

Yes, all of these.

7. Can you estimate how many FGM cases you have taken on and can you recall what year the first such client came to you?

I've done scores of them, I couldn't begin to count the numbers. The first ones came probably in the 1980s.

8. Can you estimate what percentage of all female clients' claims seeking to appeal their asylum decisions was related to FGM?

They would be a small, but measurable percentage.

9. Can you estimate what percentages of appeals of such clients who you represented were successful or unsuccessful?

All of them have been ultimately successful, one of them I've had to take to the House of Lords.

10. Please describe your first FGM case regarding the availability of information and your perception of your own performance.

There's always been quite a deal of information on FGM, I found, you just have to know where to look for it. Immigration and asylum, they've had for a long time good country data, NGOs and so forth that specialise in gender issues have very good data.

11. Were the circumstances of two or more FGM cases ever exactly the same or extremely similar?

Quite often they are. Depending on the country. If you have a lot of cases from Sierra Leone, for example, or a lot of cases from Egypt or Sudan you get similarities in them.

12. Please describe your approach to preparing an appeal in an FGM case. What errors of fact/law do you most frequently find in the Home Office/FTT/UT decision? What issues does the appeal most frequently turn on?

I think the most important thing is to get the judge to understand FGM and the most common misconception is that it only occurs to children. So, it's really important to make clear that the risk is almost a life-long risk, so that at the point of marriage you can have the family you're marrying into decide that they want her cut or the husband decide that he wants her cut, or when she goes to give birth, the doctor in the maternity hospital deciding that she should be cut, in countries where you have very high cutting rates. It's important to get judges to understand that it's not just about parents and small children, it's about a community and women.

13. So why would judges make the assumption that only small children are at risk? Is this ignorance or is it because some of the evidence points them to it?

I think it's just a working assumption.

14. The available case law on FGM suggests that regarding risk and credibility common problems are that judges do not properly consider available evidence or use speculative arguments, particularly regarding the ability of parents to protect their daughters from FGM in countries of return. However, the case law is not extensive and by no means representative. Can you please comment what relevance these two particular issues have in your experience?

The one where the parents are held to be able to protect their daughters is a very common one because it is considered a family issue as opposed to a community issue and that's probably the most significant insight you have to assist the court to arrive at. You do that by evidence and I think they need to have a better understanding of what it means to have a very high cutting rate in a particular country or a very high cutting rate within particular ethnic groups in a society. That means that it's no longer a nuclear family issue, or an extended family issue. It is a community issue and I'd say that would be

the most common reason for refusal and the most common reason why ultimately you succeed is if you get the judges to understand just what it means to be at risk.

15. And why do judges dismiss evidence without saying why?

Some judges are just bigoted. There will be judges at the first tier who have never said yes to any case, they are persistent refusers. If you have a judge like that, you may not win at first instance but you should win on appeal if you set up your evidence properly. It is about evidence and if people don't do the work of getting the evidence and preparing the evidence and thinking about it, then they may have difficulties, but the evidence is there, providing they think and collect it carefully.

16. The 2004 Qualification Directive lists possible actors of protection. While clans may count as such, parents (or families) do not. Why can parents' ability to provide protection even be considered?

It's generally stated as an issue in certain instances where you have small children and so the children are still subject to their parental guidance and parental protection. But it's a regular observation that the Home Office reasons are simply reasons that are written out for them in which they cover space in their refusal letters. I don't think they give them any great attention or care or thought. But generally speaking, they will ask questions of the parents that seek to elicit that they wouldn't want their daughter to be cut and would seek to protect her. And of course any parent would say that, but as soon as you get that answer, that is enough, so they don't take account of things like pressure. A girl of 12 or 13 in a Sierra Leonean classroom, when all of your classmates are getting cut, it's difficult for you if you and your family stand up against that. It is a lot of peer pressure operating, these sorts of issues are not considered properly.

17. In order to rebut such an argument, what evidence do you produce?

You explain the social norms, sometimes you might have an expert report, sometimes you might have county evidence, sometimes you only have your own clients actually speaking about it, it will vary from case to case.

18. Please comment on the argument that NGOs and churches can be actors of protection in FGM cases.

I wouldn't get too focused on actors of protection, these cases are very diffuse and the facts are the determinant of how the case is run. Very often there will be assertions that a person will be protected by their mosque, a community organisation or an NGO. So, it depends on the facts of the case and on the country evidence as to what sort of agencies and entities are actually campaigning against FGM and whether or not those are accessible. It really does vary from case to case and country to country.

19. Can you comment on cases where an FGM claim is rejected because internal relocation is deemed feasible, how is this usually justified and is supporting evidence produced?

This is an issue where within a society like Gambia you might have particular ethnic groups that practice it, but not all. So they say, well, you can go and live somewhere where your tribe is not in the majority, but again, that's a misunderstanding of what puts you at risk.

20. Where women appealed asylum refusals that were justified by asserting a possibility of internal relocation, how successful were they if their argument rested on 1) an inaccessibility of the new area; 2) not being safe from FGM in the area; 3) indirect *refoulement* or a different type of persecution; 4) absence of affirmative state protection? Please describe the challenges in evaluating the evidence provided in support of such claims.

You tend not to argue as one ground, you tend to have a range of arguments so there isn't one particular case that you put, almost always a case includes a multiplicity of reasons why you can't relocate. Generally, for single women, in particular, it is just being a single woman. The way you would be perceived living alone, the difficulties you will have if you're away from family and community that would otherwise be your sole source of support. And the risk that attends single women without family and community protection relocating. So that's now a fairly well accepted feature that is largely the relevant factor in almost all relocation cases.

21. Nowadays, are there any FGM claims refused because the decision maker finds that a woman who fears FGM is not a member of a PSG or cannot identify another Convention ground?

Not since Fornah.

22. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

They are more sensitive to it. Once the government starts campaigning as it is now, and I must say sometimes the government's campaign is loaded in racist terms in a sense. There are things like forced marriage and FGM which are built up as campaigns but the subliminal message is that all of these foreign communities are the source of great human rights abuses, so the ways the campaigns are built up are problematic in themselves. Nonetheless, since the government has become more sensitive to it, you're getting a lot fewer refusals and that's because it doesn't look good if you've got the government on the one hand seeking to prosecute cutters and monitoring children going on their summer holidays and on the other hand seeking to remove a family where the children would be at risk. I would say in the last year particularly I've had very few cases.

23. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

The quality of tribunal decisions is so variable, for all decisions. You get some judges who never say yes and some judges who never say no. It is

something of a lottery as to which judge hears your case. Again, generally speaking, now that there is so much publicity given to it as a considerable mischief that we would seek to ensure doesn't happen, you are going to get more judges sensitive to the issues.

24. Which sources do you use where you wish to submit evidence such as a country of origin report?

When I see cases I do think the most misunderstood part is the way in which a community works and that people don't see that women are at risk at the point of marriage or after marriage. It is thought to be all about a parent and a child. This is the context that I think is the base of many of the lost cases. And there are huge numbers of sources, there are lots of NGOs, rights groups that do a lot of work. UNICEF and WHO reports are very good, you have particular reports on FGM from different entities. So there is a massive amount of information out there if people would take the time to actually find it.

25. Can you comment on the quality of expert reports in support of your client's claims?

It varies again. I mean there are people who are very good. Most of the time you are using anthropologists and some of them are very good.

26. Is it usually necessary to submit a medical report detailing that the client has not had FGM?

Yes, usually.

27. How do you think decision making in FGM cases could be improved?

Just a better understanding of the context in which it occurs. For example cases of soweis⁶³⁵ are often more difficult cases. But I think they are really significant. Because what they are seeking protection against is committing human rights abuses. There is probably less understanding of those cases and a scepticism about whether or not in fact they are truly soweis. You get a lot of controversy as to whether or not it's an inherited position and whether or not you have to comply with the decisions of the women in your village. One of the misunderstandings is whether or not it's a problem in urban centres even in countries like Sierra Leone. There should be a better understanding of the practice of FGM in its social and cultural context by judges and legal representatives. Providing it's a genuine case, I think you shouldn't lose it. Because it's a very significant harm, most of the countries where it arises are countries that have very high rates of cutting or you have tribal groups with very high rates and that's not a bad factual base to start from. So, it's just that people have to understand in what context the question of cutting arises.

28. How can such understanding be achieved?

⁶³⁵ A sowe is the woman responsible for 'initiation', ie the cutting of girls in Sierra Leone. [Bosire (n 80) 3].

It's not too difficult to get across that issue. Representatives have to do the research. There are things like the E1N that has an extraordinary amount of information on it, but you can just google and find a great deal of information about different regions. But also getting a proper detailed statement from the clients and an understanding of their extended family and who in their extended family might have strong views about cutting and might well be able to exercise authority in the family.

29. Other than the clients' own statements, are there other sources to prove the extended family's attitude?

Generally speaking, many of these families are quite credible. There is no particular reason why you should disbelieve them. I haven't had any difficulties with judges believing that what they are saying is correct. Sometimes I've had cases where there's talk of the extended family being very strictly religious and even having photographs to show how they are dressed is an indication that they practice very strictly this conformist lifestyle.

30. Can you comment on the possibility of refused asylum seekers who upon return suffer the harm due to a fear of which they asked for asylum having legal recourse against the state who returned them?

It would be difficult to construct. You'd have to establish it as a legal wrong and if the decision was established on the basis of evidence, it might be hard to establish. I'm not saying it couldn't be done but doing anything from abroad is difficult.

31. Are you aware of any women who were returned because their protection claim failed and who were then subjected to FGM?

I haven't heard of any, but I'm sure there are cases.

32. The Serious Crime Act 2015 also introduced FGM protection orders (FGMPOs) which habitual residents can apply for before a family court. In deciding whether to grant an FGMPO and what provisions to make courts "must have regard to all the circumstances, including the need to secure the health, safety and well-being" of the woman. Can you comment on whether women who have already undergone FGM would benefit from this provision? Could they be granted health care such as reconstructive surgery and subsequently launch an asylum claim as they are one again 'intact'?

Probably.

33. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

You can put my name if you show me what you're saying.

34. May I contact you again if any additional questions arise?

Yes, by email.

Legal Representative C (Solicitor)

Berlin, Germany, 12 July 2015

1. Can you please state your job title, the area of law you specialise in and describe the daily responsibilities of your job?

I was a solicitor in practice until September 2014. I specialise in immigration and asylum law. Currently I'm negotiating a position as an Associate Lecturer with MMU's Law School.

2. Have you ever received any training in representing clients in gender-related asylum/human rights claims?

Yes.

3. Have you ever received any training in representing clients in FGM cases? What did this training consist of?

Yes, I have. The training provided an overview of what FGM is or can be. It addressed where it takes place, how it is carried out, who carries it out, who is generally subjected to FGM and why, how it has migrated with the diaspora communities, how the law and practitioners from all sectors are trying - or at times failing - to address it.

4. When did you first hear about the practice of FGM and in what context?

Approximately in 2009/2010 whilst in practice when we received referrals from public agencies.

5. When you began your career as a legal representative, were you aware of what FGM was, where it was practiced and that it could potentially be a ground for seeking asylum in the UK? If so, how were you made aware?

No, but I began practice in the 1990s.

6. Have you represented clients in any asylum/human rights cases in which the claimant or any of their dependants had campaigned against FGM in their country of origin or in the UK, feared undergoing FGM upon return, had undergone FGM or feared having to become a cutter? If so, which of the above?

Yes, cases where the client feared undergoing FGM and cases where they had undergone FGM.

7. Can you estimate how many FGM cases you have taken on and can you recall what year the first such client came to you?

Approximately three between 2009/2010 and 2014 when I became non-practicing.

8. Can you estimate what percentage of all female clients' claims seeking to appeal their asylum decisions was related to FGM?

A small figure at my Law Centre. Below 10%.

9. Can you estimate what percentages of appeals of such clients who you represented were allowed and refused?

I cannot address this as the Law Centre closed down due to legal aid cuts before all cases resolved.

10. Please describe your first FGM case regarding the availability of information and your perception of your own performance.

It involved woman from Somalia who were trafficked to the UK whilst fleeing FGM. Access to an NGO generated information about FGM but the decision to refuse could not be fully interrogated as the Centre closed down.

11. Please explain the impact of having worked on several FGM cases on your performance when representing clients in FGM cases. In what areas did you gain knowledge and how were you able to apply it?

I gained knowledge about how geographically sited the issue is and how it has spread to the diaspora communities. It has raised my awareness of the gendered nature of this form of persecution. Also, that the legal environment is uneasy with the issue and the notional cultural dimension.

12. What do you mean when you say the legal environment is uneasy with the issue of FGM?

Whilst FGM can provoke quite emotional responses, decision makers tend to be culturally relativistic in their attitudes which doesn't help women and girls who are seeking protection against it and reinforces the gendered nature of persecution and decision making.

13. Were the circumstances of two or more FGM cases ever exactly the same or extremely similar?

In so far as they raised issues around abuse and torture and gender persecution issues, yes.

14. Did they have the same outcome?

No.

15. If clients do not speak English, is interpretation usually satisfactory? Are interpreters usually male or female and does their sex seem to have an effect on the client?

We used female interpreters only. There was no obvious effect but there are numerous factors which give rise to complex dynamics with interpreters.

16. Please describe your approach to preparing an appeal in an FGM case. What errors of fact/law do you most frequently find in the Home Office/FTT /UT decision? What issues does the appeal most frequently turn on?

As I am out of practice, I cannot provide current responses. But credibility and internal flight alternative were nearly always highlighted by decision makers.

17. How frequently is an FGM claim rejected due to adverse credibility findings, either by the Home Office or in the FTT?

I cannot address this as a current issue as I am not currently practicing. I can only state that rejection due to lack of credibility was commonplace.

18. Where a claim is rejected due to adverse credibility findings, which part of your clients' account is most frequently disbelieved?

One issue was the assertion that such claims did not amount to gender persecution when FGM is carried out by women. Another was that mothers/aunts/women in the community can protect their female children.

19. What do you think causes Home Office case owners and tribunal judges to make flawed decisions on risk and credibility in FGM cases?

The 'opening the floodgates' argument and a general tendency to take a cultural relativistic approach.

20. The available case law on FGM suggests that regarding risk and credibility common problems are that judges do not properly consider available evidence or use speculative arguments, particularly regarding the ability of parents to protect their daughters from FGM in countries of return. However, the case law is not extensive and by no means representative. Can you please comment what relevance these two particular issues have in your experience?

This is very relevant. Like I said, it happens a lot.

21. The 2004 Qualification Directive lists possible actors of protection. While clans may count as such, parents (or families) do not. Why can parents' ability to provide protection even be considered?

The disregard for what the law says is itself evidence that the decision makers subscribe to cultural relativism rather than an understanding of fundamental universal human rights which should be protected irrespective of the dictates of culture, race, religion. Legal representatives simply have to learn and stress the language of universal human rights and not fall into the cultural relativism trap.

22. Please comment on the argument that NGOs and churches can be actors of protection in FGM cases.

This is one of the cultural relativistic arguments often adopted by these agencies when they should be taking an approach which promotes minimal

universal human rights standards against the ill treatment of women and girls.

23. Please comment on how legal representatives can obtain evidence regarding a woman's family's attitudes towards FGM.

In fact, we only can with great difficulty. Testimonies of family members, community witnesses, etc. are undermined by decision makers as self-serving.

24. Where an FGM claim is rejected because internal relocation is deemed feasible, how is this usually justified?

My view is that it is often a combination of the issues that the perpetrators of FGM would find her and that she would not be able to live safely as a single woman, but a woman being 'single' or a 'lone' woman in any of the societies where FGM is practiced is going to be wrapped up with so many factors connected to cultural misogyny.

25. Nowadays, are there any FGM claims refused because the decision maker finds that a woman who fears FGM is not a member of a PSG or cannot identify another Convention ground? Has this changed since the judgement in *Fornah* in 2006?

This question is better addressed by a lawyer in current practice. I haven't come across such a claim.

26. What do you think about the quality of first decisions by the Home Office, in particular about those on asylum claims based on FGM, and has this quality improved, deteriorated or remained the same over the years?

From recollection, I have to say the decisions are of poor quality.

27. What do you think about the quality of tribunal decisions, in particular about those on asylum appeals based on FGM, and has this quality improved, deteriorated or remained the same over the years?

I couldn't really say.

28. Which sources do you use where you wish to submit a country of origin report? Do these reports adequately deal with the issues surrounding FGM and the questions of internal relocation and state protection?

Objective experts are generally of good quality but their testimony is often undermined by decision makers as biased because it is the client who commissions an expert report.

29. How frequently and in what circumstances do you try to obtain an expert report in support of your client's claim? How often are you successful in obtaining one and can you describe the quality of these reports?

Legal aid issues can or have in the past prevented the use of experts. But country and medico-legal reports can be very powerful.

30. Is it usually necessary to submit a medical report detailing that the client has not had FGM?

It depends on circumstances and the age etc. of the client.

31. How do you think decision making in FGM cases could be improved?

Appropriate ongoing high quality multi-agency awareness raising among decision makers, service providers and lawyers.

32. The UK has signed the Istanbul Convention which in Art 61(2) states that “Parties shall [...] ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where [...] they might be subjected to torture or inhuman or degrading treatment or punishment.” Can you comment on the effect a ratification and incorporation of this convention into UK domestic law would have for (refused) asylum seekers who fear FGM?

Yes it could be beneficial and potentially a very powerful legal tool but it still needs to overcome ‘who are in need of protection’ as this places the evidential burden back on the woman.

33. If the Istanbul Convention were incorporated, the UK would be under an obligation to interpret Convention grounds in a gender-sensitive manner. Can you describe the impact a gender-sensitive interpretation of Convention grounds would have? Can you explain the difference it would make to have a claim under race/religion/nationality rather than PSG?

Gender sensitivity is a very broad, holistic and culturally transforming way of making decisions. The term itself has to be really carefully unpicked and understood by decision makers before it can have any real impact or difference.

34. The Serious Crime Act 2015 amended the Female Genital Mutilation Act 2003 and 2005 Female Genital Mutilation (Scotland) Act to the effect that now habitual residents are protected under the Acts. It can be argued that asylum seekers are habitual UK residents. Since it is a criminal offence to aid or abet a non-UK person to mutilate overseas a girl’s genitalia, if the girl is an habitual UK resident, the UK, or more specifically anyone ordering or participating in the removal of an asylum seeker from the UK, may be said to have committed an offence under the Acts where women’s asylum claims based on a fear of FGM are refused and they are subsequently returned to their countries of origin and consequently undergo FGM. However, in order to be criminally liable, someone would have to have had the intention to aid the crime of mutilating the woman. Can you comment on the possibility that there are decision makers who wilfully refuse and remove a woman despite their better judgement and on the possibility of proving such conduct?

Such a possibility is a very serious situation and undermines due process and indeed the role of decision makers. But how could you prove it? I don’t know.

35. What legal recourse do refused asylum seekers who upon return suffer the harm due to a fear of which they asked for asylum have against the state who returned them?

This is a complex question and I have no straightforward answer to this. The harm cannot be undone. Just trying to imagine how such a person could bring an action, the mechanism by which they could do this, which jurisdiction, what type of compensation - pecuniary or other - is complex and probably not achievable in any meaningful way. Perhaps a report to the Rapporteur for Human Rights or to UNHCR? Or maybe to the ECtHR in relation to the ECHR?

36. Are you aware of any of your former clients who were returned because their protection claim failed and who were then subjected to FGM?

No.

37. The Serious Crime Act 2015 also introduced FGM protection orders (FGMOPs) which habitual residents can apply for before a family court. In deciding whether to grant an FGMPO and what provisions to make courts “must have regard to all the circumstances, including the need to secure the health, safety and well-being” of the woman. Can you comment on whether women who have already undergone FGM would benefit from this provision? Could they be granted health care such as reconstructive surgery and subsequently launch an asylum claim as they are one again ‘intact’?

Health benefits potentially yes, but the re-starting an asylum application would be a fascinating legal and technical can of worms which would require a whole new raft of legal terms and expert evidence on ‘re-intactment’.

38. Please state whether I can use your real name when quoting your answers in my thesis or whether you would prefer to remain anonymous.

I would like to remain anonymous.

39. May I contact you again if any additional questions arise?

Yes.

OJ v SSHD (FTT IAC, 8 October 2013)

23/10 2013 14:40 FAX 02072391555

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APPEALS DETERMINATIONS
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**First-tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: [REDACTED]

THE IMMIGRATION ACTS

Heard at Birmingham
On 1st October 2013

Determination Promulgated

Before

FIRST TIER TRIBUNAL JUDGE DEAVIN

Between

[REDACTED]
(ANONYMITY DIRECTION MADE)

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Bircumshaw
For the Respondent: Mr M Lewis, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appeal

1. The Appellant is a twenty nine year old citizen of Sierra Leone, who was born on [REDACTED]. She claimed asylum on 5th April 2013. She appeals against the decision of 13th August 2013, refusing to grant asylum and giving directions for her removal.
2. The immigration history is that the Appellant came to the United Kingdom, on 4th April 2011, on a student visa, valid until 11th June 2012. Her college's

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⁶³⁶ In the interest of protecting the claimants' anonymity, all names have been rendered illegible.

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sponsor licence was revoked and she was subsequently granted further leave to remain as a student until 28th July 2013. On 5th April 2013, she attended the Asylum Screening Unit in Croydon and claimed asylum.

3. There was an immediate screening interview, followed by an asylum interview. She provided a witness statement, dated 23rd April 2013.
4. The Refusal Letter is dated 13th August 2013 and that was served on the Appellant, together with the Notice of Decision on 16th August 2013. A Notice of Appeal was served and that appeal came before me on 1st October 2013.
5. The Appellant was present at that hearing where she was represented by Mr Bircumshaw.
6. The Respondent was represented by Mr Lewis.
7. I heard evidence from the Appellant and her cousin, [REDACTED] and submissions from both representatives.
8. I have also taken into account the documents placed before me, namely, the Respondent's bundle, the Appellant's bundle, a statement by [REDACTED], a Country of Origin Report on Sierra Leone and information from the internet, handed in by Mr Lewis.
9. I reserved my decision, which I now give, together with my reasons.
10. In order to qualify for international protection, the Appellant must meet the requirements set out in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (the "Protection Regulations") and the provisions set out in the Statement of Changes in Immigration Rules, both of which implement Council Directive 2004/83/EC of 29th April 2004 (the "Directive") on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Paragraph 339L (implementing Article 4(5) of the Directive) indicates that it is the duty of the Appellant to substantiate his or her claim and sets out the relevant conditions to be met when assessing evidence.
11. It is for the Appellant to establish substantial grounds for believing that returning her to Sierra Leone would result in:
 - a. a real risk of her being persecuted on one of the five grounds recognised by the Refugee Convention, as further defined in the Protection Regulations, and thus that she is entitled to protection as a refugee; if not

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- b. a real risk of her suffering serious harm as defined at paragraph 339C of HC395 and thus that she is entitled to Humanitarian Protection; if not
- c. a real risk of contravention of her protected Human Rights under the 1950 Human Rights Convention and thus that she can resist removal on Human Rights grounds.

The Appellant's Claim

- 12. This is set out in her screening interview, her asylum interview, her statement, dated 23rd April 2013, her recent statement and her evidence before me.
- 13. In screening, the Appellant said that her primary language was Krio but she was interviewed in English. She was an African from Sierra Leone and embraced the Christian religion.
- 14. She came to the United Kingdom on a student visa in April 2011. She had previously come to the United Kingdom on a visit visa in 2010.
- 15. While in the UK, she lived with her partner, [REDACTED], and their daughter, [REDACTED]. One day she heard [REDACTED] talking on the phone, saying that he wanted to take [REDACTED] back home for female circumcision.
- 16. She then left the house where she was living with him. He has subsequently returned to Sierra Leone.
- 17. The practice of female circumcision is against her religion and she fears that if she returns to Sierra Leone both her and her daughter will be subjected to FGM.
- 18. In her initial statement, she says that she came to the UK to study business administration and to be with her partner, [REDACTED], who was also in the UK as a student. She knew him in Sierra Leone and their relationship started again when she came to the UK as a visitor in May 2010. They were in love and had a good relationship. Their daughter, [REDACTED], was born in the UK on [REDACTED].
- 19. [REDACTED] was a Krio Christian, like her, but his mother was mixed Krio and she practises female circumcision. She heard this from people but initially did not believe it, as Emmanuel always told her that he is Krio.
- 20. The Appellant's family are strictly against female circumcision. She believed that [REDACTED]'s family practised FGM in secret.
- 21. After she gave birth to her daughter, she and [REDACTED] started having misunderstandings. In September/October 2012, she overheard him talking on the phone to someone in Sierra Leone, saying that he would be returning

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there. A little later, she overheard him again on the phone, speaking to his mother, saying that he was going back to Sierra Leone with their daughter and that she would be around during the vacation period when female circumcision takes place.

22. She told him that she did not want anything to happen to her baby and that she was opposed to FGM.
23. He said that if she did not go back to Sierra Leone, he would take [REDACTED] with him and she said that would be over her dead body.
24. She spoke to a friend in Brixton, and explained the situation to her and went to stay with her for a short time. She would return to their home during the day. At the beginning of November 2012, her landlord told her that [REDACTED] had gone back to Sierra Leone and that she should hand over the keys.
25. She had never heard from [REDACTED] since then, but had spoken to her mother, who told her that she saw him in Freetown.
26. She did not claim asylum in November 2012 because she was at college and intended to finish her course.
27. In January 2013 [REDACTED] had an accident, where a hot tea bag fell on her foot. She delayed taking her to hospital and the police and social services became involved and her daughter was taken away from her for over a month. She had to stop going to college, as she had to attend court hearings and visit her solicitors and also visits [REDACTED], where social workers were looking after her.
28. On 11th March 2013, she got her daughter back.
29. During the course of the incident, she met with social workers and the police and told them that her partner wanted to carry out circumcision on her daughter. She was told by the Judge that she was not allowed to leave the country with [REDACTED] and that she should not have any contact with [REDACTED]. She was advised by her social worker to claim asylum.
30. She feared that if she were returned to Sierra Leone [REDACTED] would have access to their daughter and would carry out circumcision by force on both [REDACTED] and her.
31. They all lived in Freetown and [REDACTED] would be aware that she had returned. She had no relatives in any other part of Sierra Leone.
32. In her asylum interview, she set out the same circumstances.
33. In her recent statement, commenting on the Refusal Letter, she says that although she is concerned for her own safety, as she has heard stories of

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people being kidnapped, even at her age in Sierra Leone, her main concern is for her daughter, [REDACTED]

34. When she came to the UK to study, she was intending to return to Sierra Leone with [REDACTED]. She was working there before she came to the UK and would have been able to obtain employment, had she and her daughter not been at risk.
35. Although [REDACTED] defines himself as Krio Christian, she knows that his mother is not fundamentally from the Krio tribe. She believes she is from the Mende tribe but was brought up by a Krio woman. She supports and believes in FGM.
36. In Sierra Leone, women have a lot of power in relation to FGM and perform it themselves. Most young girls fall victim to it.
37. Although the government in Sierra Leone may outwardly express that they are against FGM, they do not in practice prevent it occurring. It is still extremely widespread and prevalent.
38. Were it not for this problem, she would have no reason not to return to Sierra Leone, where she had a good family and previously had a good job, which she believes she could return to.
39. In evidence before me, she confirmed the accuracy of her recent statement and adopted it.
40. Her ex-partner did not force her to go back with him to Sierra Leone because he knew that in the UK the police would be informed, but back home the police would not bother.
41. She believed that [REDACTED] was against FGM, but would not oppose the wishes of his mother. It was his mother that she feared.
42. [REDACTED]'s mother was from the Mende tribe and was brought up by a Krio woman, to whom she was given. Such a procedure was very common in Sierra Leone.
43. [REDACTED]'s family were very different in their lifestyle from a Krio family. Their house was set out in a native style and they all ate together from a communal pot.
44. She had never spoken to [REDACTED] or his mother about her background, as this would be considered rude.
45. It would not be possible for her to live elsewhere in Sierra Leone, as there would be language problems and she would have to make herself known to the chief in the area.

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46. She had travelled to the provinces when she was in college in order to carry out a survey, but she was told that she could not do this and was sent back to the office.
47. Her fear was mainly for her daughter.
48. Cross examined, she said that [REDACTED]'s father is still alive but his parents did not live together. His mother lives in a Krio area very close to her parents.
49. She knew that [REDACTED] was in Sierra Leone but she had had no contact with him, or his mother.
50. She came from a small village where everybody knows everybody's business.
51. She understood that [REDACTED]'s mother had been placed with a Krio woman when she was a child. She was now in her mid-forties.
52. She would have gone through FGM and now practised it.
53. She had heard nothing from [REDACTED] since he returned to Sierra Leone in November 2012.
[REDACTED]
54. He did not support FGM but listened to his mother.

Evidence of [REDACTED]

55. Miss [REDACTED] produced her UK passport.
56. She confirmed the accuracy of her recent statement and adopted it.
57. In that statement, she says that she is the Appellant's father's cousin.
58. She came to the UK in August 1977, as a student, and subsequently worked for the Gambian High Commission and obtained ILR. She had been a British citizen for many years.
59. Before her retirement, she worked as an advisor for the benefits service in Hackney and previously worked for Hackney Social Services.
60. She has returned to Sierra Leone many times and had visited the Appellant when her baby was born and attended the christening.
61. The Appellant's former partner is [REDACTED]. She does not recognise that as a common Krio name and she believes that he may be of a mixed tribe. She went to school with an aunt of the family who went by the name of [REDACTED], which is not a Krio name.

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62. The Krio have been traditionally seen as an educated tribe and it was not uncommon for women to marry Krio men as a sign of social status. She did not know [REDACTED]'s mother personally, but it was common for children from Mende and other tribes to be informally adopted by Krios who had more wealth and education. The adopted children take on the name of the adoptive parents.
63. She believed that FGM was as bad as ever in Sierra Leone. It was hard to speak out against it and it was practised by women and was always in the hands of women.
64. If [REDACTED]'s mother was determined to carry this out, she would be able to and the men in the family could not prevent it.
65. Her main concern was for [REDACTED]. She was strongly against FGM and would hate [REDACTED] to go through this barbaric process.
66. In evidence, she said that Sierra Leone does not have an adoption system and if parents cannot bring up a child, they can ask someone else to look after the child and organise the child's schooling and housing.
67. Members of other tribes have mostly been taken in by Krios, who are in a good position. Originally, Krios were the settlers and the others were native country people.
68. Asked whether [REDACTED]'s mother, having been brought up by a Krio family, would still support FGM, she said, "A leopard is a leopard". She comes from the Mende tribe and that is a part of their tradition.
69. The tradition in Sierra Leone was that the woman was the head of the family and decisions like these are made by the woman. If a son lets his mother down he can be disowned, which would cause him heartache.
70. Asked whether the Appellant could live elsewhere, she said that Sierra Leone is a small country and wherever she went, she would be found out. People know a lot about each other.
71. The United Nations sent someone to talk about FGM and to tell people to stop and she was defied.
72. If the Appellant returned to Sierra Leone, those who wanted to circumcise her daughter would wait for the opportunity and then grab her. They would then carry out the operation and have drums beating so that her screams could not be heard. She would be taken for the operation to a secluded area. The operation can be fatal.
73. The Appellant and her daughter would not be safe in the Krio area and the witness's life would not be safe if they knew she had made this statement.

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74. Krios do not now have the same authority as they did. The natives are now the leaders and they say that the Krio have ruled for too long.
75. Cross examined, she said that she was Krio and did not believe in FGM.
76. It was true that a lot of young girls had not been circumcised in Sierra Leone. They were only in danger if they were captured. There is no longer any safe Krio area.
77. Re-examined, she said that [REDACTED] would be at risk in Sierra Leone because of the relationship with her father and his mother. She had no doubt that they would come for her.

The Refusal Letter

78. The Respondent accepts the Appellant's identity and nationality.
79. They quote a UNHCR report, which says that FGM is practised by all groups in Sierra Leone, except the Christian Krio population of the western area.
80. They say that when the Appellant voiced her objections to the FGM procedure, [REDACTED] returned to Sierra Leone and did not force her or her daughter to go with him. His behaviour does not suggest any intention to force her to undergo FGM. As a Krio Christian, it would be against his beliefs.
81. The Respondent does not accept that the Appellant, or her daughter, would be at risk of FGM by [REDACTED]'s family if she returned to Sierra Leone.
82. She had had no contact with [REDACTED] since he left the UK, nor had he made an attempt to establish contact with her or her daughter.
83. It was not credible that if his mother was forcing him to make [REDACTED] undergo the procedure, that he would leave the UK without making any attempt to force [REDACTED] to go with him.
84. The Appellant was a Krio Christian and would be returning to the support network of her family and the practice of FGM is contrary to the beliefs of her tribe.
85. [REDACTED] would have the support of the Appellant and her family in Sierra Leone and her claim that she and Evian would be forced to undergo FGM if returned to Sierra Leone is not accepted.
86. The Respondent believed that there was a sufficiency of protection.
87. It was open to the Appellant to relocate within Sierra Leone.

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Submissions

88. Mr Lewis relied on the Refusal Letter.
89. The issue was whether the Appellant and her daughter would be at risk on account of her former partner's mother.
90. There has been no contact with him since November 2012. If he had wanted circumcision to be carried out, he would have made contact.
91. Freetown has a population of two million and there was no reason why they should meet. She and her daughter would be living in a Krio area and Krio did not practise FGM.
92. [REDACTED]'s mother is Krio but had FGM. There was no evidence concerning this and the court had simply been told things about [REDACTED]'s mother.
93. He referred me to the US State Department Report.
94. If the child were to be snatched that would be against the law.
95. So far as Article 8 was concerned, family life could continue in Sierra Leone.
96. The Appellant has skills and could return there and find work.
97. Mr Bircumshaw, in submissions, said that there was no strong reliance on Article 8, but there was a strong asylum claim.
98. The Appellant was part of a social group in Sierra Leone and he maintained that aspects of the Refusal Letter were spurious, including the idea that [REDACTED] could have forced the Appellant and her daughter to go to Sierra Leone. If that attempt had been made then she would have gone to the police.
99. It had never been her case that [REDACTED] was in favour of FGM. The issue was the risk in Sierra Leone, if they returned there.
100. He maintained that there was a very real risk if it was accepted that [REDACTED]'s mother was from a different ancestry and was not Krio. If that were the case then she would want her granddaughter to go through the same procedure as her.
101. It would have been simpler for the Appellant to lie and say that [REDACTED] came from a different tribe, but she has not said that. He was Krio and his mother was Mende.
102. The Appellant had given as much detail as she could concerning the mixed marriage of [REDACTED]'s parents. It was not uncommon for different tribal

groups to marry and the objective evidence supported the suggestion that if the Appellant returned, [REDACTED]'s family could seek custody.

103. Women do not have strong legal rights in Sierra Leone but FGM is controlled by women, using traditional practices and FGM is prevalent with ninety one percent of women having been subjected to it. Only nine percent of women with daughters oppose the practice, which is seen as an initiation into a secret society. The practice is deeply imbedded and banning it is not realistic.
104. It was clear that there would not be a sufficiency of protection in this case.
105. The State department report said that there have been no prosecutions. Women want to be initiated in to society and Krio are now a minority group. They were part of the colonial past, but no longer had positions of power. There was no realistic chance of the Appellant's daughter being able to avoid such persecution.
106. The Appellant was a credible witness. She had tried to explain [REDACTED]'s mother's past. It was quite possible that she had been brought up by a Krio family, but that was not the test.

Conclusions

107. I find this Appellant to be an honest and straightforward witness.
108. Her sole reason for not wishing to return to Sierra Leone is the safety of herself and, perhaps more importantly, her young daughter.
109. She is a member of the Christian Krio tribe, who are in the minority in Sierra Leone. They do not practice FGM, nor is her ex-partner in favour of it.
110. However, on the evidence before me, I am satisfied to the required standard that [REDACTED]'s mother is a woman who was circumcised and wishes her granddaughter to be similarly mutilated.
111. It has been explained to me that, in the past, children who could not be properly supported and maintained by their parents would be handed to a Krio woman or family for them to be brought up. It appears that these were the circumstances that brought [REDACTED]'s mother into a Krio family, although she is of the Mende tribe, who practise FGM.
112. The practice of FGM is carried out exclusively by women.
113. The objective evidence records the attempts that have been made to curb the practice, but this clearly, is having little effect. FGM is carried out in secret without any intervention of medical personnel.

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114. It is accepted that girls and young women in Sierra Leone are part of a particular social group in Sierra Leone who fall within the ambit of the Refugee Convention.
115. The issue before me is whether or not this constitutes a real risk for the Appellant and her daughter. They only have to satisfy me to the lower standard and I find that in this case the Appellant has discharged that burden.
116. I find that if she were to return to Sierra Leone with her daughter there would be a very real risk that her daughter, in particular, would be seized and taken by [REDACTED]'s mother, or people acting on her behalf, and that the child would be subjected to FGM.
117. There is also a substantial risk of that in respect of the Appellant herself.
118. It is in those circumstances that I find that this Appellant does have a well founded fear of persecution for a Convention reason and that the United Kingdom would be in breach of its obligations under both the Refugee Convention and the Human Rights Convention, were she to be returned to Sierra Leone.

Decision

I allow the appeal.

The anonymity order is continued.

Signed:



Date: 8th October 2013

C J Deavin
A Judge of the First-tier Tribunal

TO THE RESPONDENT**FEE AWARD**

No fee has been paid and therefore there can be no fee award.

Signed:



Date: 8th October 2013

C J Deavin
A Judge of the First-tier Tribunal



IAC-TH-CK-V1

**First-tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: [REDACTED]

THE IMMIGRATION ACTS

**Appeals heard at Taylor House
7 January 2013
Determined 18 January 2013**

Determinations promulgated
.....

Before

JUDGE OF THE FIRST-TIER TRIBUNAL CLAYTON

Between

(1) [REDACTED]
(2) [REDACTED]
(3) [REDACTED]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Ali, Legal Representative, of Duncan Lewis & Co, Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer
Interpreter: Mr A Olayiwola, Krio Language

DETERMINATION AND REASONS

1. The Appellants are citizens of Sierra Leone. The first Appellant was born on [REDACTED], the second Appellant was born on [REDACTED] and the third Appellant was born on [REDACTED]. The second Appellant is the partner and dependant of the first

Appellant. The third Appellant is their daughter and dependant upon the appeal of the first Appellant.

2. They appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the decision of the Respondent on 9 August 2012 to refuse to grant asylum to the first Appellant under paragraph 336 of HC 395 (as amended) and the decision of the Respondent on 9 August 2012 to remove the first Appellant from the UK by way of Directions under Section 10 of the Immigration and Asylum Act 1999.
3. The first Appellant entered the UK on 3 June 2008 with valid entry clearance as a spouse valid until 21 May 2010.
4. On 12 May 2010 the first Appellant made an application for ILR on the grounds of domestic violence in her marriage. This was refused on 9 November 2010 and her appeal dismissed on 3 March 2011. She became appeal rights exhausted on 21 April 2011.
5. The first Appellant contacted ASU Croydon on 21 March 2012 to make an appointment to claim asylum. On 9 May 2012 her asylum appeal was lodged. She was served with IS.151A papers on 9 May 2012 as she had overstayed her leave to remain in the UK.
6. The first Appellant attended a screening interview on 9 May 2012 and a substantive asylum interview on 17 July 2012.
7. The reasons for the Respondent's decision are contained in the refusal letter ASL.0015 dated 9 August 2012.

Examination-in-chief of the Appellant

8. Ms Fengai recalled her witness statement of 28 December 2012 which had been made in English but was fully understood by her. The contents were true and she wished it to be part of her evidence today.
9. [REDACTED] wished to adduce the witness statement of [REDACTED] dated 28 December 2012.

Cross-examination of the Appellant

10. [REDACTED]'s last appeal was dismissed was dismissed by an Immigration Judge on 3 March 2011. She did not ask for asylum until March 2012, three months after the dismissal. The asylum claim was delayed for so long because she did not know about asylum and at the same time expected she could stay here because of domestic violence. It was correct her appeal rights concerning domestic violence ended in April 2011.
11. Although she believed her life was at risk in Sierra Leone, she delayed the asylum claim for twelve months because she came to the UK with a marriage visa and did not know about asylum. It was correct the previous Immigration Judge found her to be untruthful and said her sole motive was to establish a new life in the UK.

12. The Immigration Judge now should accept Ms [REDACTED] life was in danger in Sierra Leone because she had evidence her life would be in danger if she went back. The evidence she referred to was the newspaper article in her bundle at pages 67-74. She became aware of the existence of the newspaper article because her sister told her. Someone told her sister in 2011 and her sister told her. She did not know the name of the person who told her sister about the article some two years after it was published. The person lived in the same area.
13. Ms [REDACTED] got the original newspaper dated 24 March 2008 from the person who told her sister and showed her the site. The newspaper was dated Monday 24 March 2009, but the calendar said 24 March was a Tuesday. Ms [REDACTED] did not know about the discrepancy because she was not there. It was not a coincidence that her sister just happened to tell her in 2011, when she was applying for asylum, about the article from 2009. It was not correct that the Appellant and her sister had manufactured the article and evidence from the newspaper to bolster her asylum claim.
14. Ms [REDACTED] left Kono in 2006 when her mother died. Her witness statement paragraph 22 said her mother died in 2004, not 2006; the correct date was 17 January 2004. Ms [REDACTED] left Kono for the first time in 2004 when her mother had died, but went back and left again in 2007 for Gambia.
15. Ms [REDACTED] did not know who [REDACTED] was. The newspaper article at pages 67 and 68 was read to her because she only read a little bit. At page 67 [REDACTED] was the person who described herself as the Appellant's friend and informed a journalist of her history in Sierra Leone. [REDACTED] claimed to be the Appellant's friend and knew so much about her, but the Appellant did not know her. A lot of people knew the Appellant was with the rebels.
16. The newspaper article was not correct when it said the Appellant went back to Kono to get her family property after both her parents were killed in the war because her father died in 2002 of an asthma attack and her mother died in 2004. It was not true where it said the Appellant went back to Kono to take possession of the family property because her big sister was there. Although the Appellant was last in Kono in 2007, she was moving between Kono and Freetown. There were so many inaccuracies, it was not correct to say the part about indigenes storming her residence was true. If they had stormed her residence, her sister would have told her, but her sister just said they needed to look for her because they knew she was a rebel. Members of the community were looking for her.
17. At interview Q15 it said the first Appellant still had three sisters in Kono, but two were in Kono and one in Freetown. She did not remember the last time anybody made enquiries as to her whereabouts. A youth community based in Kono told her sister they would kill the Appellant.
18. Ms [REDACTED] was in contact with her sister [REDACTED] in Freetown. [REDACTED] rented a property there. [REDACTED] did not say anything about experiencing similar enquiries about her. Freetown was far from Kono, to travel by car or bus took all day. She had lived with [REDACTED] in Freetown before. [REDACTED] was not the same sister who took the Appellant away from her uncle who attempted to force her into marriage in Sierra Leone, that was her sister [REDACTED]. The Appellant's uncle [REDACTED] had a house in Freetown and a

house in Kono. The Appellant was not afraid of a forced marriage from [REDACTED] because she had a partner and child.

19. Ms [REDACTED] was last involved with Charles Taylor's household in Sierra Leone in 2006 when they went for trial. She worked for Charles Taylor's family for one or two months. When she worked as a cook she was paid by Charles Taylor's family. Ms [REDACTED]'s witness statement in the Respondent's bundle B3 paragraph 17 said the family did not pay her, but that was when she was in Liberia. They paid her when she was in Sierra Leone. Paragraph 17 said when she was housemaid for the family in Sierra Leone she met [REDACTED] again but the Appellant was not a maid, but helping them. Also she was dating Charles Taylor's lawyer. The statement from May 2012 said she was a housemaid, but the witness statement from December 2012 said she was not a maid but just dating the lawyer. That was because the Solicitor who made the application made a mistake.

20. [There was a break of twenty minutes.]

Examination-in-chief of the Appellant (Continued)

21. The first Appellant's statement at B3 paragraph 17 said she was at Lomble in Sierra Leone with Charles Taylor's family. Lomble was inside Freetown. The witness statement paragraph 31 said even though she was just a cook in Charles Taylor's household, she had been openly visiting Charles Taylor and attending his trial at the Special Court. She did attend, but remained outside the court at the gate. She did not mention the visits to Charles Taylor in the witness statement of 8 May 2012, but had told her lawyer.
22. It was correct that the current witness statement of December 2012 paragraph 31 said she openly visited Charles Taylor at the Special Court. It did not say she just accompanied his wife but not did go in. She did tell the lawyer and explained she was left at the gate, but she did not go right inside to see Charles Taylor. She went into the building but not into the room where Charles Taylor was tried. She did not go into the public area where the public could see the proceedings. She was not in the same room as the hearing and could not see the proceedings. She did not see Charles Taylor and the judges. The witness statement paragraph 31 said she visited Charles Taylor at the Special Court on many occasions, but she did not actually visit him as she stayed just with the people.
23. Although the first Appellant was a cook in Charles Taylor's household, she went with family members to the Special Court because [REDACTED] knew her from way back from Liberia and knew she could trust her. When they went to the court, the Appellant stayed in the car and [REDACTED] took food through. She was in the car with relatives of Charles Taylor because they trusted her and knew her very well. She needed to be in the car visiting Charles Taylor at the Special Court because they went to the reception area.
24. The witness statement paragraph 30 said Ms [REDACTED] saved over \$7,000 and used it to get a travel document to leave Sri Lanka. She got \$7,000 because Auntie [REDACTED] gave her £100 every week and Puyu also gave her money. Paragraph 28 referred for the first time to a secret date with Puyu, who was Charles Taylor Junior. She had not mentioned this in the first witness statement in May 2012 but did tell her lawyer.

25. At interview Q97 and Q98 it said both the first Appellant and her partner were against FGM. The child would still be at risk in Sierra Leone because the first Appellant was a victim and it was common to all the females in her family. Neither of them could protect the child because it was the custom. Her partner would be viewed as head of the family in Sierra Leone but his mother was one of the strongest advocates of this traditional custom.
26. Her partner was last in contact with family members on Christmas Day. He was maintaining contact with family members even though they believed they posed a threat to his child because it was his mother. She lived at Bo, the second city. If she and her family returned to Sierra Leone her husband would tell his parents where they were living.
27. The partner's witness statement paragraph 18 said that in 2004 his mother went insane because of his depression and had still not recovered. This was the same lady who had the power to enforce FGM if she returned now. She would be able to do it because she was well now. Her partner's witness statement dated 28 December 2012 said she had not recovered, but they spoke to her on Christmas Day several times. Ms [REDACTED] did not know if his mother had recovered in the last week.
28. Ms [REDACTED] was still having counselling with Freedom From Torture. Her next appointment was on 10 January but the appointment card was at home. This started in June or July and there had been about fourteen or fifteen sessions.

Re-examination of the Appellant

29. If returned to Sierra Leone, the Ms [REDACTED] would be associated as a rebel because she has visible marks on her waist, hand and arm. She thought the youth would want to harm her because she was with them for four years and one of her friends, [REDACTED] was captured. The first Appellant had the same marks on her body. The scars were given by Captain [REDACTED] to show she was one of them so if she escaped and was captured by soldiers they could recognise she was a rebel. They tortured her with a lot of cuts. [REDACTED] did the torturing. Other than the cuts her ankle and back hurt.

Submissions on Behalf of the Respondent

30. The Presenting Officer submitted she would rely on the refusal letter of 9 August 2012. An adverse finding of credibility was sought. **Devaseelan** principles should be applied and the previous Immigration Judge's facts not overturned, that was the starting point. That determination at paragraph 24 found the first Appellant to be not credible and a person who went to extreme lengths to mislead the professionals supporting her in the UK. Paragraphs 32 and 33 said the first Appellant's evidence was totally incredible and she was not a witness of truth.
31. It was suggested today whether it was possible to depart from the findings of fact because of new evidence, but the fundamental piece of evidence was the newspaper article at page 67 of the first Appellant's bundle. Following **Tanveer Ahmed** little or no weight should be attached to it. The first Appellant had a history of being untruthful and was unable to offer any credible evidence today why the article was

dated Monday 24 March 2009 when the calendar said 24 March 2009 was a Tuesday.

32. The first Appellant also accepted there were material inaccuracies in the newspaper. She did not know the identity of [REDACTED] who is named as the source of the information in the article. There was no real credible explanation as to how it was that an article in existence since 2009 came to her sister in 2011 coincidentally at the time the first Appellant was claiming asylum in the UK. She confirmed the evidence that the attack on her former home in Kono did not take place and there was no evidence her sister said any direct attacks against the family occurred before or after her departure from Sierra Leone. Therefore the court was asked to find a reasonable likelihood that the new evidence had been manufactured in the full knowledge of the first Appellant in order to bolster her asylum claim.
33. The medical report at pages 33 to 51 from the Medical Foundation reiterated the concerns of the first Immigration Judge at paragraph 24 saying the first Appellant had a proven history of misleading the professionals. The majority of the medical report was from the information provided by the first Appellant herself. There was no evidence the author of the report had access to the first Appellant's past medical history. The court was asked to note that whilst the scar was on her left arm, at page 41 it said the scars were on her right arm and were very faint. There were other references to visible scars on her arms, but they were faint, paragraph 42.
34. The only way the report assisted was that the first Appellant was abducted between the ages of 9 and 13 and ill-treated by rebels. Nothing assisted her claim that she would continue to be identified some twelve years after the civil conflict ended because of the very faint visible scars on her arms. The first Appellant had other scars on her thigh and breasts but they were all concealed under clothes and did not assist by suggesting she was in any way involved with Charles Taylor's household in Sierra Leone as recently as 2006.
35. The objective evidence in the country guidance case of **FB** did not suggest a person involved with the rebels in 2000 would be of adverse interest on return now. It was submitted the first Appellant's claims to be part of Charles Taylor's household in 2006 had been fabricated. There was no reference in the initial witness statement of May 2012 of involvement with Charles Taylor anything other than as a cook for a few weeks in 2006. This was a clear attempt to bolster the association with Charles Taylor in the current witness statement. Her claim to be involved with Charles Taylor's son was a fabrication. Her claim she was required to visit Charles Taylor at the Special Court was a fabrication. Her evidence was not consistent on that aspect.
36. It was submitted that the first Appellant had repeatedly failed to explain why as a cook in Charles Taylor's household and not important enough to visit Charles Taylor, she would be required to accompany his relatives in the car. It was submitted she remained in Sierra Leone several months after leaving work in Charles Taylor's house and there was no credible evidence to corroborate her submission that because of her links to Charles Taylor for one or two months in 2006 she would be at risk of reprisals.
37. It was submitted the first Appellant was of no interest to the authorities. On two previous occasions she got a national passport and was not called to give evidence

at Charles Taylor's trial. She now said the child was at risk of FGM, but the Respondent would rely on the country guidance case of **FB**, paragraphs 62 to 78 and 82 to 94. The first Appellant would be returned with the support and protection of her husband. **FB** made it clear members of the Bundu society did not adopt a hostile attitude to non-adherence of Bundu principles. The treatment directed at the minority who did not subscribe to FGM was just taunting and harassment, not persecution. Also, internal relocation was viable and would not be unduly harsh. The first Appellant was in contact with relatives in Freetown including her sister and there was no suggestion anyone in Freetown had approached her sister and made threats.

38. The first Appellant had continually failed to give any credible reason why she and her partner would maintain contact with his mother who they said would enforce FGM against their express wishes. She had failed to give a credible explanation why he would divulge their whereabouts to a woman who would pose such a risk to their child. There was a clear discrepancy between the ability of the partner's mother to enforce FGM given the claims in his witness statement paragraph 18 where it said his mother had not recovered from insanity.
39. The partner was relatively well-educated having studied accountancy in 2004 and worked as an assistant accountant in Freetown. He had been an illegal overstayer in the UK for over six years and had been served with an IS96. **FB** made it clear that even Appellants without the protection of a man could reasonably relocate to Freetown. Here the first Appellant continued to maintain contact with relatives in Sierra Leone. Also they would have an IOM returns package and offered the chance to re-establish themselves. Therefore even if the first Appellant were accepted as credible, internal relocation was viable.
40. COIS 24.25 to 24.31 showed the assistance available. COIS 25.20 to 25.24 said there was a new law in Sierra Leone by which it was unlawful for a female under 18 years to be initiated. There was a reported decline in the practice of FGM, COIS 27.03. There was now free healthcare for new mothers and children since April 2010. Therefore it was submitted the first Appellant had failed to demonstrate she or the child would be at risk in Sierra Leone. There was no objective evidence to place the first Appellant at risk and therefore the appeal should be dismissed.
41. Concerning her partner, he did not have a freestanding asylum appeal despite alleging risks to his own life in 1996/97. The mere fact his claim was delayed damaged his credibility plus there had been substantial changes. There was therefore no evidence of any continuing interest in him. It was submitted Article 3 and humanitarian protection stood or fell with the asylum appeal. The appeal should be dismissed.

Submissions on Behalf of the Appellant

42. Ms Ali submitted the first Appellant had demonstrated a well-founded fear of persecution for a Convention reason. She claimed to be a victim of FGM and that her daughter would suffer the same fate. The Appellant had suffered FGM and therefore had a subjective fear it would be inflicted on her daughter. The custom was prevalent in Sierra Leone and the authorities were unwilling to intervene. Without the procedure she would be ousted. The Bundu details were at pages 180 and 181. Everyone in the Appellant's and the husband's family underwent FGM.

43. The Presenting Officer disputed torture, but the medical report was extremely supportive. She had over 58 scars. The scars corroborated that she was telling a true account of her claim and the benefit of the doubt should be given. Following paragraph 339K, the fact she had already suffered persecution indicated a fear and real risk. It was conceded it would not be the same hand, but she underwent torture and was associated as a rebel. COIS 25.20 said although the police dealt with FGM, they were hesitant to interfere with cultural practices and therefore there was no protection.
44. Concerning internal relocation, she could relocate elsewhere, especially Freetown, but it was not viable because the article was in a National newspaper and on a website. The Appellant became aware of the article in 2011 because her sister was only told of it in 2011. It was not expressed to the Appellant but was on the internet. Concerning the newspaper, the Appellant said that because people would come across it, she would be recognised throughout Sierra Leone. The community she grew up in knew she had been held by rebels. When she returned to Kono she was taunted and bullied. That was prior to the article being released and therefore it would be significantly worse if she returned now because the article was still accessible over the internet.
45. Concerning the discrepancies between the first Appellant's account today and previously, there were difficulties in dealing with victims of torture. They had difficulties in recalling dramatic circumstances. The first Appellant was adamant she told her previous Representatives of the omissions and was advised they would have no bearing on the case. She had now been advised she should complain. She was an extremely vulnerable person and had only learned about asylum this year. Therefore no adverse inferences should be drawn.
46. The Presenting Officer said she was not credible and misled people and the authorities, as found by the previous Immigration Judge. However, considerable weight should be placed on her evidence today. The medical report paragraph 76 referred to several scars. The doctor noted significantly she had not attributed all these scars to torture and therefore considerable weight should be given because she was not exaggerating her claim.
47. Concerning her partner's mother, his witness statement said she was insane. But it was not just fear of the mother, both families had undergone this procedure. Therefore on the evidence the first Appellant had a well-founded fear of persecution and was unable to return to her own country for protection. There was also the Article 3 claim for the daughter as well and also humanitarian protection and discretionary leave.

Decision

48. The burden is upon the first Appellant to show that returning her to Sierra Leone would expose her to a real risk of persecution for one of the five grounds recognised by the 1951 Convention or of a breach of her protected human rights or her right to humanitarian protection.
49. I have considered with the greatest care all the evidence before me, both oral and documentary, including the items listed in the attached schedule.

50. Having considered the evidence before me as a whole with the most anxious scrutiny, I do not find the first Appellant to be credible. Indeed I find her to be a stranger to the truth. As a starting point, I refer to the determination of Immigration Judge Meah promulgated on 25 February 2011. Immigration Judge Meah concluded:
32. *In totality, and having considered all the evidence as placed before me in the round, I do not find that the Appellant has at any point been a victim of any kind of domestic violence. I find that this whole elaborate scenario has, in all probability, been concocted by her in an effort to achieve ILR in the UK. I found her and her evidence to be totally incredible and I do not find her to be a witness of truth.*
33. *I find there is a strong possibility that she deliberately lied about her age to appear older in marrying her estranged spouse who is 59 years her senior and that she is now attempting to blame him for all of this and creating the impression that she was an innocent party. She also claims that she was being forced by an uncle to marry another older man yet failed to provide any details about this. Nevertheless she went on to marry a man considerably older than her of her own accord and in any event, with the aim of achieving a better/newer life in the UK. I find her claim to have suffered domestic violence is a pure fabrication without any evidence to show this has truly occurred in any shape or form after she was unable to go through with the reality of having to cohabit with a man who was much older than her and, when she felt her plans to study, work and go out in the UK were not going as she had envisaged when she had decided to marry her spouse in Gambia.*
51. I accept the Respondent's view that the newspaper article at page 67 of the Appellant's bundle was a fundamental piece of evidence. I find this article has been concocted or, at the very least, tampered with. The article appeared to come from information supplied by [REDACTED] who claims to be a friend of the family. However, in cross-examination, the Appellant had no idea of [REDACTED]'s identity. There was no plausible explanation as to why the article had taken two years to come to light, only appearing by coincidence at the time the Appellant was claiming asylum in the UK.
52. There was no evidence from the Appellant's sister of any direct attacks against the family and in cross-examination Ms [REDACTED] confirmed that no attacks took place upon her home in Kono. The most damning piece of evidence concerning the newspaper report was that it was dated Monday 24 March 2009. The Respondent submitted a calendar to show that 24 March 2009 was a Tuesday. I therefore place little or no weight upon the newspaper item which has so clearly been proved false. I therefore find Ms Ali's submission that the first Appellant could not relocate internally in Sierra Leone because the newspaper article was in the public domain to be entirely without merit.
53. I have taken the greatest care to read the report from the Medical Foundation. I do not doubt the Foundation is a most worthy organisation, but most of the report has come from information provided by the first Appellant herself, and I take note of Immigration Judge Meah's view that she had a history of misleading professional

people who were attempting to assist her. There was a scar on the Appellant's left arm which I personally observed. It was very faint and could have been produced by a number of means.

54. The Appellant claimed to have been abducted by rebels when she was 9 years old and detained for some four years. Given my view of the Appellant's lack of credibility, even if I consider such detention to be true, I accept the Respondent's submission that there was nothing to suggest she would continue to be identified some twelve years after the civil conflict had ended because of very faint scars on her arms. Any other scars the Appellant might claim to have received at that time were hidden beneath clothing.
55. At the very highest, even if she had suffered ill-treatment amounting to persecution at that time, there was nothing in the Appellant's claim to suggest she would be so subjected in the future. In her initial statement dated May 2012, there was no reference by the first Appellant to any association or involvement with Charles Taylor or his family other than being a cook for a very few weeks in 2006. There was no plausible explanation as to why, given her very lowly role as a cook, she would have been of sufficient importance to travel with Charles Taylor's relatives in their car and visit him at the Special Court in Sierra Leone. I find this claim of [REDACTED] to have been so close to Charles Taylor's family to have been invented to bolster a weak asylum claim. I accept the Respondent's submission that there would be no risk of reprisals because of her association as a very junior member of Charles Taylor's household for one or two months in 2006.
56. Ms Ali submitted the main thrust of Ms [REDACTED]'s asylum claim was now the fear FGM would be carried out on her young daughter. I find this claim to be totally spurious. It is without question that FGM is still prevalent in West Africa among certain communities. I have no reason to doubt that Ms [REDACTED] underwent this unpleasant, dangerous and medieval custom herself. However, she clearly stated that she and her husband were very much against the husband.
57. In cross-examination Ms [REDACTED] agreed that, should they be returned to Sierra Leone, Mr [REDACTED] would be considered to be the head of the family. Furthermore, her evidence was that Mr [REDACTED] was against the practice. Mr [REDACTED] said she feared Mr [REDACTED]'s mother who was influential. This was despite evidence from Mr [REDACTED]'s witness statement that his mother had suffered from a mental illness as recently as Christmas 2012. However influential Mr [REDACTED]'s mother might be, I do not find it plausible she could enforce FGM against the wishes of Ms [REDACTED] and Mr [REDACTED], particularly if she was suffering from mental illness or severe depression. If Ms [REDACTED] and Mr [REDACTED] return together they would be able to establish a new family and protect their daughter. If Ms [REDACTED] returned alone, Mr [REDACTED]'s mother would have no influence or control over her or indeed, need know of her whereabouts.
58. If Ms [REDACTED] had a subjective fear of returning to the same area, I accept the Respondent's submission that internal relocation would be open to her. Indeed, as already stated, Ms Ali's only submission against it was the presence of the now discredited newspaper report. Sierra Leone is a large country and there is no reason why Ms [REDACTED] should not live in a different area if she so chose. There is also no

reason why, if she felt herself to be at risk, she should not avail herself of the protection of the police or the authorities.

59. I accept the Respondent's submission that Ms [REDACTED] was of no interest to the authorities because of her previous somewhat tenuous and brief links with Charles Taylor. She was able to get a passport on two occasions without any problems. By her own evidence, she has been in constant touch with her sister in Freetown and also has other relatives there. There was never any suggestion in any of her evidence that anyone had approached her sister in Freetown and made threats. She would therefore have a place to which she could return if she felt unwilling to return to Kono.
60. It is clear from the documentary evidence that dreadful things amounting to atrocities did occur in Sierra Leone during the civil war. Fortunately that has been over for some considerable time and there is no evidence of reprisals for those who had a somewhat peripheral relationship with Charles Taylor. I find Ms [REDACTED]'s fear of FGM for her daughter to have been invented or greatly exaggerated in order to bolster a weak asylum claim. I have found her evidence to be untruthful and manipulative.
61. Unfortunately I am able to give little weight to the report of the Medical Foundation due to Ms [REDACTED]'s propensity to deceive those trying to assist her. Ms [REDACTED] came to the UK as a spouse, but the marriage broke down. Immigration Judge Meah found that there was no suggestion whatsoever of the claimed domestic violence and dismissed her appeal. I find that this asylum claim has been invented purely to thwart removal and allow the Appellant to stay in the UK.
62. In summary therefore I find that the first Appellant has failed to persuade me to the appropriate lower standard that she has a well-founded fear of persecution for a Convention reason in Sierra Leone. The asylum appeal is dismissed.
63. As the asylum appeal is dismissed, humanitarian protection must be considered. As already stated, I do not find the first Appellant to be credible and there are no substantial grounds for believing she would face a real risk of suffering serious harm if returned to Sierra Leone. The appeal for humanitarian protection is dismissed.
64. Turning to the Ms [REDACTED]'s appeal under Article 3 of the ECHR, as already stated, I do not find her asylum appeal to be credible and I am not persuaded to the appropriate lower standard that if returned to Sierra Leone she would be at real risk of suffering serious harm contrary to Article 3. The appeal under Article 3 of the ECHR is dismissed.
65. Considering the first Appellant's Article 8 appeal, she is entitled to respect for her family and private life. However, Article 8 does not confer an unfettered discretion as to where such family and private life may be enjoyed. Ms [REDACTED] is a citizen of Sierra Leone, the country in which she has spent almost all her life. Her partner is also a citizen of Sierra Leone and he appears to have overstayed his welcome in the UK by a number of years. He has no legal basis upon which to remain here. Although he did submit a witness statement in support of Ms [REDACTED]'s appeal, he did not take the trouble to accompany her to the hearing.

66. Ms [REDACTED]'s daughter is of tender age, and is also a citizen of Sierra Leone. It would clearly be in her best interests to return to Sierra Leone with her parents. Both Ms [REDACTED] and her daughter have close relatives in Sierra Leone to whom they could turn for support, at least initially. Mr [REDACTED]'s position in the UK is at the very least precarious as he would appear to have no rights to be here. He would thus have the options of returning to Sierra Leone with Ms [REDACTED] and their daughter in order to re-establish themselves as a family unit there. Ms [REDACTED] and his daughter would then be under his protection as the adult male head of the family.
67. Ms [REDACTED] is entitled to respect for her private life, but she has been living in the UK only since June 2008 and her application to remain on the grounds of domestic violence was dismissed and she became appeal rights exhausted on 21 April 2011. Any private life which she may have accrued after that time has been in the full knowledge that her status here had not been settled and she could well be leaving. It would appear that all of Mr [REDACTED]'s private life in the UK has accrued in the knowledge that he did not have permission to be here.
68. I therefore find following **Razgar**, the all Appellants have enjoyed a limited family and private life in the UK, but any interference with that enjoyment, either real or imputed, would be entirely proportionate given the need to maintain firm and fair immigration control. The appeal under Article 8 of the ECHR is dismissed.
69. The Secretary of State has given Directions for the removal of the first Appellant by way of Directions under Section 10 of the Immigration and Asylum Act 1999. The Removal Directions are upheld.

SUMMARY

- (a) The asylum appeal of the first Appellant, [REDACTED], is dismissed.
- (b) The asylum appeal of the second Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (c) The asylum appeal of the third Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (d) The appeal for humanitarian protection of the first Appellant, [REDACTED], is dismissed.
- (e) The appeal for humanitarian protection of the second Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (f) The appeal for humanitarian protection of the third Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (g) The appeal under Article 3 of the ECHR of the first Appellant, [REDACTED], is dismissed.

- (h) The appeal under Article 3 of the ECHR of the second Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (i) The appeal under Article 3 of the ECHR of the third Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (j) The appeal under Article 8 of the ECHR of the first Appellant, [REDACTED] is dismissed.
- (k) The appeal under Article 8 of the ECHR of the second Appellant, [REDACTED] is dependent upon that of the first Appellant and is therefore dismissed.
- (l) The appeal under Article 8 of the ECHR of the third Appellant, [REDACTED], is dependent upon that of the first Appellant and is therefore dismissed.
- (m) The Removal Directions are upheld.

**TO THE RESPONDENT
FEE AWARD**

As the appeal has been dismissed there can be no fee award.

Signed



Date 8 February 2013

Judge Clayton

Judge of the First-tier Tribunal

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