Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Refugee Status for Females at Risk of FGM and Parents Opposed to it in The Gambia

Question(s) at stake:

1. Whether intact females in The Gambia face a real risk of Female Genital Mutilation (FGM) and whether internal relocation is available to them. 2. Whether parental opposition to FGM is sufficient to prevent a female from The Gambia from being subjected to FGM when the extended family practices it.

Outcome of the ruling:

Although women in Gambia are not at a real risk of FGM, assessing the risk of FGM is a "fact-sensitive exercise" (para 122). Factors affecting the risk include (1) the female's ethnic background, (2) the prevalence of FGM, intermarriage, and polygamy in the ethnic group of her parents or her husband, (3) the wider family's attitudes towards FGM, and (4) the socio-economic milieu of the female, such as her age, education, and marital status. When it is established that a person is at a real risk of FGM in her home community, internal relocation is unlikely to be a safe and viable option for her. In light of the Country Guidance (CG), the appeals were allowed. Both Miss K and AS are at a real risk of FGM upon return to The Gambia. Should they refuse to undergo the practice, no sufficiency of protection nor internal relocation would be available to them and their families.

Topic(s):

- Immigration and Asylum

Keywords:

- Female Genital Mutilation (FGM)
- Gender based persecution
- Grounds/Reasons of persecution

- Membership of a particular social group
- Real Risk of persecution
- Refugee status

Tag(s):

- Ethnic groups
- Harmful traditional practices

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Country:

United Kingdom

Official citation:

K and Others (FGM) The Gambia CG [2013] UKUT 00062

Link to the decision:

https://tribunalsdecisions.service.gov.uk/utiac/2013-ukut-62

ECLI:

No ECLI number / ECLI number unknown

Date:

13 October 2016

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal from the First Tier Tribunal (Immigration and Asylum)

Previous stages:

K, J, and Miss K

- On 7 September 2010, the Upper Tribunal found the decision of the Asylum and Immigration Tribunal (AIT) to contain an error of law on the issue of internal relocation.
- Permission to appeal against the AIT's decision was granted on 17 February 2010.
- The Appeal against the refusal decision was dismissed by the AIT on 20 January 2010.
- The Home Office (HO) refused the asylum application of K, J and Miss K and served them with removal directions (date unknown).
- The HO refused K's application for further leave to remain in the UK as a student (date unknown).

AS

- On 6 January 2012, the Upper Tribunal found the decision of the First-Tier Tribunal (FTT) to contain an error of law on the issue of internal relocation.
- The Secretary of State was granted permission to appeal against the FTT on grounds of an error of law (date unknown).
- The FTT allowed the appeal against the refusal decision on 19 August 2011.
- On 10 June 2011, the HO refused AS's application for asylum on and served removal directions.

No official citations of the previous stages are available.

Subsequent stages:

- No information found.

Branches / Areas of law:

Administrative law; Asylum law.

Facts:

K, J, and Miss K

K and J are a married couple. Miss K is their child. All three are citizens of The Gambia born in 1979, 1981, and 2009 respectively.

K arrived in the UK in July 2015 as a student and was joined by J in June 2007. The details of Miss K's arrival in the UK were not specified. "K's application for further leave to remain as a student was rejected" (para 2). The family applied for asylum on the basis that Miss K would be at a real risk of FGM upon return to The Gambia. K and J maintained that, despite being against the practice, they would be unable to protect their child against such a risk. K and J had a son who was being raised by K's parents in The Gambia. They feared that should they resist FGM being performed on Miss K, they would lose contact with their extended families and their son. K comes from the Mandinka ethnic group. J comes from the Fula ethnic group and underwent FGM when she was around five years old.

The HO refused their application for asylum and served the family with removal directions on the basis that they could safely relocate internally. The family's appeal against the refusal was dismissed by the FTT, which held that while Miss K was at a risk of FGM, that risk was not imminent, and could be avoided through relocating to another part of the country. Upon reconsideration, permission to appeal the FTT's decision was eventually granted on the basis that it had contained an error of law.

AS

AS was a citizen of The Gambia and 20 years old at the time of the hearing. Having entered the UK as a tourist on 25 December 2009, she overstayed her visa and applied for asylum. The basis of her claim was that FGM would be forcibly performed on her upon return to The Gambia. AS came from an educated family and was herself educated. Her father worked as a lecturer at the University of The Gambia and her mother ran her own fruit-selling business. When AS was 12 years old, her parents were visited by her family members from her father's side, who informed them that AS would be required to undergo FGM. While in the UK, AS was informed in a telephone conversation

received a phone call informing her that “her status as an uncircumcised woman was becoming a big problem within the family and that her father had given his word that she would undergo FGM upon her return from the UK” (para 18). The information was confirmed by her mother.

The HO refused AS’s application for asylum and issued removal directions to her. Her appeal against the refusal decision was allowed by the FTT. At the hearing, the FTT found AS’s account to be credible. The FTT held that AS was at a real risk of FGM upon return to The Gambia and that the option of internal relocation would not be available to her. The Secretary of State accepted that AS was at a risk in her home area but was given permission to appeal the FTT decision on the basis that the FTT had erred in law on the issue of internal relocation.

K, J, Miss K, and AS

In their separate appeals before the Upper Tribunal, K, J, and Miss K were appellants and AS the respondent. For ease of reference, all four were referred to as the “claimants”. The appeals were heard with a view to provide “Country Guidance on those identified as being at risk of FGM in The Gambia” (para 6), including on the issue of sufficiency of protection and internal relocation.

It was agreed by all parties that FGM was prevalent in The Gambia. It was also accepted that FGM amounts to persecution within the remit of the Refugee Convention, both for the individual at risk and for the parents of a minor child opposing to the procedure.

The main areas of dispute included:

- the extent to which belonging to a certain ethnic community and/or coming from a multi-ethnic background influence the rates of FGM in The Gambia;
- parents’ ability to protect their minor female until they turn 18;
- whether the risk continues past the age of 18; and

the viability of internal relocation.

Ruling:

After hearing extensive evidence from country experts, medical reports, and considerable background information, the Upper Tribunal allowed the appeals. The ruling can be divided in two main parts. The first provided Country Guidance and the second dealt with the two appeals.

Country Guidance

Regarding the risk of FGM:

1. “FGM has been practised upon about three quarters of the female population of The Gambia historically” (para 120). Despite ongoing campaigns aimed at eliminating FGM, the most recent scientific evidence available at the time of the hearing, based on data from 2005, indicated no significant changes in its prevalence. (para. 120)
2. The incidence of FGM varies within ethnic groups and subgroups. As set out in the detailed table attached to the judgement, “[w]ithin the five main ethnic groups there are subgroups, within which the incidence may vary”. “In no ethnic group is the practice universal; in some ethnic groups the practice is absent.” Ethnic groups are thoroughly interspersed as a result of intermarriage. (para. 121)
3. Generally, intact females in The Gambia do not face a real risk of FGM. However, a fact-sensitive exercise must be undertaken in order to assess the risk of an individual being subjected to FGM. (paras. 118, 122)
4. Factors that significantly affect the risk of FGM include:

- “ethnic group (whether parental or marital);
- the attitudes of parents, husband, and wider family”;
- socio-economic factors such as the age and education level of the individual said to be at risk. (para. 123)

5. Parental and spousal opposition reduces the risk for both unmarried and married females. However, such opposition may be insufficient to prevent an individual from being subjected to FGM in the event that the extended family

practices it. Higher levels of education and living in an urban setting reduce the risk of FGM. However, the age of the female is largely irrelevant to the risk level. (paras. 109, 124)

Regarding state protection:

1. Where it is established that an individual faces a real risk of FGM, there is no evidence to suggest that sufficient state protection could be accessed either by the female in question or her family. (para. 127)

Regarding internal relocation:

1. Due to The Gambia being small and its population highly interconnected, internal relocation is unlikely to be a viable option for an individual facing a real risk of FGM. Opposing to undergo the practice is likely to result in losing one's social standing and inability to find employment. (paras. 119 and 128)

Determination of the appeals:

Applying the CG to the facts of the appeals, the Upper Tribunal found that the decisions of the First Tier Tribunal contained errors of law. As such, they were set aside and remade by allowing the appeals on asylum grounds. (paras. 130 –132)

Main quotations on cultural or religious diversity:

Referring to the expert report titled "*Female Genital Mutilation in The Gambia: A Desk Review"*, the Upper Tribunal noted that:

- "It provides an overview of the breakdown of society by ethnic group and draws attention to the boding of ethnic groups by virtue of religion and to extended attention to the bonding of ethnic groups by virtue of religion and to extended family linkages through cross marriage. It says the 'individual in society is an integral part of the community with his/her identity depending on his/her role, status and relations within society. Traditional or historical determinants of status are age, kinship and, in some cases, caste'." (para.

23)

- “The summary of the report states that FGM is ‘seen both officially and by the public as a cultural issue, and thus a problem, which is difficult to deal with, as it is deep-rooted and therefore politically sensitive’.” (para. 24)
- “The report considers emerging trends […] that some circumcisers who have participated in sensitisation workshops have continued in practice but have modified their practice ‘cutting the tip of the clitoris instead of the more customary deep cutting to remove the clitoris and part of the *labia minora*’. There is reference to the younger age at which the procedure is carried out possibly indicating a trend in part a reaction against campaigns and in part because young girls are seen as less capable of fighting back. There were indications of fewer celebratory rituals, that for those circumcised against their will and those of their parents there was no celebration, and no celebration follows if the girls are considered ‘too old’. There is also reference to instances where circumcisers agreed to stop the procedure but continued to perform it in secret.” (para. 25)

Referring to the same report, the Upper Tribunal quoted the following societal factors impacting the practice of FGM:

On age:

- “[…] the studies that communities practice FGM as ‘religious obligation’ perform it during infancy. In contrast, when the practice is explicitly referred to as an ‘initiation rite’ for entrance into womanhood and preparation for marriage, it is performed later […] This is however dependant on whether the community abides by community arrangements […].The studies also indicate that Circumcisers will operate on all girls in a community during the prescribed period in order to clear a backlog of candidates for the operation if the last initiation rite, for example, took place seven years ago. In such cases, every child in the community between ages 0-7 years may be

subjected to the operation, even if the baby were born on the very day the operation is planned to take place." (para. 26.i)

- On "[c]hastity and avoiding shame, rite of passage, marriageability, social standing":
- "FGM is believed to be associated with positive moral values [...] a means of protecting them against bringing shame upon the family by avoiding pre-marital sex or abstaining."
- "[...] in some Gambian communities [FGM] is considered a 'rite of passage to adult womanhood and represents a medium for the transmission of long held values, attitudes and norms of behaviour to the effective performance of the role of mother, wife, home manager'... with the reduction in the age at which the operation is carried out nowadays, some studies have concluded that FGM as a 'rite of passage' is becoming less important"'
- "[FGM] has become a class phenomenon [...].Those who have [undergone FGM] tend to regard themselves as superior in all respects to those who have not and there are "strict codes of conduct about whom they should mix with".' (para. 26.vi)

On "[i]dentity [g]ender [sic] and sexuality":

- "[...] FGM is a woman's affair as women make the decisions themselves with little or no male involvement [...] The concern that men's energies would be used up if they married uncircumcised women is particularly so in polygamous relationships. And although women do not see FGM as a means by which men control women's sexuality, to Gambian men it is an important consideration." (para. 26.vii)

On "[e]conomic factors":

- "[...] economic reasons prevail in different facets of the practice...the conclusions reached in a number of these studies differ...for most

Circumcisers, FGM is not the main source of livelihood although the financial benefits that accrue from it tempt them to continue the practice." (para. 26.viii)

The Upper Tribunal quoting oral expert evidence:

- "surrounded by profound systems of symbolism and cosmological and ontological meanings [...] concepts of the individual and attitudes regarding individual freedom of choice are constrained by a pronounced cultural perspective which sees (a) individuals as bearers of the faith and future of the lineage into which they have been born, and (b) women as bearing the future of the lineage in their reproductive capacities which are therefore of general interest to the entire lineage past, present and future. Thus, in such an environment abduction of a female child for purposes of FGM does not appear as a criminal or immoral act in the eyes of those who might do it. Rather, it appears as a deeply moral and correct act". (para. 55)
- "there is usually a constellation of decision-makers involved in the process of determining whether or not a child should be circumcised... indeed, rather than being seen as the exclusive property of parents, children in the Gambia are customarily regarded as belonging to the husband's natal extended family or 'clan'." (para. 71)

Referring to oral expert evidence, the Upper Tribunal noted that:

- "If a child was able to avoid FGM through childhood, Professor Chant states that the issue would arise on or after marriage. Around 40% of marital unions are polygamous and FGM is considered a tribal right with the agreement of the family; there is pressure from co-wives as well as the husband's female kin. The lack of circumcision keeps the woman out of the social group because she is unclean. She is seen as 'wearing her husband out with insatiable sexual desires'. Professor Chant described these cumulative pressures as tantamount to force." (para. 80)

- “The evidence from Senegal, where approximately 40% of the population is Mandinka, is instructive. The level of FGM in 1999 was some 40%. After the passing of specific legislation, followed by intense NGO and government activity, there has been a fall over more than a decade to about 13%. This is laudable and encouraging, but also indicates that the extent of such entrenched practices in the cultural make-up of society means that very considerable work has to be undertaken to reduce their prevalence. Assertion and exhortation are not a sufficient basis upon which to found a conclusion that significant change has occurred. That conclusion can come only once there has been rigorous analysis of the extent to which stated new attitudes and intentions have been carried through into practice.” (para. 111)
- “[…] the absence of evidence of any instances of abduction for purposes of enforced FGM […] has to be considered against the reality of a kin-based society and in the context of cumulative social pressure and the difficulty of making and carrying through an official complaint.” (para. 112)
- “We cannot but conclude that FGM continues to be widely practised; that it results in serious injuries and even fatalities; that although legislation exists which could be used, it is rarely if ever prosecuted; and that there is such a lack of effective official intervention as to amount to absence of legal protection.” (para. 116)

Main legal texts quoted in the decision:

International law

- Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW).
- Convention on the Rights of the Child (adopted on 20 November 1989; entered into force on 2 September 1990) (CRC).

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

Gambian law

- The Children's Act of 2005

UK law

- Immigration and Asylum Act 1999

Cases cited in the decision:

- None

Commentary

Refugee Status for Females at Risk of FGM and Parents Opposed to it in The Gambia

Country Guidance (CG) cases are specific to the UK immigration system. They are a unique fact-based form of assessment because they involve the evaluation of a large body of evidence on the general social and political conditions of a specific country, as well as the particular circumstances of an individual case. They are binding on subsequent cases concerning similar issues and similar factual evidence (Clayton and Firth 2018: 389; Thomas 2008).

The Country Guidance case of *K and others (FGM)* [2013] is part of a consolidated judicial trend in the UK, in which fear of harm from the female genital mutilation (FGM) is recognized as persecution within the remit of the 1951 Refugee Convention (Steiner and Alston 2007). FGM was first recognised as a form of persecution on Convention grounds by the House of Lords in *Fornah and K* [2006].

K and Others (FGM) [2013] is an authoritative precedent for asylum claims concerning the risk of FGM in The Gambia particularly in two main respects: (1) in relation to the role of age, education, and ethnic background in determining the risk of FGM; and (2) in relation the extent to which parents who oppose the practice may face a risk of harm amounting to persecution for a Convention

reason (Home Office 2018:21). In the case, the parties were in agreement that women and girls fearing FGM, as well as a minor's parents who are against the procedure, form a particular social group (PSG) within the meaning of the Refugee Convention. It fell on the Upper Tribunal to establish whether the parents would face a real risk of persecution upon return to The Gambia by reason of their membership to such PSG (causal nexus).

The Upper Tribunal engaged with significant country background information, oral and written evidence from country experts, as well as medical reports to assess the risk of persecution on return to The Gambia. This enabled the Tribunal to find that FGM has been performed on "about three quarters of the female population" in The Gambia (para 120). It also allowed the establishment of a nuanced understanding of how often, and how differently, the country's main ethnic groups and sub-groups performed FGM. It considered data on prevalent attitudes and perceptions towards FGM, as well as local efforts to combat the practice, which have culminated in three "Dropping the Knife" ceremonies, i.e., public ceremonies where circumcizers, religious, and community leaders pledge to cease advocating for, and performing, FGM. Additionally, the Upper Tribunal considered data on prevalent attitudes and perceptions towards FGM among the Gambian population and appreciated the cultural, social, and religious justifications for the procedure (Guiné and Moreno Fuentes 2007; Middelburg and Balta 2016).

The Upper Tribunal's reasoning indicates that it used extensive cultural evidence form its above-mentioned FGM risk assessment exercise to infer that societal pressure – applied through shaming and the fear of discrimination and ostracism – plays a major role in ensuring that the practice continues in accordance with local customs (Christou and Fowles 2015). Indeed, while FGM was traditionally performed as part of a "rite of passage to adult womanhood" (para 26) and a prerequisite for marriage, the practice is mainly seen as a tool for gaining social standing and access to social networks. The latter is of high importance in The Gambia, a small and interconnected country where relationships are pivotal in accessing employment. The potential to lose social standing is especially relevant

to both sets of claimants in this case – parents opposing the practice and educated women at a risk of FGM – because opposing FGM, in effect, means risking destitution. As such, the cultural evidence considered by the Upper Tribunal significantly informed its decision to allow both appeals.

The Upper Tribunal found that the harmful societal pressure experienced by parents who oppose FGM for their daughters could amount to persecution. It specified however that this was still a fact-sensitive issue to be decided in each individual case. Although not explicitly referred to by the Upper Tribunal, its reasoning in this regard is in line with the UNHCR (2009) position expressed in its Guidance Note on Refugee Claims relating to FGM.

A peculiarity of the judgement is that it makes no reference to previous case law despite the existence of highly relevant decisions. For example, in the case of *MH & Others (Art 3-FGM) Sudan CG [2002],* in which refugee status was granted to parents facing a risk of harm amounting to persecution within the remit of the Refugee Convention as they were unable to prevent their daughter from undergoing FGM.

Furthermore, the Upper Tribunal could have reinforced its reasoning – i.e., that internal relocation was unduly harsh in the event that rejecting FGM would result in destitution – by referring to the ruling in *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v Secretary of State for the Home Department* (2008: para. 39), which held that *"if survival comes at a cost of destitution, beggary, crime or prostitution then that is a piece too high to pay.*"

On the other hand, the Upper Tribunal engaged with Gambian legislation, namely the Children's Act of 2005, which *"prohibit[s] social and cultural practices that affect the welfare, dignity, normal growth and development, and life and health of a child or are discriminatory to the child on the grounds of sex"*. While pointing out that the 2005 Act does not specifically mention FGM, the Upper Tribunal reasoned that it *"clearly intended to make FGM punishable"* (para. 99). However, it concluded that sufficient state protection was not available in The Gambia by noting that there had been no reports of prosecutions against FGM.

It is important to note that, since the case of *K and others (FGM)* was heard, the Women's (Amendment) Act of 2015 has been enacted in The Gambia. The 2015 Act explicitly made FGM a criminal offence. Under the 2015 Act, anyone who engages in, or is an accomplice to, the practice can be imprisoned for up to three years. The Home Office's updated Guidance Note on FGM in The Gambia interprets this legislative development as a sufficient reason to depart from the reasoning in *K and others (FGM)* regarding the sufficiency of protection element (Home Office 2016).

Whether, and to what extent, the Home Office's above-mentioned position is correct will require clarification in subsequent cases, which may eventually come before the Upper Tribunal. Until then, however, *K and others (FGM)* remains good law to be followed by the courts.

Literature related to the main issue(s) at stake:

Home Office reports cited in the judgement:

- Home Office, *Country of Information Report: The Gambia* (Home Office 2011)
- UK Border Agency, *The Gambia Operational Guidance Note* (Cm v.4.0, 2007)

Academic literature cited in the judgment:

- Gambia National Women's Bureau, *Female Genital Mutilation in the Gambia: A Desk Review*. (Gambia National Women's Bureau 2002), available at < https://silo.tips/download/female-genital-mutilation-in-the-gambia-a-desk-review> accessed on 14 December 2019.

Case-law cited in the template commentary:

- *FB (Lone Women - PSG - Internal Relocation - AA (Uganda) Considered) Sierra Leone v Secretary of State for the Home Department* [2008] UKAIT 00090
- *MH & Others (Art 3-FGM) Sudan CG* [2002] UKIAT 002691

Guidelines and reports cited in the commentary:

- Home Office, *Country Policy and Information Note Gambia: Female Genital Mutilation* (Home Office 2016)
- Home Office, *Gender issues in the asylum claim* (Home Office 2018)
- United Nations High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* (UNHCR 2009) (UNHCR FGM Guideline Note)

Academic literature cited in the template commentary:

- Christou, Theodora and Sam Fowles. 2015. “Failure to Protect Girls from Female Genital Mutilation”. *The Journal of Criminal Law* 79(5): 344-357.
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- Middelburg, Annemarie and Alina Balta. 2016. “Female Genital Mutilation /Cutting as a Ground for Asylum in Europe. *International Journal of Refugee Law* 28(3): 416-452.
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- Steiner, Henry and Philip Alston. 2007. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press.
- Thomas, Robert. 2008. “Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom”. *International Journ*404*of Refugee Law* 20(4): 489-532.

Further readings

- Akrivopoulou, Christina and Theodora Roumpou. “Asylum Hard Cases: Sexual Orientation, Female Genital Mutilation and Health in the Jurisprudence of National Supreme Courts and the EctHR”. *International Journal of Human*

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- Boyle, Elizabeth H. and Amelia C. Corl. 2010. “Law and Culture in a Global Context: Interventions to Eradicate Female Genital Cutting”. *Annual Review of Law and Social Science* 6(1): 195-215.
- Cook, Kate. 2016. “Female Genital Mutilation in the UK Population: A Serious Crime”. *The Journal of Criminal Law* 80(2): 88-96.
- Mestre, Ruth and Sara Johnsdotter. 2019. “Court Cases, Cultural Expertise and “Female Genital Mutilation” in Europe”. *Studies in Law, Politics, and Society 78(1):* 95-112.

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