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Question(s) at stake:

1) Whether “women in the Ivory Coast” form a particular social group (PSG) under the Refugee Convention. 2) Whether the appellant– a Muslim woman with an illegitimate child and a victim of female genital mutilation (FGM), forced marriage, and domestic violence – would upon return to the Ivory Coast face a real risk of persecution under the Refugee Convention or treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). 3) Whether the removal of the appellant and her child from the UK would be in breach of their rights under Article 8 of the ECHR, and 4) Whether sufficient protection and internal relocation would be available for them within the Ivory Coast.

Outcome of the ruling:

“Women in the Ivory Coast” can constitute a PSG under the Refugee Convention because they share a general position of inferiority in Ivorian society compared to men (paras. 282–284). It will depend on each applicant's “own particular circumstances, including her cultural, social, tribal, or regional background” (para. 4), to determine whether she faces persecution because she belongs to that particular social group.

The risk of harm that women in the Ivory Coast face as a result of “FGM, forced marriage, domestic violence, and the effects of adultery and discrimination” (para. 279) is serious enough to amount to persecution and inhumane treatment in breach of their rights under Article 3 of the ECHR. Due to a strong contrast in attitudes towards women, this risk is significantly higher in traditional rural communities than in urban areas. An adult female who faces one or more of those risks is unlikely to access sufficient protection, but internal relocation to an urban centre may be possible without causing undue hardship.

In light of the Country Guidance (CG) findings, the Upper Tribunal dismissed MD’s appeal on “asylum, humanitarian protection and human rights grounds” under Articles 3 and 8 of the ECHR (para. 329). Although the appellant was at risk of suffering isolation and stigmatization that would render her life intolerable in the northern village of Odienne, she and her son could return safely to Abidjan, a cosmopolitan and multi-ethnic urban centre. Although their removal would constitute an interference with the appellant’s private life in the UK, such interference would be proportionate to the public interest in maintaining an effective immigration control.

Topic(s):

- Immigration and Asylum

Keywords:

Tag(s):

Author(s):

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MD (Women) Ivory Coast v SSHD CG [2010] UKUT 215 (IAC)

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Date:

07 July 2010

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal from the Asylum and Immigration Tribunal

Previous stages:

- “On 20 June 2008, Senior Immigration Judge Gill adjourned the appeal to give the Home Office [HO] time to consider additional evidence lodged by the appellant” (para. 205). Several adjournments were subsequently ordered.
- Senior Immigration Judge Nichols set aside the previous decision of the Asylum and Immigration Tribunal (AIT) because it was found to contain a material error of law. A second-stage reconsideration hearing was ordered.
- On 1 March 2007, AIT Immigration Judge D Harris dismissed MD’s appeal against the HO’s removal decision.
- On 28 December 2006, MD appealed against the HO’s refusal letter and removal notice on asylum and human rights grounds.
- On 1 December 2006, the HO refused MD’s application for asylum and, on 6 December 2006, and ordered MD and her child’s deportation to the Ivory Coast.

No official citations of the previous stages are available.

*NB: Subsequent to the second stage reconsideration hearing, the AIT was abolished and the determination was issued by the Upper Tribunal (see Schedule 4 of the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010). *

Subsequent stages:

MD (Ivory Coast) v Secretary of State for Home Department [2011] EWCA Civ 989

- On 14 June 2011, the Court of Appeal dismissed MD’s appeal against the determination of the Upper Tribunal.
- MD argued that the Upper Tribunal erred in law by giving significant weight to letters from an unidentified political officer from the Foreign and Commonwealth Office (FCO). However, the Court of Appeal held that the authority of the FCO letters lay not in the authorship of the political officer who prepared them but, in the fact, that they were issued by the FCO. As such, the name and the qualifications of the FCO official had no impact on the outcome of the appeal. The Upper Tribunal did not treat the political officer’s letters as expert evidence but as general country background information. The approach is in accordance with the guidance contained in *NA v United Kingdom (25904/07)* (2009) and *TK (Sri Lanka) v SSHD* [2009].

Branches / Areas of law:

Administrative law; Asylum law

Facts:

The appellant, MD, an Ivory Coast national. She was born on 7 July 1987 in Daloa. She was Muslim and belonged to the Mallenke (Dioula) ethnic group. The appellant’s father came from the Diaby tribe located in the northern part of the country.

He was born in Odienne, a town in the north of the Ivory Coast. MD's mother originated from the Toure tribe. Both spoke Dioula. The appellant described both communities as deeply conservative where women covered their heads and were accompanied by a male when travelling long distances. The appellant's parents moved from Daloa to Abidjan because of strong family opposition to their mixed marriage.

FGM was universally practised among MD's father's tribe. For him, having a daughter who was not ritually circumcized in accordance with customary practice was a source of "ostracism, shame and ridicule" (para 29). MD's mother was against the practice and strongly opposed her daughter being circumcized. FGM was not practised among her tribe. MD's mother died when the appellant was 15. "Immediately after the formal period of mourning", the appellant, her father, and younger sister moved back to Daloa where "the appellant was forcibly circumcised" (para. 31). She "suffered great pain and felt betrayed by her father" (para. 31). Five months later, the appellant was forced to enter "an arranged traditional marriage with a 70-year old man" in Odienne (para. 292). The appellant "was the third of his wives and the youngest" (para. 31). She was subjected to domestic abused after refusing to have sexual relations with him. "She was repeatedly raped by her husband and ill-treated" (para. 2).

Towards the end of 2004, the appellant started a relationship with a man called B and was impregnated by him. MD fled the village in June 2005 when her pregnancy became apparent. She "found refuge in Abidjan at the home of one of her former teachers". Although B was from Abidjan, MD did not hear from him and did not have any knowledge of his location within the city. In September 2005, MD used her mother's jewellery to finance the departure from the Ivory Coast via an agent. "She arrived in the United Kingdom on 9 September 2005 and applied for asylum on the same day" (para. 2). She was 18 years old at the time. She gave birth to a son in December 2005 in the UK.

The basis of MD's asylum claim was that "she feared family retribution as a result of her adultery" (para. 3). She maintained that "both her husband and her father would kill her for bringing shame and dishonour to their families and the authorities would not intervene to protect in what would be considered a domestic dispute" (para. 34). MD related that her cousin was "beaten to death" in an act of communal punishment in Odienne because it was believed she had brought dishonour to the family" by refusing to remain with her husband (para. 32). For this reason, the appellant argued that it would not be safe for her to return to Odienne as her husband and her father's relatives lived there. She argued she could not return safely to Abidjan either because her father was living there and information about her return would be passed on to him. Internal relocation would be unduly harsh as she would be unable to find employment of sufficient income to provide for herself and her son.

MD's asylum application was refused in December 2006 and removal directions to the Ivory Coast were served for her and her son. MD's appeal against the refusal decision was dismissed by an Asylum Immigration Tribunal (AIT) immigration judge in March 2007. The appellant was found to be a credible witness who would be at real risk of persecution or serious harm in her home town Odienne. However, the AIT immigration judge held that the authorities were able and willing to offer adequate protection from such risk. Alternatively, internal relocation to an urban area such as Abidjan was a viable option. The immigration judge relied on *DI (Ivory Coast) CG* [2002] which held that both 'sufficient protection' against the risk of FGM and 'internal relocation', within the meaning of the 1951 Refugee Convention, were available in the country.

Upon reconsideration, the dismissal decision was set aside for containing a material error of law. A senior AIT judge found that the issues of sufficient protection and internal relocation had been inadequately dealt with. Namely, the dismissal decision strongly relied on the authority of the Country Guidance case of *DI* despite acknowledging that it was over five years old and that the *Human Rights Watch Report 2007* reflected a deterioration of the situation since *DI*. Moreover, the AIT judge did not apply the proper legal test in relation to internal flight given that he did not consider whether 'internal relocation' to Abidjan would be 'unduly harsh' for MD and her son, within the meaning of the Refugee Convention. Also, the AIT did not properly determine "whether or not the appellant would receive adequate state protection in her town of origin" (para. 9). Therefore, a second-stage reconsideration was ordered.

The current appeal

The current appeal before the Upper Tribunal was heard as a Country Guidance case on the risk of persecution as well as the risk of serious harm faced by single women with illegitimate children and women subjected to domestic violence and forced marriage in the Ivory Coast.

The basis of the appellant's asylum claim remained that she and her child faced a real risk of persecution and serious harm upon return to the Ivory Coast on account of her forced marriage and adultery. She claimed that "both her husband and her father would kill her for bringing shame and dishonour to their families" and the police would be unwilling to intervene in what they would view as a "domestic dispute" (para. 34). As a Muslim woman of mixed tribal heritage and with a name recognisable to the local population as originating from the north of the country, she would face a real risk of sexual violence and danger at road checkpoints around Abidjan. She would face stigmatization and ostracism in any community in the Ivory Coast, as well as discrimination in the housing and employment market. As a lone Muslim woman with a young child and no

family support, the appellant argued, she would be unable to find employment upon return to Abidjan. She would become destitute and would resort to prostitution for survival.

Medical evidence in the form of a report and a psychiatric assessment submitted to the Upper Tribunal stated that “the appellant was suffering from a Depressive Disorder, Moderate in severity with the somatic syndrome” (para. 44). She experienced persistent headaches and difficulties sleeping. She was prone to becoming severely distressed. She was frightened to leave the house. The appellant was receiving counselling, which was expected to continue for some time. However, her fear of a return to the Ivory Coast impaired her ability to move beyond her trauma through therapy. She suffered abdominal pain as a result of FGM and was “admitted to hospital […] for a minor operation following the birth of her son” (para. 41). “[T]he appellant had a limited ability to trust others and remained very isolated and reliant on her own limited and fragile resources” (para. 40). The medical assessment concluded that she “struggled to cope with suicidal thoughts and her deeply depressive moods. Her trauma would be exacerbated by a return to the Ivory Coast” (para. 40). The state of her mental health would make it “difficult for her to focus on practical issues” (para. 40). She would struggle to cope with work, negotiate bill payments, and make important decisions.

During oral evidence to the Upper Tribunal, the appellant noted that she attended ESOL courses and was making progress in learning English. Her son, aged 3, was attending nursery school. MD described the area in which she lived in Abidjan with her family as an ethnically mixed community and “modern”. As a Muslim woman, she did not wear a headscarf and “was not required to be accompanied when walking outside” (para. 303). However, she stated that she would not be safe in Abidjan because her father, who worked as a driver carrying goods between Abidjan, Odienne, and surrounding areas, would discover her whereabouts. She did not maintain contact with the teacher who had housed her prior to her departure to the UK and did not ask for her address or contact details. The appellant stated that she overlooked this because of the anxiety and concern for her life that she felt before the departure. However, she conceded that she would be able to find the teacher’s house if she returned to Abidjan.

The respondent’s submission was that the appellant was not at risk of legal punishment for her “adultery” on return to the Ivory Coast because the polygamous customary marriage she was forced to enter was not legal. The respondent submitted evidence from the Foreign and Commonwealth Office (FCO) in the form of letters prepared by a political officer working at the British Embassy in the Ivory Coast. The letters stated that customary, polygamous and forced marriages of minors were all common in the rural areas of the Ivory Coast. However, only civil marriages are legally binding. “Adultery is both a ground for divorce and a criminal offence punishable by imprisonment of two months to a year (para. 66). Legal divorces were rare and families would seek to prevent a marriage from falling apart as it would bring dishonour to the family. A woman who has left her husband may be rejected by her parents and may be unable to find a second husband in the same village. Although customary practices on ways to handling matters such as infidelity and divorce varied from village to village, no sources consulted during the preparation of the letters confirmed any form of ritual punishment for women accused of adultery or having an illegitimate child.

Therefore, the respondent argued that the appellant’s fear of being punished by her family and tribe for her adultery was not well founded. Alternatively, the state authorities would have provided sufficient protection were she to face a real risk of harm. The respondent argued that the Ivory Coast has a “Ministry of Women, Family and Children’s Affairs” and a “National Committee in Charge of Fighting against Violence against Women and Children” (para. 35). Women affected by FGM could also access NGO support.

Ruling:

The Upper Tribunal considered an extensive amount of country background information, as well as evidence from one expert witness in oral and written form, evidence from the Foreign and Commonwealth Office (FCO), and medical evidence regarding the appellant. The ruling can be divided into two main parts. The first is concerned with giving country guidance on single women returning to the Ivory Coast with a child born out of wedlock and women subjected to forced customary marriage and domestic violence. The second part of the ruling is concerned with determining MD’s appeal.

Country Guidance

The most important conclusions are the following:

1. Women in Ivory Coast can form a “particular social group” (PSG) under the Refugee Convention. Whether a female applicant is at risk of persecution for that reason “will depend on her own particular circumstances including her cultural, social, tribal, or regional background”. (paras. 4, 15–17, 282–284)

The Upper Tribunal applied the *Fornah* [2006] decision by analogy to Ivory Coast. In *Fornah*, the House of Lords recognized "women in Sierra Leonne" as capable of forming a PSG because their shared common characteristic was a general position of inferiority to men. Similarly, the country background information submitted before the Upper Tribunal in the current case indicated attitudes of institutionalized social inferiority towards women in Ivorian society. (paras. 274–275)

2. The risk of harm that women in the Ivory Coast may face from "FGM, forced marriage, domestic violence, and the effects of adultery and discrimination" are sufficiently serious to amount to persecution and inhumane treatment under Article 3 of the ECHR. (paras. 279, 282, 284)

3. Women face a significantly higher risk of harm in traditional rural communities than in urban centres such as Abidjan because attitudes towards women differ greatly across the Ivory Coast, which impacts the level of risk women face. "[T]raditional rural communities, particularly in the north or central regions" of the country, are likely to hold more conservative views on the position of women in society, FGM, female education, a wife's duty to obey her husband, and the value of female fidelity within marriage (paras. 273, 278–279)

The Upper Tribunal arrived at this conclusion on the basis of the UNICEF Multiple Indicator Cluster Survey, which indicated a substantial variation in attitudes and practices between traditional rural communities and urban areas, especially in relation to FGM, domestic violence, and the value of female education (paras. 271–272)

4. Where a woman faces one or more of the risks stemming from FGM, forced marriage, domestic abuse, and the effects of adultery and discrimination, the state is unlikely to provide sufficient protection. (para. 280)

The Upper Tribunal deduced a lack of protection by noting that the government's attempts to outlaw FGM notwithstanding, it continued to be practised almost universally in some areas of the Ivory Coast, particularly in the northern parts of the country. Similarly, polygamy and forced marriage remained commonly practised although both are criminal offences punishable by up to 3 and 5 years of imprisonment respectively and a fine under the Marriage Act of 1964. The Upper Tribunal regarded this as evidence of the state's reluctance or inability to enforce its legislation and to stamp out discrimination against women (paras. 63–66, 269, 276)

5. Where sufficient protection is unavailable, internal relocation in an urban centre may be possible without undue hardship. However, this will depend on the particular circumstances of each case and will require careful consideration of the support mechanisms available. (para. 277)

   The Upper Tribunal reached this conclusion based on the country background information, which indicated that ethnically mixed and relatively cosmopolitan urban areas, such as Abidjan, offer an environment in which lone women with a young child and without a network of male or family support can access employment and accommodation. This suggests that women in this position would not be at risk of destitution nor of being forced into beggary or prostitution by way of survival (as per the "unduly harsh" test developed in *Januzi* [2006] and *AH (Sudan)* [2007]). (paras. 10–14, 277)

6. FGM is practised almost universally in some areas of the Ivory Coast. By contrast, not all women in urban areas face the same level of risk. In some cases, religious or ethnic differences are likely to impact the assessment of the risk of FGM. Muslim social structures, in particular, are likely to be highly traditional. Therefore, each case must be examined according to its facts. (paras. 269, 297)

   In a traditional community, the possibility of widespread social pressure to adhere to social norms is great. Most will willingly adopt the practice as a rite of passage into the community. However, where the parents of a child oppose FGM, there is no evidence of physical coercion, such as the abduction of a non-circumcized child by the community in order to forcibly perform FGM on the child against the parents' wishes. (para. 270)

7. Polygamy, forced marriage and "marriages in which a bride-price is paid" are punishable with up to five years of imprisonment and a fine (para. 63). Under "the Marriage Act of 1964, [o]nly marriages performed by a registry official are legal", meaning that customary marriage is not legally recognized (para. 63). Marital rape is not a criminal offence under the Penal Code of the Ivory Coast. There are no specific legal provisions against domestic violence other than the laws governing criminal offences like assault and battery. However, under Article 391 of the Ivorian Penal Code, a spouse can be convicted of adultery and be sentenced with up to a year in prison regardless of their

gender. By contrast, there is no evidence of customary punishments for adultery in the Ivory Coast (paras. 63–66, 249, 307).

8. The weight to be given to any particular piece of evidence in asylum and immigration cases – including information provided by the Foreign and Commonwealth Office, British embassies, High Commissioners, and diplomatic representatives – is to be determined by the Upper Tribunal in accordance with its expertise. By contrast, 'Operational Guidance Notes' prepared by the UK Home Office are policy statement and are therefore not to be treated

   as country background information. (paras. 264–266)

   The Upper Tribunal came to this conclusion by following the guidance contained in *NA v United Kingdom (25904/07)* (2009), in which the European Court of Human Rights held that the Upper Tribunal was "entitled" to attach weight to information provided by British embassies. It is for the Courts to decide the weight to be given to any piece of evidence. The Upper Tribunal noted that the approach of the Strasbourg Court was in line with UK precedents. Namely, *LP (Sri Lanka) CG* [2007], which accepted as evidence "letters provided by the British High Commission (BHC) from Colombo" (para. 240), and *BK (Failed asylum seekers) DRC CG* [2007], which held that the Tribunal was entitled to attach weight to information provided by British embassy staff in good faith. (paras. 230, 240–242)

Determination of the appellant's case

The determination of the AIT was set aside because it was found to contain an error of law. In re-rendering the decision, the Upper Tribunal dismissed the appeal on "asylum, humanitarian protection and human rights grounds" under Articles 3 and 8 of the ECHR. (paras. 326–329)

The most important findings are the following:

1. The appellant belongs to a "particular social group" since she is a woman in the Ivorian society may suffer treatment that would amount to persecution under the Refugee Convention on that ground. (para. 282)

2. Assessment of the appellant's credibility: The Upper Tribunal accepted the AIT's finding that MD's account of her experiences in the Ivory Coast was credible. However, the Upper Tribunal did not find credible some of the appellant's oral evidence.

   Namely, the Upper Tribunal did not accept that the appellant maintained no contact with the teacher who had housed her for three months in Abidjan prior to her departure to the UK. MD's explanation – i.e., that she had forgotten to take the teacher's contact details because she was in a hurry to leave – was not found credible given that she had spent three months planning for her departure. The Upper Tribunal also concluded that the appellant had exaggerated her sense of isolation in the UK. According to medical evidence, the appellant maintained that she had no friends at all in Liverpool and that she was frightened to leave her house due to feelings of paranoia. The Upper Tribunal did not find this credible because the appellant was going to college on her own three to four times a week where she was likely to have made friends and she was taking her son to nursery school from Monday to Friday. The Upper Tribunal also did not find credible the appellant's explanation that inconsistencies between her account and the medical reports were due to mistranslations. (paras. 285–290)

3. Assessment of risk in urban centres (Abidjan): The appellant does not face a risk of harm, such as domestic violence or an honour killing, as a consequence of her forced marriage and adultery. Furthermore, MD does not face the risk of destitution because she would be able to obtain housing and employment. (paras. 302–312)

   The Upper Tribunal came to this conclusion by noting that Abidjan was a city with a population of about 3 million people which the appellant herself described as ethnically mixed and "modern". As a young Muslim woman, she was not restricted in her movement or in terms of what she could wear. The Upper Tribunal concluded that the appellant's father did not have the means or ability to find out about MD's return to the Ivory Coast or her whereabouts in Abidjan. He was not described as a man of influence and Abidjan's large population indicated that a parochial system of information exchange was unlikely. (paras. 305–306)

4. Assessment of risk in Odienne: Were the appellant to return to Odienne, she would suffer isolation and stigmatization, which would render her life unbearable and thus amount to a breach of her rights under Article 3 of

the ECHR. Were she to be subjected to physical violence at the hands of her father or "husband", the police – though capable of providing adequate protection – would not intervene if they perceived the matter as a domestic affair. However, the appellant is not at risk of customary punishments for having transgressed the social norms of the community. MD is also not at risk of prosecution for her adultery during her polygamous customary marriage. This would only have been the case if her marriage were legally recognized under the Marriage Act of 1964. For the same reason, the appellant's "husband" did not have the right to require her to return to Odienne. (paras. 63–66, 217, 249, 255–256, 299, 307–309, 313–317)

5. Assessment of other risks: The appellant, a Muslim woman of mixed tribal origin and a northern name, would not face a real risk of sexual violence at police or other road checkpoints upon return to Abidjan. (para. 236)

   In reaching this conclusion, the Upper Tribunal considered evidence from several agencies and NGOs, which indicated that women were at risk of sexual assault at checkpoints. However, the Upper Tribunal concluded that they were irrelevant to the appellant's case because they were concerned with roadblocks in other areas of the Ivory Coast rather than Abidjan. The Upper Tribunal gave weight to the FCO letter and its conclusions that it would be safe for MD to return. (paras. 231–236)

6. The question of whether internal relocation would be available on return does not arise in the appellant's case because she would be returning to her home area of Abidjan. (paras. 301, 318)

   The Upper Tribunal reasoned that although born in Odienne, for the purpose of her asylum claim the appellant's home area was Abidjan. She spent almost her entire life there except for about two years when she was forced into an arranged customary marriage in Odienne. She returned to Abidjan after leaving her elderly husband. As such, the Upper Tribunal concluded that there would be no reason for the appellant to return to Odienne as she had no relatives there with whom she would wish to remain in contact and the father of her son lived in Abidjan. The appellant's "husband" did not have the right to force her to return to Odienne given that their customary marriage was not legally recognized. (paras. 292–296, 318)

7. Article 8 ECHR: The appellant's removal from the United Kingdom would not interfere with the family life she enjoyed with her son because the two of them would return to the Ivory Coast together. However, it would interfere with the private life of the appellant as she had developed stronger community links in the UK while attending college than she was willing to admit. However, such interference would be a proportionate response to the goal of maintaining effective immigration control. (para. 319–325)

   The Upper Tribunal arrived at this conclusion by applying the test of proportionality developed by the House of Lords in *Razgar* [2004], In this case, it was ruled that when the removal of a foreign national interferes with their private life, this interference must be proportionate with a legitimate public goal. The Upper Tribunal also followed the House of Lords decision in *Beoku-Betts* [2008], which held that the direct impact on other family members is relevant when assessing an immigration claim under Article 8 of the ECHR. As such, the Upper Tribunal took into consideration that MD's son was attending nursery school in the UK but noted that the child was of an "adaptable age". (paras. 321–325)

Main quotations on cultural or religious diversity:

- "The most we can say is that amongst a traditional community there is likely to be social pressure exerted to conform to the *mores* of the community and, depending on the attitude and fortitude of the individuals concerned, the pressure may or may not be capable of being withstood. In practice, this will not arise in the majority of cases in a traditional community because most will willingly adopt the practice [of FGM] as a rite of passage for whatever reasons they may have. Social pressure to conform, however, does not inevitably lead to parents succumbing to it if they are set against the practice." (para. 270)

- "A traditional society is likely to hold conservative views in relation to FGM, a woman's role in society, education for women, the value of arranged marriages, a wife's duty of obedience to her husband, female chastity outside marriage and female fidelity within marriage, amongst other things." (para. 273)

- “We have already set out the problems faced by women in the Ivory Coast. It is as well to recall that in *Fornah*, Lord Bingham when considering the definition of a particular social group in the case of women in Sierra Leone, chose the broadest classification on the clear evidence that women shared a common characteristic because they were forced into a position of social inferiority compared with men. If FGM afforded a means by which a woman was accepted into Sierra Leonean culture it did so on the basis of institutionalised inferiority.” (para. 274)

- “This inferiority is seen in many other ways [in the Ivory Coast] and we have probably only referred to some of them. Hence the prevalence of domestic violence, discrimination in levels of education between men and women, the discriminatory treatment of women in the legal system as it affects women guilty of adultery compared with men and the pervasive influence of traditional practices which perpetuate the stereotypical image of women as socially inferior are all examples of the methods by which women are discriminated against. To this might also be added the informal resistance to the employment of women in some areas of the job market … [T]hese techniques… are [not] backed by sanctions or punishments but they remain a pervasive influence.” (para. 275)

- “Whilst the prevalence of these attitudes varies from area to area, the fact that such attitudes survive is evidence of the State’s reluctance or inability to stamp them out. It seems to us unlikely that the arm of the state operates with consistent force throughout the country. Indeed, it cannot do so if the law provides for the criminalisation of a particular form of conduct and yet the incidence of the practice suggests in some areas it is almost universal. Once again, however, we would caution about making generalisations about the sufficiency of protection.” (para. 276)

- “There is a wide variation in attitudes towards women in different parts of the Ivory Coast. In particular there is a strong contrast between traditional rural communities, particularly in the North or Central regions when compared with Abidjan, a relatively cosmopolitan city of mixed ethnicity along with other urban cities.” (para. 278)

- “This attitude impacts upon the risk faced by women of FGM, forced marriage, domestic violence, the effects of adultery and discrimination.” (para. 279)

- “We have concluded that women in the Ivory Coast are capable of being members of a Particular Social Group and that the risks they may suffer from FGM, domestic violence and forced marriage are sufficiently serious to amount to persecutory treatment in the absence of a sufficiency of protection, but the risk is not universal and in particular is very much less likely in an urban area such as Abidjan.” (para. 282)

- “Although this appeal did not develop the distinctions between different religious or ethnic groups, it is likely that there will be cases where these differences are also significant. Ms Monekosso is likely to be correct when saying that the Muslim social and community structures, in particular, are highly traditional.” (para. 297)

- “Thus, the appellant’s actions in rejecting traditional values by demonstrating her reluctance to participate in the practice of FGM, or to comply with the demands made upon her in her arranged marriage and to form a relationship outside marriage and to desert her husband are likely to have aroused the antipathy of the community as a whole but only in the locality where these actions took place.” (para. 298)

- “We do not consider that the appellant has committed a criminal offence for which she is liable to be prosecuted; nor that her father has the means of adducing evidence to support such a charge were it possible to make it. Were he to do so, it would appear his only motive in making the attempt would be revenge or vindictiveness. We would not lightly conclude that a father would pursue his estranged daughter for so little purpose. A customary marriage does not have the force of the law to protect it and it is not therefore likely the appellant’s ‘husband’ would have the right to require her return to Odienne, were he alive or were that his wish.” (para. 306)

- “There is insufficient evidence to support the claim of customary punishment for adultery in the area around Odienne. There is no evidence of customary punishment in Abidjan. The evidence does not suggest who might initiate the process, or prosecute it to a conclusion, or carry out the sanction or punishment. Although the appellant said that her father and husband would kill her for bringing shame and dishonour upon the families, there is scant evidence of a system of ‘honour killings’ and even less evidence that her father or her husband has the means to effect the appellant’s death.” (para. 307)

- “We are not satisfied that the appellant’s actions will result in a prosecution for adultery. This was a traditional marriage and not a legal one. This was a polygamous marriage which the Marriage Act 1964 does not recognise. This effectively bars criminal proceedings against the appellant.” (para. 313)

- “Nor are we satisfied that the appellant will suffer traditional punishment as a result of her conduct wherever she may go in the Ivory Coast. We have considered the source of Ms Monekosso’s opinion that such consequences are certain to occur and we are not satisfied that she is able to establish this in relation to a Muslim community in the north of the Ivory Coast. Whilst there may be parallels that can properly be drawn between traditional African societies, we would not consider that we can infer that evidence of practices in one society establishes the practice in another. In our judgment, we should be slow to make inferences of this nature unless supported by evidence that bears rigorous academic scrutiny.” (para. 314)

- “[I]n view of our findings of fact in relation to the animosity that a traditional society may express towards a person who transgresses the social norms, we consider it likely that the appellant would face isolation and ostracism were she to return to Odienne.” (para. 315)

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 6 December 1984) (CEDAW)
- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- EU Council Directive 2004/83/EC on Minimum Standards for the Qualification Status of Third Country Nationals or Stateless Persons or Refugees or as Persons Who Otherwise Need International Protection (No longer in force; end date of validity 21 Dec 2013; repealed by Directive 2011/95/EU) (the Qualification Directive)
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)
- UN Convention on the Rights of the Child (adopted 30 November 1989, entered into force 2 September 1990) (UNCRC)

UK Domestic Law

- Borders, Citizenship and Immigration Act 2009
- Immigration Rules (adopted 23 May 1994, entered into force 1 October 1994)
- Refugee or Person in Need of International Protection (Qualification) Regulations SI2006/2525 (adopted 18 September 2006, entered into force 9 October 2006) (Protection Regulations)
- Statement of Changes in Immigration Rules CM6918 (the amended Immigration Rules)

Ivory Coast Domestic Law

- Marriage Act 1964
- Penal Code (Article 391)

Cases cited in the decision:

Previous Country Guidance

- *DI (Ivory Coast) CG* [2002] UKAIT 04437

Particular Social Group and FGM

- *Fornah* [2006] UKHL 46

Sufficiency of protection

- *Horvath* [2000] UKHL 37

Internal Relocation

- *AH (Sudan)* [2007] UKHL 49

Januzi [2006] UKHL 5

Risk on return – Article 3 ECHR

- *N* [2005] UKHL 31
- *NA v UK* [2008] ECHR 616; (Application no. 25904/07)
- *RS (Zimbabwe)* [2008] EWCA Civ 839
- *Y and Z* (Sri Lanka) [2009] EWCA Civ 362

Risk on return – Article 8 ECHR

- *Beoku-Betts* [2008] UKHL 39
- *Costello-Roberts v UK* [1993] 19EH4412
- *Huang* [2007] UKHL 11
- *Razgar* [2004] UKHL 27

Expert evidence

- *BK (Failed asylum seekers) DRC CG* [2007] UKAIT 00098
- *LP (LTTE area – Tamils – Colombo – risk? Sri Lanka)* [2007] UKAIT 00076
- *NA v United Kingdom (25904/07)* (2009) 48 E.H.R.R. 15, [2008] 7 WLUK 506

Commentary:

The Risk of Persecution or Serious Harm Faced by Single Women with Illegitimate Children, and by Women Subjected to Forced Customary Marriage and Domestic Violence in the Ivory Coast

Country Guidance (CG) cases have been an integral part of the UK immigration system since 2001. They are a unique fact-based form of assessment. They involve the evaluation of a large body of evidence related to the general social and political conditions in a specific country, as well as the particular circumstances of a given case. They have a binding effect on subsequent cases concerning similar issues and on factual evidence (Clayton and Firth 2018; Thomas 2008).

The CG case of *MD* is an authoritative precedent on the conditions faced by single women with an illegitimate child and of women subjected to forced customary marriage, FGM, and domestic violence on return to the Ivory Coast. It builds on previous case law and contributes to a growing body of judicial decisions concerned with women who face persecution because they did not conform to socially-assigned roles and cultural norms regarding acceptable behaviour in their home communities.

MD paved the way for increased protection for women from the Ivory Coast seeking asylum in the UK in two main ways. Firstly, it confirmed that they are capable of forming a PSG under the 1951 Refugee Convention because they share a fundamental condition, i.e., they are socially inferior to men. Engaging with cultural and socio-legal evidence, the Upper Tribunal concluded that the prevalence of issues such as domestic violence, sexual harassment, or discriminatory treatment in the education, employment and legal systems, as well as the prevalence of traditional practices such as FGM, polygamy, and forced marriage, are manifestations of pervasive attitudes of women as inferior to men. The Upper Tribunal strengthened its reasoning by noting that its decision is consistent with the House of Lords determination in *Fornah* [2006] and with the approach recommended by the *UNHCR Gender and PSG Guidelines*.

Secondly, the Upper Tribunal set aside the previous Country Guidance case of *DI (Ivory Coast) CG* [2002] in relation to sufficient protection and held that when a woman faced one or more of the risks stemming from “FGM, forced marriage, domestic violence, and the effects of adultery and discrimination”, the state was unlikely to intervene (para. 279). The Upper Tribunal reached this conclusion by noting that the *Human Rights Watch Report 2007*, published five years after *DI*, contained evidence of the authorities’ indifference towards female victims of domestic violence, sexual harassment, and rape. The report attested to a tendency among police officers to regard domestic violence disputes as a private matter and to be reluctant to intervene unless serious bodily harm was caused. Victims were discouraged from initiating criminal “proceedings due to the shame that could be brought upon and entire family” (para. 5). Additionally, the Upper Tribunal determined that the local authorities were not able to offer effective protection based on the country background information, which noted that FGM, forced marriage, and polygamy remained common despite being illegal.

At the same time, the *MD* case brings into the spotlight three common difficulties asylum seekers face after overcoming the initial hurdle of being recognized as a member of a PSG under the Refugee Convention (Bailliet 2012; Brendan 2010; Cohen 2020; Mullally 2011; Querton 2012). One of them is establishing credibility during the asylum procedures (Hawthorne et al 2015). In the case of *MD*, the AIT concluded the appellant was a credible witness – a finding which the Home Office did not contest. However, her previously established credibility was damaged during the appellant's oral evidence before the Upper Tribunal. The Tribunal concluded that "the appellant had exaggerated [the] sense of isolation" she claimed to have experienced as a direct consequence of the conditions described in her medical reports (para. 319). The Upper Tribunal reasoned that the appellant would not have managed to attend college for English language classes a couple of times a week and ensure her son went to nursery school if she were as unwell as her psychiatric assessments described her to be.

Secondly, this case highlights the difficulty in proving a well-founded fear of persecution on the basis of cultural evidence. In *MD*, the Upper Tribunal rejected the claim that the appellant had a fear of serious harm upon return to the Ivory Coast, be that an objective or a subjective fear. The Tribunal reasoned that, because the polygamous marriage the appellant was forced into was only customary (i.e., lacking legal recognition), the authorities could not charge MD with adultery. For the same reason, her "husband" could not bring her to his village by force because he did not have a legal right to do so. The Upper Tribunal accepted that her father and "husband" could seek to harm her in revenge or vindication, but held unlikely the prospects that "a father would pursue his estranged daughter for so little purpose" (para. 306). This indicates that the Upper Tribunal may have underappreciated the importance of saving one's family *honour*, and therefore the likelihood of honour killings, among northern tribes in the Ivory Coast.

Lastly, the case highlights the need for high-quality anthropological and socio-legal research into the distinct ethical codes of different tribes and communities across the African continent as well as the urgent need for researchers trained to provide legal evidence during asylum hearings (Berger 2015; Good 2015). In *MD,* the Upper Tribunal rejected most of the evidence provided by the independent expert because it failed to provide "evidence that bears rigorous academic scrutiny" and maintain an objective and unbiased opinion without assuming the role of an advocate in court (para. 314). This was particularly damaging for the appellant's case because the expert was the only independent witness to comment on customary punishments for women charged with infidelity – e.g., forced servitude of land, public beatings, ritualistic cutting of women's backs with razors to "sanctify" them and signal their adulterous past, ostracism, and honour killings. Rejecting the evidence, the Upper Tribunal accepted the evidence on socio-cultural matters provided by the British embassy in the Ivory Coast instead. MD appealed to the Court of Appeal on the basis that this constituted an error of law – an argument that the Court of Appeal rejected.

Almost a decade after *MD,* international actors continues to monitor closely the political and socio-economic situation in the Ivory Coast (EASO 2019; HRW 2020; US Department of State 2019). These indicate that Ivorian women continue to face significant challenges despite some legislative improvements in relation to their position in society. For example, widows now have the legal right to inherit up to a quarter of their late husband's estate and the new age of consent for marriage is 18. Nonetheless, many widows do not know of their rights and/or are unable to enforce them, while child marriage remains common and FGM is practised extensively in some parts of the Ivory Coast. This means that the Upper Tribunal may hear a similar case in the future. Until then, the Country Guidance in *MD* remains good law.

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

Guidelines cited in the judgement:

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- UNHCR 'Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (Geneva 2002) (UNHCR PSG Guidelines)
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