



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00152/2017

THE IMMIGRATION ACTS

Heard at Field House

**On 8 October 2018
Extempore**

**Decision & Reasons
Promulgated
On 17 October 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**M N
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, instructed by Duncan Lewis Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal in which both parties appeal with permission against a decision of First-tier Tribunal Judge Rowlands promulgated on 1 May 2018. The judge concluded that the appellant's appeal failed on asylum and humanitarian protection grounds but allowed it on human rights grounds.

The appellant challenges the finding on asylum grounds. The Secretary of State challenges the finding with respect to human rights grounds.

2. I considered that it is appropriate to consider the issue of whether or not the decision to refuse the asylum claim involved the making of error of law before proceeding whether to determine whether the decision in that removal of the appellant would be a breach of article 3 on health grounds did involve the making of error of law.
3. I heard submissions from Mr Bandegani on behalf of the appellant and from Mr Bramble from the Secretary of State and for the reasons which I now give I was satisfied that the decision of the First-tier Tribunal involved the making of an error of law. I then proceeded to hear submissions with regard to the remaking of the decision on asylum and humanitarian protection grounds.
4. There is a long history to this case which is set out in the decision of Judge Rowlands. That history is not in any way controversial and there is no need to reproduce that here. In summary, the appellant's claim is that she whilst in Kenya in 1998 her husband decided to join the Mungiki sect and that she was also expected to join. She was badly treated by the sect including being forced to undergo FGM as part of their initiation process and some years after joining the sect she defected fleeing both from them and her husband. She tried to get assistance from the Kenyan police but was unsuccessful and twice had to move before being tracked down. She then fled to the United Kingdom arriving roughly in 2000. Her current fear is that she would not be safe if returned to Kenya as the Mungiki is still able to kill people, will track her down and it was also said that she presents a real present risk of suicide were she forced to return to Kenya. There is as Judge Rowlands noted a detailed statement of all the facts set out in a witness statement of 29 March 2018.
5. The Secretary of State did not accept the appellant's claim and concluded that in any event the Mungiki were no longer a threat to her the reasons set out in the refusal letter dated in this case a further submissions decision of 2016.
6. The judge accepted the appellant's credibility. He did so having taken into account various reports including that of an expert on FGM accepting that this had been performed and noting that the starting point was the findings made in the past by Judge Prior.
7. The judge directed himself at paragraph 24 that there is some objective evidence of the activities the Mungiki in Kenya, the Country Guidance case being VM (FGM, risks, Mungiki, Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049 which confirmed there was evidence the Mungiki organisation seeks to impose FGM and other forms of violence of women and children other than those who have been initiated into their sect.

8. The judge concluded at paragraph [25] having set out how the appellant was harmed in the past, that he was satisfied she told the truth despite the inconsistencies about her experiences in Kenya.
9. The judge then went on to consider whether or not she would be at risk on return noting the claim Mungiki have a presence throughout Kenya and that they will try to find her and as a lone woman with no support she would be unable to resist and would be at risk of persecution.
10. The judge at [27] states

“I have looked at the available objective evidence and consider that the Mungiki are not, following government crack downs, the force they used to be. It is also a fact that her previous problems occurred whilst her husband is alive and part of the sect himself. That is no longer the case. I also note that it is about 20 years since her problems occurred and I am not satisfied that they would have interest in her at all. It would be reasonable to expect her to return to the capital if she could not return to her home area. Even without any kind of support there she ought to be able to survive especially with the help of church authorities.”
11. The judge then went on to state that how he had regard to the totality of the evidence both oral and documentary he was not satisfied there was a real risk of harm.
12. The grounds of challenge are that the judge
 - (i) failed to have proper regard to and follow the decision in **VM** that being a country guidance; and,
 - (ii) failed properly to take into account the expert report prepared by Professor Nasong’o and also more recent newspaper reports indicating that the Mungiki are still active in particular with regard to the most recent election campaigns.
13. Permission was granted on 18 July by Upper Tribunal Judge Lindsley.
14. Having considered the material I conclude that the judge erred in that while it may have been open to him no longer to follow **VM** he would have to have explained in detail why and with reference to the material on which he concluded that that case would no longer be followed. He did not do so.
15. There are references to the totality of the evidence but it is unclear on what evidence the judge concluded that the Mungiki were a spent force. Although it is, as Mr Bramble submitted, evident from a passage set out in the refusal letter at paragraph 37 that there had been some diminution in the presence of the Mungiki and that they have been targeted by the state, that is not properly referenced by the judge. Nor are there references to more recent up-to-date material which indicates in s

newspaper reports from 2016 and 2017 that the Mungiki are indeed still active.

16. Further the judge does not appear to have taken account of Professor Nasong'o's report in which he deals specifically with the apparent diminution in the effectiveness of the Mungiki. He accepted that the government appeared to target them but the position had now changed. This is set out in some detail at paragraph 23 of his report and it is important to note here that the order to shoot to kill referenced by the respondent in the refusal letter is said essentially to be a ploy to eliminate Mungiki elements who were likely ICC witnesses against the president, but that once this was accomplished attacks against the Mungiki and they emerged stronger than ever both organisationally and financially. This is referenced with which refer to the enduring vibrancy from the Mungiki and their activities.
17. For these reasons I am satisfied that the judge erred in failing properly to explain why he had not followed **VM** and taking account of her evidence. Further this error is clearly material and properly analysed is certainly capable of showing that **VM** should still be followed.
18. In terms of remaking the decision Mr Bandegani took me to the passages set out above. He submitted that the Mungiki had not been stopped in any real sense, that they were still present and still present a threat. He submitted also that they are as is set out in Professor Nasong'o's report at paragraph 17 a ruthless organisation whereby if a member disobeys they would have their head cut off and put in public. He submitted also that an individual cannot really leave the gang in any way other than by death, again relying on Professor Nasong'o's report.
19. Mr Bandgani submitted that in circumstances there was still a real risk to the appellant notwithstanding the fact that she has been out of the country for twenty years as on the basis of the country guidance **VM** there is still a realistic prospect that she would be detected on arrival either in Nairobi or elsewhere in Kenya and as a lone woman she would be more likely to come to the attention of the Mungiki and suffer again the ill-treatment she had suffered in the past which she submits amounts to persecution.
20. For the respondent Mr Bramble submitted that account needs to be taken of the lapse of time since the appellant left Kenya and that there is a realistic prospect she would not be at risk. He relied in particular on passages already cited in the refusal letter submitting that the appeal should be dismissed.
21. Having considered the material for myself I conclude first that there is no sufficient basis in the material provided for not following the country guidance decision **VM**. Twelve years has elapsed since that decision was handed down but I consider that on the basis of the report of Professor Nasong'o, the position has not materially changed. His report is a reliable

source. The report is properly referenced and contains the appropriate self-direction with regards the Ikarian Reefer test.

22. I consider further that whilst there may well have been as the respondent indicates some targeting of the Mungiki cult or sect a few years ago, the position has now changed and if anything has reversed. I am satisfied from paragraph 23 of Professor Lasongo's report that they are now stronger than before. I consider also that there is evidence that they were involved in electoral campaign violence in the recent past.
23. It is nearly twenty years since the appellant left and that does give me some cause for concern. In many cases one would have thought that after twenty years' absence from a country somebody would no longer be of interest.
24. In this case I bear in mind the nature of the Mungiki organisation as set out in Professor Nasong'o's report and also referred to **VM**. There are passages in which it is referred to as mafia like and that it is not possible to leave the gang. It is clear that those who attempt to do so are made examples of. This illustrates two things: first, that they are prepared to use extreme violence and can do so with impunity, and second, there is a tendency to make examples of people to show what happens if you do try to leave the organisation.
25. Given also the ruthlessness within which they operate and their ability to gather information about people, I conclude that there is still a reasonable likelihood, first of the appellant's return to Kenya becoming known despite where she goes given the Mungiki are active across the whole territory as is their information gathering network. There is therefore a real risk that she would be subjected again to the level of ill-treatment she was subjected to in the past if not worse.
26. Accordingly, I am satisfied with the appellant has a well-founded fear of persecution in Kenya on the basis of membership of a particular social group and Mr Bramble accepted that there was no dispute as to whether the Refugee Convention was engaged for the purposes of a Convention reason. I therefore allow the appeal on the basis the appellant is a refugee.
27. Further and in any event for the sake of completeness I am satisfied that in the circumstances the removal of the appellant to Kenya would be in breach of Article 3 of the Human Rights Convention and the appeal will fall to be allowed on that basis also. Given that I have concluded that the appellant is a refugee she is not for that fact alone entitled to humanitarian protection so I formally dismiss the appeal on that basis.
28. As I have concluded that the appellant's removal would be in breach of Article 3 of the Human Rights Convention and that she is a refugee, any error in the judge's reasoning that the appellant's removal would be in breach of article 3 on health grounds is not capable of making a material

difference to the outcome of the appeal. I therefore formally dismiss the respondent's cross appeal as the pleaded errors were not capable of affecting the outcome of the appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal on asylum and human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 12 October 2018



Upper Tribunal Judge Rintoul