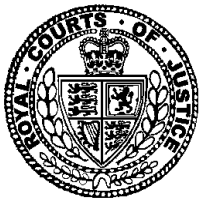

Neutral Citation Number: [2019] EWHC 2475 (Fam)

Case No: NR18 F05001

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2019

Before:

Sir Andrew McFarlane
President of the Family Division

Re A (A Child: Female Genital Mutilation: Asylum)

- -

Counsel James Holmes and Junior Counsel Naomi Wiseman instructed on behalf of the applicant local authority
Leading Counsel Karon Monaghan QC and Junior Counsel Dr Charlotte Proudman on behalf of the Mother
Leading Counsel John McKendrick QC and Junior Counsel Claire van Overdijk on behalf of the Secretary of State for the Home Department
Counsel Kathryn Cronin and Junior Counsel Artis Kakonge on behalf of the child through her Childrens' Guardian

James Holmes and Naomi Wiseman (instructed by Suffolk Legal) for the **Applicant Local Authority**
Karon Monaghan QC and Dr Charlotte Proudman
(instructed by Duncan Lewis) for the **Respondent Mother**
John McKendrick QC and Claire van Overdijk (instructed by **Government Legal Service**) for the **Secretary of State for the Home Department**
Kathryn Cronin and Artis Kakonge (instructed by Miles & Partners LLP) for the **Respondent Child**

Hearing dates: 30th January 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE RIGHT HONOURABLE SIR ANDREW MCFARLANE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P:

1. The parents of the child at the centre these proceedings are of Sudanese origin, but they now hold only Bahraini citizenship. The mother was born in Sudan and moved to Bahrain following her marriage to the father. As a child in Sudan she underwent female genital mutilation [FGM]. She has reported that two of her sisters died as a result of the FGM procedure and that the practice continues in the family with three of her nieces having already been subjected to FGM. The mother was a Sunni Muslim, who converted to Shia before subsequently converting back to Sunni. The parents have five children in all, four are older boys and the youngest, a girl [A], who is now 10 years old, is the subject of this application.

2. The family travelled to the UK on 18 August 2012. The father left again on 30 August 2012 and has not returned. He is now believed to have been detained in a military prison in Bahrain. On 31 August 2012 the mother made her first application for asylum in the UK. She withdrew this in early 2013 and applied for Assisted Voluntary Removal. She later also withdrew that application in January 2014.

3. On 2 September 2015, the mother made a fresh application for asylum on the basis that, if removed to Bahrain, A would be subjected to FGM and the mother would be mistreated as a result of converting from Sunni to Shia Muslim. That application was refused by the Home Office on 16 December 2016. The mother's appeal against that decision was dismissed by the First Tier Tribunal [FTT] on 25 July 2017. A number of determinations were made by the FTT, the most crucial of which was: 'in respect of [A] there are not substantial grounds for believing that there is a real risk of her being subjected to any form of FGM'. Permission to appeal was refused by both the FTT and the Upper Tribunal [UT] and on 14 May 2018, Holman J refused the mother's application for leave to apply for judicial review of the UT decision. Appeal rights were thereby exhausted, and the mother and children were due to be deported in late September 2018.

4. The relevant local authority, Suffolk County Council, had been previously involved with the family due to concerns about the risk of FGM. An assessment had been undertaken by Barnardo's in 2017 which recommended the making of an FGM protection order under the Female Genital Mutilation Act 2003 if the family returned to Bahrain. There was however considered to be no risk of FGM whilst the family remained in the UK and the local authority therefore closed its file at that stage.

5. On 26 September 2018, the local authority was contacted by A's school as A had informed them that she was due to be deported to Bahrain on 27 September. The mother believed they would be deported further from Bahrain to Sudan due to new rules removing citizenship from nationals who had been away from Bahrain for 5 years. Barnardo's reiterated their advice that there was a high risk of FGM and therefore the local authority issued an application for an FGM protection order on 27 September 2018. The father was not and has not been served with the application.

6. The matter came before HHJ Richards on 1 October 2018. The mother attended court in person and was assisted by an interpreter. The judge transferred the matter to the Family Division of the High Court and invited the Secretary of State for the Home Department to be joined as an intervener and to attend the next hearing. The following

orders were also made pursuant to Paragraph 4, Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003:

> "1. The First Respondent is prohibited from leaving the jurisdiction of England and Wales with or in the company of [A].
>
> 2. The Secretary of State for the Home Department or anyone acting on his behalf are prohibited from removing, instructing or encouraging any other person to remove [A] from the jurisdiction of England and Wales.
>
> 3. The Secretary of State for the Home Department or the First Respondent are prohibited from obtaining a Passport or any other Travel Document for [A], if one has not already been obtained."

The order of HHJ Richards also includes the following recitals:

> "A) UPON the Court being satisfied that on the following information having been provided to the court, there is a risk of Female Genital Mutilation to [A]:
>
> a. An assessment has been undertaken by Barnardo's which has concluded that if [A] was to remain in the United Kingdom there is low risk of FGM but that this would need to be reassessed if [A] was to be removed from the United Kingdom;
> b. That it is likely if the Mother is removed to Bahrain that she would be then removed to Sudan, where there is a high prevalence of Female Genital Mutilation;
> c. The Mother has undergone a medical examination which has established that she has been subjected to FGM and that her two sisters have died from such a procedure; and
> d. The Father is currently in military prison in Bahrain and is therefore unable to protect [A] from any risk of Female Genital Mutilation.
>
> …
> C) AND UPON the Court being of the view that this application is not a device to circumvent any immigration orders, as such application has been brought by the Local Authority on the advice of Barnardo's who are respected and recognised, for their expertise in relation to Female Genital Mutilation.
>
> …
> E) AND UPON the Court accepting the below order does restrict the Secretary of State for the Home Department's discretion, but the Family Courts primary consideration is the welfare of [A] and that further evidence is required, namely the extent to which the issue of FGM was considered by the Secretary of State for the Home Department when dealing with this family's asylum application so the court maybe properly informed before exercising its discretion under this Act."

7. A further hearing took place on 31 October 2018 before Newton J. The Secretary of State submitted that he was not bound by the FGM protection order and that the order should be discharged as having been made in excess of the court's jurisdiction, however he agreed not to set removal directions for a period of 6 weeks. The injunctions remained in place against both the mother and the Secretary of State. The matter was transferred to me as President of the Family Division for hearing on 30 and 31 January. This is the judgment following that hearing. Before proceeding

further, I can only apologise to all concerned with this case for the inordinate delay that has preceded the handing down of this judgment; the delay has been caused by the pressure of other work in the intervening period. During the interim period, however, with the agreement of all parties, the FGMA proceedings have continued before Newton J and have not been held up by the determination of the point of law to which I now turn.

The Issues

8. Newton J helpfully identified the following issues for consideration:

   (a) Whether a judge of the Family Division and/or the Family Court can lawfully injunct or restrain the exercise of the Secretary of State for the Home Department's immigration powers in relation to a mother and child by making an FGM protection order.

   (b) The role of the Family Division in assessing the risk of a child being subjected to female genital mutilation (FGM) in circumstances where the risk has been assessed by the Immigration and Asylum Tribunal and dismissed as a basis for asylum with all appeal rights exhausted.

   (c) The duty on the local authority in meeting its statutory obligations under the FGM Act 2003 in these circumstances.

   (d) Whether the FGM protection order (dated 1 October 2018) should be continued or discharged.

Female Genital Mutilation Protection Orders

9. Female Genital Mutilation Act 2003, s 5A ['FGMA 2003'] (as inserted by the Serious Crime Act 2015) makes provision through Schedule 2 Part 1 of that Act for a court in England and Wales to make female genital mutilation protection orders ['FGM protection orders'].

10. Schedule 2, paragraph 1 provides as follows:

> (1) The court in England and Wales may make an order (an "FGM protection order") for the purposes of—
>
> (a) protecting a girl against the commission of a genital mutilation offence, or
>
> (b) protecting a girl against whom any such offence has been committed.
>
> (2) In deciding whether to exercise its powers under this paragraph and, if so, in what manner, the court must have regard to all the circumstances, including the need to secure the health, safety and well-being of the girl to be protected.
>
> (3) An FGM protection order may contain—
>
> (a) such prohibitions, restrictions or requirements, and

(b) such other terms,

as the court considers appropriate for the purposes of the order.

(4) The terms of an FGM protection order may, in particular, relate to—

(a) conduct outside England and Wales as well as (or instead of) conduct within England and Wales;

(b) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who commit or attempt to commit, or may commit or attempt to commit, a genital mutilation offence against a girl;

(c) other persons who are, or may become, involved in other respects as well as respondents of any kind.

(5) For the purposes of sub-paragraph (4) examples of involvement in other respects are—

(a) aiding, abetting, counselling, procuring, encouraging or assisting another person to commit, or attempt to commit, a genital mutilation offence against a girl;

(b) conspiring to commit, or to attempt to commit, such an offence.

(6) An FGM protection order may be made for a specified period or until varied or discharged (see paragraph 6).

11. In Schedule 2, 'the court' in England and Wales means the High Court or the family court [Schedule 2, paragraph 17].

The Submissions of the Parties

12. The court has been assisted by detailed submissions on behalf of the local authority, mother, children's guardian (representing the interests of A) and the Secretary of State.

13. On behalf of the local authority, Mr Holmes submitted that the orders made by HHJ Richards on 1 October were orders within the court's jurisdiction and should be upheld save for the injunction against the Secretary of State which should be replaced with an invitation to the Secretary of State to agree to refrain from enforcement action whilst she (as she now is) reconsiders her position in the light of the family court's determinations.

14. Mr Holmes drew an analogy with cases in which it has been established that the family court may exercise the inherent jurisdiction in relation to a person liable to removal or deportation. Whilst he accepts that the case law demonstrates that the jurisdiction should be exercised very sparingly as it cannot deprive the Home Office of its powers, he submits that there is authority to the effect that an invitation from the court is something to which the Secretary of State must have regard.

15. In support of that submission, Mr Holmes took the court to two authorities:

> *R v Secretary of State for Home Department ex parte T* [1995] 1 FLR 292; *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam)).

16. *R v Secretary of State for Home Department ex parte T* was a decision of the Court of Appeal (Staughton and Hoffmann LJJ and Sir Roger Parker) dismissing appeals by the elder brother of Eritrean children who had sought injunction orders and judicial review in the Family Division aimed at restraining the Home Secretary who was otherwise intent upon removing the applicant from the UK under the immigration jurisdiction. In the course of the leading judgment, Hoffmann LJ, having reviewed relevant case law over the preceding 25 years, extracted the following propositions [at page 296]:

> "(1) The court may entertain an application to invoke its wardship jurisdiction or powers under the Children Act 1989 made by or in respect of a person liable to removal or deportation.
>
> (2) The jurisdiction will be exercised very sparingly because:
>
> (a) a wardship or Children Act order cannot deprive the Secretary of State of the power conferred by the Immigration Act 1971 to remove or deport the child or any other party to the proceedings, although it may be something to which the Secretary of State should have regard in deciding whether to exercise the power; and
>
> (b) in cases in which there is, apart from immigration questions, no genuine dispute concerning the child, the court will not allow itself to be used as a means of influencing the decision of the Secretary of State."

17. In formulating these propositions Hoffmann LJ explained that he had relied upon the clear formulation of the roles of the family court and the regime for immigration control set out by Russell LJ in *Re Mohamed Arif (An Infant)* [1968] Ch 643, which had subsequently been cited with approval by Butler-Sloss LJ in *Re F (A Minor) (Immigration: Wardship)* [1990] Fam 125. Hoffmann LJ described Russell LJ's reasoning as 'unassailable' for the following reason:

> "The judge hearing an application in wardship or under the Children Act is not entitled to have regard to immigration policy. Even if the Secretary of State has been joined as a party to the application, the judge must be guided solely by the interests of the child. It would therefore make no sense for his decision to prevent the Secretary of State from exercising a power based on altogether different considerations."

18. In *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam); [2003] 2 FLR 921, Munby J (as he then was) considered an application for the continuation of care proceedings with the avowed aim of thwarting the Home Secretary's decision to deport the parents and children. Having reviewed the relevant case law, in particular the judgment of Hoffmann LJ in *ex parte T*, Munby J drew a number of conclusions, including:

> "48. As the authorities show, and the point perhaps requires emphasis, exactly the same fundamental principles apply whether the court is exercising its private law powers under Part II of the 1989 Act, its public law powers under Part IV of the 1989 Act, the wardship jurisdiction, or its inherent jurisdiction in relation to children recognised and to an extent regulated by section 100 of the 1989 Act. Proceedings under the Adoption Act 1976 apart, whatever jurisdiction he may be exercising a judge of the Family Division can no more than a judge of the County Court or a Family Proceedings Court make an order which has the effect of depriving the Secretary of State of his power to remove a child or any other party to the proceedings."
>
> Munby J went on to make the following further observations:
>
> "53. So much for the authorities. The law, as I have said, is clear and I do not propose to add to the jurisprudence on this topic. I simply make the following points by way of emphasis:
>
> i) The functions of the court under the 1989 Act and of the Secretary of State under the Immigration Act 1971 and related legislation are, by and large, separate and distinct. The court and the Secretary of State are performing different functions.
>
> ii) The court when exercising its powers under the 1989 Act is not entitled to have regard to immigration policy. It must be guided by the interests of the child.
>
> iii) The court when exercising its powers under the 1989 Act necessarily has to apply a different test from the test that the Secretary of State applies:
>
> a) So far as concerns the Secretary of State the child's interests are *not* paramount. There is a balancing exercise in which the scales start even.
>
> b) In contrast (and assuming that threshold is established in those cases where there is a threshold to be met) the court has to apply the principle that the child's welfare is the paramount consideration.
>
> iv) Where the proceedings under the 1989 Act relate to a child who is liable to removal or deportation the jurisdiction should be exercised very sparingly.
>
> v) If, apart from immigration questions, there is no genuine dispute concerning the child, then the court must not allow itself to be used as a means of influencing the decision of the Secretary of State. Indeed, the use of the court's jurisdiction merely to attempt to influence the Secretary of State is an abuse of process."

Having considered the arguments in *Re A*, Munby J had no hesitation in discharging the care proceedings in order to allow the immigration process to take its course.

19. Mr Holmes accepted that the authority of *Re A* applied equally to an application for an FGM protection order, particularly given that paragraph 1(3) of Schedule 2 of the Act states that an order may contain 'such prohibitions, restrictions or requirements… as the court considers appropriate for the purposes of the order'.

20. Mr Holmes explored the very different roles of the family court and immigration court and accepted that the family court is unable to review the decision of the Secretary of State. He submitted, however, that there was no restriction on the family

court reconsidering the risk assessment undertaken by the FTT. In that context, however, Mr Holmes accepted that the FTT had had the same evidence from Barnardo's that has now been presented to the family court.

21. Notwithstanding that removal directions had been given, the Children Act 1989 and the ECHR required the local authority to undertake an assessment to identify the risks relating to A and to consider protective measures such as an FGM protection order. The situation, he said, was additionally complicated as the FTT determination was confidential and was not normally disclosed to local authorities.

22. Finally, Mr Holmes drew attention to a House of Lords decision, *K v Secretary of State for the Home Department: Fornah v Home Secretary Home Department* [2007] 1 AC 412, in which Baroness Hale observed that FGM will almost inevitably interfere with the absolute rights protected by ECHR, Art 3:

> "[94] Hence, it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment within the meaning, not only of article 3 of the European Convention on Human Rights, but also of article 1 or 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the International Covenant on Civil and Political Rights, and article 37(a) of the Convention on the Rights of the Child."

As Hayden J has rightly held in *A Local Authority v M* [2018] EWHC 870 (Fam), an application for an FGM order must therefore be evaluated through the prism of Art 3.

23. Through Ms Monaghan QC and Dr Proudman, the mother submitted that the family court should make a declaration that it has jurisdiction to injunct the Secretary of State pursuant to Schedule 2 of the FGM Act 2003 and to continue the order until the family court has evaluated the risk. The court is also invited to extend the FGM order to prohibit removal of the mother and A's siblings.

24. Attention was drawn to the exclusive jurisdiction of the family court to make FGM protection orders and the wide-ranging powers conferred on the court by Schedule 2 of the 2003 Act. Ms Monaghan noted that there is no statutory restriction as to the identity of the respondents to FGM injunctions and therefore no statutory bar upon making an order against the Home Office.

25. It was readily foreseeable that those assessed as at risk of FGM in England and Wales may have insecure immigration status and be subject to immigration controls, but nonetheless Parliament had not limited the family court's powers to make protection orders in such cases. Ms Monaghan thus submitted that it was plainly intended by Parliament that the family court could make such an order to prohibit removal, even if removal directions have been set and to do so would frustrate the intention of the Home Office and Immigration Tribunals.

26. Ms Monaghan did not accept that Sir James Munby's judgments in *R (Anton) v Secretary of State for the Home Department* [2004] EWHC 2730/2731 and in *GD*

(Ghana) v Secretary of State for the Home Department [2017] EWCA Civ 1126 were authority for the court being unable to make an FGM protection order where removal directions had been set and, in the alternative, insofar as they may be held to be authority, Ms Monaghan submitted with respect that they were wrong.

27. In *R (Anton)*, Sir James Munby said, at paragraph 33:

> "33... A judge of the Family Division cannot in the exercise of his family jurisdiction grant an injunction to restrain the Secretary of State removing from the jurisdiction a child who is subject to immigration control – even if the child is a ward of court. The wardship judge cannot restrain the exercise by the Secretary of State for the Home Department of his power to remove or deport a child who is subject to immigration control…
>
> 34 This does not mean that the family court cannot make a residence order in respect of a child who is subject to immigration control or cannot make such a child a ward of court. Nor does it mean that the family court cannot make a care order in respect of such a child. What it does mean, however, and this is the important point, is that neither the existence of a care order, nor the existence of a residence order, nor even the fact that the child is a ward of court, can limit or confine the exercise by the Secretary of State of his powers in relation to a child who is subject to immigration control'.

28. In *GD (Ghana)*, having once more rehearsed the earlier case law and his own words in *R (Anton)*, Sir James said:

> "48. It should go without saying, but I fear there is need to spell out what ought to be obvious: exactly the same principle now applies in relation to child arrangement orders as applied previously in relation to residence orders.
>
> 49. So far as I am aware, none of these principles have ever been challenged or doubted. Is it too much to demand that people pay more attention to them?
>
> 50. The fact that, in law, the Secretary of State is not bound by an order of the Family Court, as it now is, or of the Family Division, does not, of course, mean that she can simply ignore it. As Hoffmann LJ said in *ex p T*, 297,
>
> > "Clearly, any order made or views expressed by the [family] court would be a matter to be taken into account by the Secretary of State in the exercise of his powers. If he simply paid no attention to such an order, he would run the risk of his decision being reviewed on the ground that he had failed to take all relevant matters into consideration."
>
> 51. Be that as it may, the fact is – the law is – that the Secretary of State when exercising her powers of removal or deportation is *not* bound by any order of the Family Court or of the Family Division and that the Secretary of State, if she wishes to remove or deport a child or the child's parent, does *not* have to apply for the discharge or variation of any order of the Family Court of Family Division which provides for the child or parent to remain here."

29. In order to justify the strong position that she had taken, Ms Monaghan drew a firm distinction between FGM protection orders and CA 1989, s 8 orders and wardship orders with which the existing case law was concerned. FGM protection orders safeguard bodily integrity in circumstances where Article 3 ECHR may be invoked, as opposed to CA 1989, s 8 and the wardship jurisdiction which is limited to matters concerning the child's general welfare. It is the engagement of Art 3 which establishes the crucial distinction between FGM cases and the previous welfare-based authorities.

30. The mother's case is that Parliament has given the task of conducting risk assessments in FGM cases to the family court, rather than the FTT, and, in consequence of the State's duties under Art 3, there is a positive obligation (to which there is no exception) on the family court to undertake such a risk assessment and for it to be respected by the Secretary of State and within the Immigration Tribunal process.

31. Ms Monaghan further submitted that the High Court has a general supervisory jurisdiction over executive decision-making and has the power to grant injunctive relief. The power to grant an FGM protection order falls in line with these supervisory powers and should be exercised, indeed, she submitted, to decline to do so would violate Article 6 ECHR.

32. Finally Ms Monaghan echoed the submissions of the local authority in relation to the different roles of the Family Division and Asylum and Immigration Tribunals and the Home Office by highlighting the different weight accorded to the interests of the child, the separate representation of the child afforded in the family courts and the higher level of scrutiny as to the fact-finding exercise provided by the family courts. In this regard, Black LJ's description in Re *H (A Child)* [2016] EWCA Civ 988 is relevant:

> "25. In approaching an asylum/humanitarian protection claim, the Home Office looks to see whether the person concerned has a well-founded fear of persecution or is at real risk of serious harm for a non-Convention reason. The approach to risk is not the same as that taken in a family case. In a family case, establishing risk is a two-stage process. First, the court considers what facts are established on the balance of probabilities; then it proceeds to consider whether those facts give rise to a risk of harm, see *Re J (Children)* [2013] UKSC 9. In contrast, in an asylum/humanitarian protection claim, the material presented by the claimant is looked at as a whole with a view to determining whether there is a well-founded fear of persecution or substantial grounds for believing that a person would face a real risk of serious harm, a reasonable degree of likelihood of serious harm being what is required. There is no comparable process of searching for facts which are established on the balance of probabilities."

33. The Secretary of State's position from the outset of involvement in these proceedings has been that a judge of the Family Court or in the Family Division has no jurisdiction to injunct the Secretary of State's exercise of immigration powers. It is thus submitted that the orders made by HHJ Richards were made in excess of jurisdiction and should be discharged. However, the Secretary of State agreed not to set new removal directions pending this hearing.

34. Mr McKendrick and Ms van Overdijk maintain the Secretary of State's core submission that a judge in family proceeding has no jurisdiction to injunct the

Secretary of State's exercise of her immigration powers. They also argue that the family courts must respect any decision of the FTT/UT in respect of the risk of FGM in the country of return and consider that as part of their analysis of all the circumstances in determining whether to make an FGM protection order. This would mean that where the FTT has dismissed the risk of FGM, the family courts are still required to consider any application for an FGM protection order but the starting point must be whether, in light of the FTT decision that the risk does not provide a basis for the person to remain in the UK, there is any scope for an order to provide assistance. Whilst in exceptional circumstances the family courts may take a different view to the immigration tribunals, this should be rare, and the court would need to identify a material basis for that conclusion. No such basis arises in the present case and Mr McKendrick therefore seeks the discharge of the injunctive relief currently directed against the Secretary of State.

35. Further, Mr McKendrick submits that, in terms of local authority obligations, a local authority properly carries out its statutory duty in taking steps to inform itself of the immigration status of an individual and considering this and any decision making under the Immigration Acts as part of its assessment of the risk of FGM.

36. In his oral submissions, Mr McKendrick stressed the importance that the Secretary of State attaches to the issue of FGM, which is, he said, a barbarous act. The duty to make decisions in asylum cases was given to the Secretary of State, but the asylum process and the court process under the FGMA 2003 are intended to be complementary. There is, however, a firm demarcation between the jurisdiction of the family court and the immigration process. The Secretary of State relies upon the clear and authoritative decisions of the Court of Appeal which establish that the family court does not have jurisdiction to injunct the Secretary of State in the exercise of the asylum jurisdiction and this applies to cases of FGM just as it does to any other family proceedings.

37. Mr McKendrick submitted that if a judgment of the family court in the course of proceedings under the FGMA 2003 included a finding of a real risk of A suffering FGM then this would be considered by the Secretary of State under the terms of paragraph 353 of the Immigration Rules:

> '353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
> (i) had not already been considered; and
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.'

38. Where the family court carries out its role in determining an application for an FGM order and, in the course of doing so, evaluates the risk, the complementary system operates by the Secretary of State then considering whether the outcome of the family

court process amounts to a fresh claim under Rule 353. Mr McKendrick submitted that in that manner the State's obligations under Art 3 were satisfied.

39. On behalf of A, Ms Cronin and Ms Kakonge drew attention to the fact that the children's guardian reserved her position as to the appropriate order but submitted that A is a child in need of protection. Ms Cronin pointed to the words of Lord Scarman in *Re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791 to demonstrate the well-established jurisprudence relating to intersecting areas of practice in which family courts, immigration tribunals and the Secretary of State are involved:

> "The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority."

Ms Cronin submitted that an examination of the case law identified principles and guidance suggesting that, in intersecting cases, each jurisdiction should undertake enquiries and make their own determinations and findings.

40. Ms Cronin looked in more depth at the FTT decision in this case and pointed out that it is the mother's appeal rights which are exhausted and not the child's, as A had not submitted a separate asylum claim. The FTT judge had no jurisdiction to determine A's status and was wrong to state that A did not qualify for refugee status. As A's own appeal rights are not exhausted, there is solid advantage to her in this claim in this family courts. Case law has made clear that local authorities play a key role in safeguarding girls from FGM. The multi-agency FGM guidance, read alongside the facts of this case, demonstrated that the intervention of this local authority was entirely appropriate, particularly when it can also be seen that the key risk factors flagged in the guidance were given scant regard within the immigration tribunals.

41. In the course of her oral submissions Ms Cronin echoed those on behalf of the Secretary of State. The family court will conduct its evaluation on a wider canvas than that considered within the asylum process and will look at, amongst other things, the family dynamics and the family's ability to protect the child. The findings of the family court can then, she submitted, be fed into the asylum and immigration decision making process.

42. In reply, Ms Monaghan submitted that reliance upon Rule 353 fell well short of what is required to meet the State's positive obligations under Art 3. This is partly because it is for the mother to apply for reconsideration under Rule 353, there is no guarantee that a parent will do (or be able to do) this in every case, with the result that the child may go unprotected. Given the singular quality of the harm that is likely to follow from FGM, reliance on the Rule 353 procedure is, she submitted, unacceptable in terms of Art 3.

Discussion and conclusion

43. I propose to take each of the three substantive issues identified by Newton J in turn.

(a) FGM court's power to injunct Secretary of State?

44. The authorities to which reference has been made firmly establish that in proceedings under the CA 1989 or in wardship proceedings the family court does not have jurisdiction to grant injunctive orders against the Secretary of State for the Home Department aimed at restricting his or her exercise of powers with respect to the regulation of immigration and asylum. The question raised in the present case is whether proceedings in the family jurisdiction under the FGMA 2003 are in a different category such that the court when making an FGM protection order does have power to restrain the Secretary of State from removing a person from the jurisdiction of the United Kingdom.

45. Ms Monaghan submits that there is indeed a distinction between FGM cases and other family proceedings. The distinction is said to arise from ECHR, Art 3 which, it is accepted by all parties, imposes a positive obligation upon the State to take steps to protect an individual from 'inhuman or degrading treatment'.

46. It is, again, common ground that FGM is treatment which is highly likely to amount to a breach of Art 3. The purpose of the FGMA 2003, which establishes criminal liability which can attract a sentence of up to 14 years imprisonment, is to outlaw the practice of FGM. The Act gives the Family Court wide-ranging and extensive powers to protect girls and women from being exposed to FGM either in this jurisdiction or abroad. An application for an FGM protection order must therefore be considered through the prism of Art 3.

47. Despite the ease with which Ms Monaghan is able to establish FGM within the context of Art 3, it is not possible to travel with her to the next stage of her argument which is that, because FGM engages Art 3, the family court has in FGM protection order cases jurisdiction to injunct the Secretary of State in contrast to the court's inability to do so in any other family proceedings.

48. Firstly, although by focusing on one specific behaviour which is very likely to engage Art 3, FGM has to be seen in that context, it is the case that many, possibly very many, asylum cases will also involve an alleged risk of behaviour which may also fall within Art 3. There is, however, no suggestion in any of the authoritative judgments on this issue to the effect that there is an exception to the blanket prohibition on the family court granting orders against the Secretary of State where a risk of Art 3 treatment has been established by findings in the family court. On the contrary, the words of Lord Scarman in *Re W*, of Hoffmann LJ in *ex parte T* and of Sir James Munby in *Re A*, *R (Anton)* and *GD (Ghana)* are firmly couched in terms of structure and principle, with no contemplation of any exception.

49. As Lord Scarman, Hoffmann LJ and Sir James Munby separately make clear, the Secretary of State and the family courts are each operating a different and entirely distinct jurisdiction that has separately been entrusted to them by Parliament. Whilst, as Mr McKendrick submitted, the two jurisdictions may be complementary, they are wholly separate with no potential for any structural crossover. Notwithstanding the probable engagement of Art 3, there is simply no jurisdictional space in the structure that has been created by Parliament in which the family court can reach across and directly interfere in the exercise by the Secretary of State's exclusive powers with respect to the control of immigration and asylum.

50. Secondly, in the light of the clear and well-established authority on the point, if Parliament had intended to create an exception with respect to the family court's jurisdiction under the FGMA 2003, one would have expected the Act to have contained an express provision to that effect.

51. Thirdly, the discharge by a State of its positive obligations under Art 3 is to be contemplated by looking at the operation of the State's engagement with the issue as a whole. In this regard, I accept the Secretary of State's analysis of the Family Court's FGMA jurisdiction being complementary to the separate scheme regulating immigration and asylum operated by the Secretary of State and specialist tribunals. Where a family court has undertaken a risk assessment with respect to FGM relating to a family which is also the subject of immigration control, then the Secretary of State and the tribunals will take account of that assessment when making any relevant determination, or, if the family proceedings have (as here) followed the immigration process, may re-consider the immigration decision under Rule 353.

52. Although this court heard submissions that the complementary scheme that has been described would fail to discharge the State's duties under Art 3, such submissions were neither expanded upon nor supported by reference to any detailed evidence of any failure. To succeed in establishing the need for the family court to have jurisdiction to prevent the Secretary of State from exercising her jurisdiction to remove an individual, it is not sufficient, in my view, to indicate that it might be helpful or desirable for such a jurisdiction to exist; what is required is evidence that, without the family courts having the power to injunct, the State would plainly be in breach of its obligations under Art 3. In short, the jurisdiction for the family court to injunct the Secretary of State in the exercise of her immigration and asylum jurisdiction could only be established as an essential element to meet the State's Art 3 obligations if there is clear evidence that this is necessary.

53. The first issue raised is therefore answered by holding that there is no jurisdiction for a family court to make a FGM protection order against the Secretary of State for the Home Department to control the exercise of her jurisdiction with respect to matters of immigration and asylum.

54. The extent of the family court's jurisdiction in such matters is to invite the Secretary of State and/or the relevant tribunals to consider any determinations made by the court in FGMA proceedings.

(b) Relevance of previous FTT evaluation in Family Court risk assessment

55. Turning to the second issue, namely the role of the family court in assessing risk in FGMA proceedings where the risk has previously been assessed by the FTT, I am unable to accept the Secretary of State's submission that an FTT assessment must be the 'starting point' or default position for the court and that the court should only deviate from the FTT assessment if there is good reason to do so.

56. The Secretary of State's submission is not supported by any authority. In fact, as the helpful observations from Black LJ (as she then was) in *Re H* (see paragraph 32 above) demonstrate, the approach to risk assessment in a family case is a different exercise from that undertaken in the context of immigration and asylum. The family court has a duty by FGMA 2003, Schedule 2, paragraph 1(2) to 'have regard to all the

circumstances' and, to discharge that duty, the court must consider all the relevant available evidence before deciding any facts on the balance of probability and then moving on to assess the risk and the need for an FGM protection order. Although the family court will necessarily take note of any FTT risk assessment, the exercise undertaken by a FTT is not a compatible process with that required in the family court. It is not therefore possible for an FTT assessment to be taken as the starting point or default position in the family court. The family court has a duty to form its own assessment, unencumbered by having to afford priority or precedence to the outcome of a similarly labelled, but materially different, process in the immigration jurisdiction.

(c) The duty of a local authority to investigate

57. I can take the third issue very shortly as there is no dispute on the point before this court. A local authority has duties to safeguard and promote the welfare of children in its area who are in need under CA 1989, s 17(1) and s 47(1)+(3) [in England] and the Social Services and Well-being (Wales) Act 2014, s 21 [in Wales]. If, on investigation, the authority determines that a FGM protection order is necessary, it will issue an application.

58. The local authority in the present case acted entirely properly in the investigation and instigation of proceedings. Indeed, given the tight timetable that they were told of, they acted with commendable and appropriate speed.

Outcome

59. It follows that clauses 2 and 3 in the order made on 1 October 2018, which sought to injunct the Secretary of State in the exercise of her powers with respect to immigration and asylum, must be discharged. They will be replaced with a request to the Secretary of State to restrain enforcement of the immigration decisions in this case until the conclusion of the FGMA application and thereafter to re-consider the immigration determination in the light of any risk assessment undertaken by the family court.