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

Female Genital Mutilation Protection Orders – A Balancing Act between Safeguarding against the Risk of FGM and Other Fundamental Rights of the Child

Question(s) at stake:

Whether a local authority's application for a Female Genital Mutilation Protection Order (FGMPO) prohibiting the removal of the female infant from the UK to Sudan should be granted. Whether the FGMPO's interference with the rights of the child and those of her family under Article 8 of the ECHR is justified to protect her rights under Article 3 of the ECHR.

Outcome of the ruling:

The High Court granted the local authority a FGMPO to prevent the infant from travelling with her mother to Sudan. The child faced a real risk of undergoing FGM in Sudan, which her mother was determined to protect her from but would have been unable to do.

The state, through its courts, has a positive obligation to take all reasonable preventive measures to protect a person at risk of FGM. The FGMPO's interference with the rights of the child and those of her family under Article 8 of the ECHR was a necessary measure to safeguard the child from treatment contrary to her rights under Article 3.

Topic(s):

- The Human Body

Keywords:

- Balancing act
- Bodily practices

- Female Genital Mutilation (FGM)
- Genital modifications
- Genital modifications
- Right to physical integrity
- Right to respect for family life
- Right to respect for private life
- Rights and freedoms

Tag(s):

- Gender
- Female genital mutilation protection orders

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Country:

United Kingdom

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A Local Authority v M [2018] EWHC 870 (Fam)

Link to the decision:

http://www.bailii.org/ew/cases/EWHC/Fam/2018/870.html

ECLI:

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Date:

19 April 2018

Jurisdiction / Court / Chamber:

High Court of Justice (Family Division)

Remedy / Procedural stage:

FGM Protection Order

Previous stages:

No information found.

Subsequent stages:

No information found.

Branches / Areas of law:

Family law

Facts:

The case concerns the application for a FGMPO filed by a local authority to prevent an infant, N, from travelling to Sudan with her mother, M.

N was born in the UK. Her parents, M (mother) and F (father), were born in Sudan. M gained British citizenship following an application for asylum and held a UK passport only. F also applied for asylum in the UK but was unsuccessful. M and F had lived in the UK for more than ten years and had seven children together, six of whom were boys. N was their only female child.

During the 2017 summer school holidays, the family travelled to the Middle East, and from there to Sudan, where both sides of the extended family lived. The family's original intent was to return to the UK. However, during the stay, F decided to remain in Sudan. M was strongly opposed to F's decision. She had fled Sudan as a refugee and believed the UK offered better opportunities for her and her family. F refused to allow M or the children to return to the UK and locked away the children's passports in a safe to prevent them from travelling.

M, who at this stage was heavily pregnant with N, persuaded male members of their extended family to convince F to allow her to travel to the UK. M's request was based on the argument that she would have access to the best medical care available to her during labour. M had already experienced childbirth complications in the past. F reluctantly agreed with the plea.

Upon return to the UK, M contacted the social services. She maintained that she was scared of her husband's family, and that she had "escaped" Sudan with her unborn baby who would be at a real risk of undergoing FGM in Sudan. Having herself undergone FGM, M was very much opposed to the practice and believed F would succumb to pressure from his family and permit the procedure on N. The social services assessed M on 8 December 2017 and provided her with refuge accommodation because she raised concerns about the fact that F had family members in the UK. M said she was fearful of F's family following a previous incident during which F's sister removed their four-year-old son during the night while M was asleep in order to have him undergo a procedure to remove his "palatine uvula (the flesh at the back of the throat)" (para. 20). In the end, the procedure was performed on the child against the beliefs and the wishes of his parents.

During the meeting on 8 December, M recounted to the social services that she had purchased a ticket to the UK with the assistance of her mother and brother. Upon return to her family home in the UK, she learnt that it had been emptied of all their belongings by members of F's family. She also recounted that F's family had gained access to M's personal documents, including her bank card, from which money was diverted to Sudan. In response, the local authority applied for a FGMPO to prevent N from travelling with her mother to Sudan.

The case was heard before the High Court of Justice (Family Division) on 30 January 2018. Mr Justice Hayden made the following main findings of fact:

- N would be at risk of FGM upon return to Sudan. The risk would be greatest when N would be between five and nine years old (according to country background evidence);
- M was determined to protect N from undergoing FGM. However, she would be powerless to do so in Sudan;
- M loved and respected her husband, and wanted the family to live in the UK;
- F behaved lovingly and responsibly towards M in the UK, but violently and controllingly in Sudan;

- F kept the older children's passports at a bank in Sudan, which M had no access to;
- F was unaware of the judicial proceedings in relation to the FGMPO. He was told by M that they were unable to travel back to Sudan because N was being treated in hospital. To this end, M "sent to F a photograph of a baby in an incubator" (para. 10). F did not entirely accept M's account of N's alleged illness.

Mr Justice Hayden did not deliver a judgement due to his concern about F's manipulative seizure of his older children's passports. For example, Mr Justice Hayden concluded that, without consulting or informing M, F and his family organised a permanent relocation to Sudan when the family had left the UK in summer 2007. The Judge's conclusion was based on the fact that all belongings had been removed from M's and F's family home in the UK and money had been transferred from M's UK bank account to Sudan by F's family).

The case was recalled due to some dispute regarding M's evidence. By the time of the second hearing on 22 February 2018, M had significantly modified some parts of her account. She now claimed that male members of "the wider family were progressive in their attitudes" towards FGM and some of the family's women were not circumcised (para. 15).

However, the local authority maintained nonetheless that N was at risk of FGM upon return to Sudan and that the state had a responsibility to protect the child against such risk pursuant to section 3A of the Female Genital Mutilation Act 2003 (FGMA 2003).

The case was heard before the High Court of Justice (Family Division) on 2 and 8 March 2018 with a view to rule on whether the FGMPO applied for by the local authority concerning N was justified and whether it ought to be approved. At the hearing, M acknowledged that N's rights under Article 3 of the ECHR were protected by the state. However, M argued against the FGMPO, which would involve a travel ban, on the basis that it would infringe on N's rights under Article 8. Namely, she would be unable to have a direct relationship with her father and

siblings. Thus, the children's, M's and F's rights under Article 8 would be breached.

The relevant legislation for the purposes of this hearing is set out as follows:

- In the UK, FGM is a criminal offence punishable by up to 14 years of imprisonment under the *Female Genital Mutilation Act 2003;*
- FGMPO applications can be submitted under *Schedule 2 of the 2003 Act* (as inserted by the Serious Crime Act 2015, s.73);
- A local authority is a "relevant third party" for the purposes of the 2003 Act, in accordance with the Female Genital Mutilation Protection Order (Relevant Third Party) Regulations 2015 (SI2015/1422).

Ruling:

Regarding N's risk of FGM in light of M's modified account

- N was at real risk of FGM in Sudan. (para. 8)
- Mr Justice Hayden concluded that M had sought to downplay the risk of F and his family performing FGM on N because she was missing her children in Sudan, and that the actual risk of FGM had not diminished. It had been the children's first time living in Sudan, one of them had contracted malaria in her absence, and they communicated frequently via WhatsApp. The separation between the mother and her older children had caused M extreme distress. As such, Mr Justice Hayden found "entirely unconvincing" M's modified claims about the presence of more progressive views towards FGM within her and her husband's extended family. (paras. 15, 21)

Regarding Article 3 of ECHR

- FGM goes against one's rights under Article 3 of ECHR, which states that "*no one shall be subjected to torture or to inhumane or degrading treatment or punishment"*. Consequently, the risk of FGM faced by N is to be evaluated through the prism of the ECHR. (*K and Fornah* followed). (paras. 22-24)

- Article 1 of the ECHR imposes a positive duty on the UK to prevent N from being subjected to inhumane or degrading treatment. The obligation to protect N extends beyond the UK's jurisdiction (*ISSA v Turkey* [2004]; *Ocalan v Turkey* [2005]*; *Al-Skeini and others v Secretary of State for Defence* [2007]). (paras. 26–27)

- What is expected of the UK is not to undertake an unduly burdensome obligation, but to do "all that could reasonably be expected" to protect N against the risk of treatment contrary to her rights under Article 3 (*Osman v United Kingdom* [2000]; *Officer L* [2007]; *E v Chief Constable of the Royal Ulster Constabulary (HL)(NI)* [2008]). (paras. 29–36, 38, 52)

  This involves proactively taking preventive measures to safeguard N from the risk of FGM (*Cruz Varas v Sweden* [1991]; *Vilvarajah v United Kingdom* [1991]; *Chahal v United Kingdom* [1996]; *A and Osman 29* [1998]; *Z v United Kingdom* [2002]). (paras. 28–30)

  Summary of the obligations stemming from Article 3: "All this makes it very clear that the State is required to take active measures, designed to ensure the protection of the individual's Article 3 rights. Such protection has to provide adequate protection from the identified risk. The failure to provide protection which can objectively be assessed as adequate will itself constitute a violation of Article 3. What is adequate however, will require to be assessed on a case by case basis, in line with the approach on the Strasbourg court." (para. 44)

Regarding the principle of proportionality in Article 8 ECHR

- The FGMPO would affect N's rights under Article 8. N is "entitled to the opportunity of a relationship with her brothers, father and, in principle, her extended family" (para. 39). However, N's rights under Article 8 are not to be considered alongside her Article 3 rights because the latter are absolute. (*Re: X (A Child) (Female Genital Mutilation Protection Order)* [2017] considered; *A v British Broadcasting Corporation (Secretary of State for the*

Home Department intervening) [2015] applied). (paras. 24, 39, 40)

- The interference with the family's rights under Article 8 "must be limited to that which is necessary to protect" N's Article 3 rights (para. 41). This is an exercise "to be assessed on a case-by-case basis" (*Commissioner of Police of the Metropolis v DSD and Another* [2018] followed) (paras. 41–43).

Regarding the FGMPO application

- "[F]ailing to protect a girl from the risk of FGM" is an offence pursuant to section 3A of the 2003 Act (para. 14). As a person of responsibility for N, M would not be guilty of the offence where it is established that she did all reasonably within her power to obviate the risk of FGM. (para. 14)
- In assessing whether the application of the FGMPO would be adequate and justified given its interference with Article 8 rights, several factors are important to be considered in relation to M's ability to protect N against the risk of FGM in Sudan. These include the family's background and the previous ability of the mother to have her way against her husband's or his family's will. To this end, F's seizure of the children's passports and M's previous inability to prevent F's sister from secretly performing a mutilation on her son without her consent is of relevance. (paras. 20, 54)

In light of the above, Mr Justice Hayden granted the FGMPO as requested by the local authority. He found that N would face a real risk of FGM upon return to Sudan, which M would be unable to protect her from, despite M's determination and willingness to do so. (paras. 54, 55, 57)

Main quotations on cultural or religious diversity:

- "All have agreed, who could not, that FGM is an abomination. It is inhuman, degrading and torturous to its victims." (para. 16)
- "the HM Government: Multi-Agency Statutory Guidance on Female Genital Mutilation […] summarises both the short and long term consequences of

this barbaric practice. It also sets out the complex justifications and motivations for it. These include: bringing status and respect to the girls; preservation of virginity/chastity; social acceptability for marriage; cleanliness, hygiene and aesthetic desirability; the warning off of bad luck or evil spirits. Whilst all right thinking men and women would deprecate this reasoning it is important to understand it and acknowledge it in order properly to evaluate the issues and risks." (para. 17)

- "Before I consider the application of the case law it is necessary to identify the data and analysis provided by UNICEF in relation to the Sudan […] to the various graphs surveying the prevailing attitudes in the Sudan towards FGM as well as the extent of the practice. […] a number of key statistics emerge: a girl is likely to be at greatest risk between the ages of 5 and 9 years of age; 90% of girls and women in Sudan have undergone FGM. […] It is also statistically important to note that, notwithstanding the extent of the practice, slightly more than half of women and girls are opposed to it. This indicates that their own wishes are frequently not able to prevail." (para. 25)
- "Though I do not question M's determination [to protect N from undergoing FGM and to reunite her family in the UK], I regret to say I do doubt her capacity […] M's status as a mother and wife has been subjugated already, in the recent past, to stronger cultural imperatives. It is also very clear that as a woman, in her family, she does not enjoy equal respect alongside her husband nor is her autonomy valued by the extended family." (para. 54)
- "N, in common with the prevailing culture in the Sudan, would be most at risk in the age group 5-9 years of age. This is the bracket in which, statistically, most Sudanese girls are subjected to FGM. […] M herself was subjected to the process when she was 9 years of age i.e. within the window which is most culturally normative. However, I very strongly suspect that M's views on the practice are known by her husband but may not be shared by him with the same commitment. M's rejection of much that she sees as negative or retrograde in Sudanese culture is clear for all to see. Thus there

is a risk that the family might act precipitously. This I determine to be a real risk and not merely a speculative one." (para. 55)

Main legal texts quoted in the decision:

International legislation

- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (adopted on 4 November 1950, entered into force on 3 September 1953) (ECHR)

Domestic legislation

- Female Genital Mutilation Act 2003 (FGMA 2003)
- Female Genital Mutilation Protection Order (Relevant Third Party) Regulations 2015 (SI2015/1422)
- Serious Crime Act 2015 (c.9, s. 72(2) and 73)

Cases cited in the decision:

UK cases

FGM and Article 3 ECHR

- *K v Secretary of State for the Home Department: Fornah v Home Secretary Home Department* [2006] UKHL 46

FGM Protection Order

- *Re: X (A Child) (Female Genital Mutilation Protection Order)* [2017] EWHC 2898

European Court of Human Rights cases

- *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26
- *Chahal v United Kingdom* [1996] 23 EHRR 413
- *Commissioner of Police of the Metropolis v DSD & Another* [2018] UKSC 11
- *Cruz Varas v Sweden* [1991] 14 EHRR 1

- *E v Chief Constable of the Royal Ulster Constabulary (HL)(NI)* [2008] UKHL 66
- *ISSA v Turkey* [2004] 41 EHRR 567
- *Ocalan v Turkey* [2005] 41 EHRR 985
- *Officer L* [2007] 1 WLR 2135
- *Osman v United Kingdom* [2000] 29 EHRR 245
- *Vilvarajah v United Kingdom* [1991] 14 EHRR 248
- *Z v United Kingdom* [2002] 34 EHRR 3

Commentary

Female Genital Mutilation Protection Orders – A Balancing Act between Safeguarding against the Risk of FGM and Other Fundamental Rights of the Child

This decision is part of a judicial trend in relation to FGM-related offences pursuant to the Female Genital Mutilation Act 2003. What makes it distinct is that it marks the first successful application of a local authority for a FGMPO since they were first introduced by the Serious Crime Act 2015. In particular, its relevance lies in the careful cultural assessment undertaken by the judge culminating in an act of “delicate balance” (para. 42 of the judgment) between the competing rights of the child and her family under the ECHR.

An FGMPO is a civil order which may be made by a Family Court for the purposes of protecting those at risk of undergoing FGM (Home Office 2016; Home Office 2018:8). As laid down in Schedule 2 of the 2003 Act, an FGMPO may contain “such prohibitions, restrictions or requirements” and “such other terms as the court considers appropriate”. As such, the courts enjoy significant discretion in awarding a protective order and the conditions under which it is granted. However, what is notable in this particular judgement is Mr Justice Hayden’s decision to carry out his assessment through the lens of the ECHR, in particular of Articles 1, 3, and 8. A rights-based approach was thereby adopted calling for the courts to ensure that, where a protective order is deemed necessary, its conditions do not interfere more than necessary with the applicant’s private life and freedom of movement.

To this end, the Judge reasoned that although not expressly stated in the 2003 Act, Article 3 of the ECHR is intrinsic to the statute because FGM is a human rights issue that is torture-like in its manifestations. The Judge strengthened his reasoning by referring to the House of Lord's observations in *K and Fornah* [2006], a landmark decision in which women at risk of FGM in Sierra Leone were recognized for the first time as members of a "particular social group" for the purposes of granting protection under the 1951 Refugee Convention.

More specifically, the Judge quoted paragraph 94 in *K and Fornah*, which cites Baroness Hale's description of FGM as "a human rights issue […] because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment" and her listing of the multitude of international legal instruments condemning the practice. These include the ECHR, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the Convention on the Rights of the Child. The judge reinforced his reasoning by conducting a comparative analysis of several decisions rendered by European Court of Human Rights (ECtHR) on state obligations pursuant to Article 1 of the ECHR and the test of proportionality in relation to competing ECHR rights. This approach is consistent with the UNHCR's position in its FGM Guideline Note (2009:7), which recognizes FGM as a form of persecution and cites Article 3 of the ECHR when arguing that FGM constitutes a gross infringement of a person's rights (Middelburg and Balta 2016; Greenman 2015).

Mr Justice Hayden proceeded to undertake a careful assessment of the cultural and social justifications for the practice (see Middelburg and Balta 2016), as well as the country and family background relevant to the case. The starting point of the analysis was the UK government's Multi-Agency Statutory Guidance on Female Genital Mutilation (2016) – which spells out the significant short and long-term negative consequences of the procedure for those undergoing it – and data analysis provided by UNICEF (2016) on the age brackets within which females typically undergo FGM in Sudan. The Judge also noted the evidence given by M on the consequences FGM had had on her throughout her life, describing it as

“shocking” and “not easy [to] forget” (para. 16). This led the Judge to conclude that FGM is a “barbaric practice”, “an abomination”, and “inhuman, degrading and torturous to its victims” (paras. 16-17). Also worthy of mention is the insightful manner in which the judge was able to establish the vulnerability of the infant’s mother, despite M’s attempts to mask it.

Thus, the judge engaged with both country background and factual evidence to conclude that the FGMPO was necessary. M would be unable to protect her daughter against FGM because M’s status as a woman in Sudan was not equal to that of her husband and his family who wanted the infant to undergo the procedure (Christou and Fowles 2015; Senyonjo 2007).

In light of the above, Mr Justice Hayden’s analysis of Article 3 rights in the context of applications for FGMPOs has been regarded as an exemplary judicial reasoning and has been applied in subsequent decisions concerning FGMPOs, including the most recent case of *Re M (Female Genital Mutilation Protection Order: No Order on Application)* [2019]. In its first opportunity to consider the application of an FGMPO, the Court of Appeal noted at paragraphs 23 and 24 of *X (A Child FGMPO)* [2018] that the 2003 Act was broad and did not provide guidelines for a court to follow when determining whether and how it should exercise its power to grant an FGMPO. As such, following the Court of Appeal’s scrutiny of Mr Justice Hayden’s reasoning, the case was given a positive judicial consideration and remains good law.

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

Reports cited in the judgement:

- Home Office, *HM Government: Multi-Agency Statutory Guidance on Female Genital Mutilation* (Home Office 2019), available at <<https://www.gov.uk/government/publications/multi-agency-statutory-guidance-on-female-genital-mutilation>> accessed on 02 December 2019.

- UNICEF, *Sudan: Statistical Profile on Female Genital Mutilation* (UNICEF 2016), available at <<https://data.unicef.org/resources/fgm-country-profiles/>> accessed on 02 December 2019.

Guidelines and reports cited in the commentary:

- HM Government, *Multi-agency Statutory Guidance on Female Genital Mutilation* (Home Office 2016)
- Home Office, *Gender Issues in the Asylum Claim* (Home Office 2018)
- Home Office, *FGM Protection Order: Fact Sheet* (Home Office 2016)
- United Nations High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* (UNHCR 2009) (UNHCR FGM Guideline Note)

Academic literature cited in the commentary:

- Christou, Theodora and Sam Fowles. 2015. “Failure to Protect Girls from Female Genital Mutilation”. *The Journal of Criminal Law* 79(5): 344-357.
- Guiné, Anouk and Francisco Javier Moreno Fuentes 2007. “Multiculturalism and Citizenship in the United Kingdom: The Case of Female Genital Mutilation’”. In Maureen Tobin Stanley and Gesa Zinn (eds), *Female Exiles in Twentieth and Twenty-first Century Europe* Volume 1, 223-248. New York: Palgrave Macmillan.
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- *(Female Genital Mutilation Protection Order: No Order on Application)* [2019] EWHC 527 (Fam)

Further readings

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- Senyonjo, Manisuli. 2007. “Culture and the Human Rights of Women in Africa: Between Light and Shadow”. *Journal of African Law* 51(1): 39-67.
- Steiner, Henry and Philip Alston (eds). 2007. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press.

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