Female Genital Mutilation: *Re B and G*

In *Re B and G (Children) (No 2)* [2015] EWFC 3, [2015] 1 FLR (forthcoming) care proceedings were brought by a local authority in relation to two children, B, a boy, now aged 4 and G, a girl, now aged 3. Both the mother, M, and the father, F, come from an African country. Proceedings commenced in November 2013, triggered by M's seeming abandonment of G in the street. B and G were placed in foster care. A separate judgment deals with all the other issues in the case (*Re B and G (Children)* [2014] EWFC 43).

This is the first time FGM has been raised in care proceedings. Because of the importance of this issue, this judgment is confined to FGM. Suspicion that G had been subjected to FGM first arose in November 2012 after blood was found in her nappy, a medical examination and report said there was no sign of any circumcision. The question was raised again in November 2013 when the foster carer reported G's ‘irregular genitalia'. Three expert reports by medical professionals were before the court, and all three experts gave oral evidence:

(1) Dr Alison Share, a Consultant Community Paediatrician at St James's University Hospital in Leeds;

(2) Dr Comfort Momoh MBE, a Registered Midwife employed by Guy's and St Thomas Hospital NHS Foundation Trust in London (she is not a medical doctor; her doctorate is an honorary doctorate from Middlesex University); and

(3) Professor Sarah Creighton, a Consultant Obstetrician and Gynaecologist at University College Hospital in London and Consultant Adolescent Gynaecologist at Great Ormond Street Hospital.

Female genital mutilation

Giving judgment in open court, Sir James Munby, President of the Family Division, adopts the World Health Organisation's classification of FGM which divides FGM into four major types. This case is concerned with type IV FGM, the least physically severe type of FGM: ‘Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.'

There is a distinction between the World Health Organisation (WHO) definition of FGM and the definition of FGM in the Female Genital Mutilation Act 2003 (the 2003 Act). In his judgment at para [11], Sir Justice Munby states that: ‘for the purposes of the criminal law what is prohibited is to “excise, infibulate or otherwise mutilate” the “whole or any part” of the “labia majora, labia minora or clitoris.” This brings within the ambit of the criminal law all forms of FGM of WHO Types I, II and III (including, it may be noted Type Ia). But WHO Type IV comes within the ambit of the criminal law only if it involves “mutilation” '. It is not clear whether Type IV constitutes mutilation. However, Sir Justice Munby goes on to state at para [70] that establishing whether FGM Type IV constitutes ‘significant harm' in family law is a separate issue to whether FGM Type IV is a criminal offence under the Female Genital Mutilation Act 2003. He adds that he is concerned with the family law aspect, and it is for the criminal court to determine whether Type IV constitutes mutilation for the purposes of the 2003 Act, as and when that matter arises.

The issues

The local authority's case was that G has been subjected to FGM, WHO Type IV, in the form of the scar adjacent to her left clitoral hood identified by Dr Share and Dr Momoh who both examined G with the naked eye. The local authority's case was initially that this constitutes

'significant harm' within the meaning of s 31 of the Children Act 1989 and this alone, assuming the parents were implicated, was sufficient to justify a care plan for the adoption of both children. After Sir James Munby queried this on the first day of the hearing, the local authority modified its position that it would not seek to persuade the court that such a finding without anything more would make adoption proportionate. There were three issues, which potentially required determination by the court:

(1) Was G subjected to FGM as alleged?

(2) If so, did this amount to significant harm?

(3) If so, what are the implications?

Issue (1): Was G subjected to FGM as alleged?

Both parents deny that G has ever been subjected to FGM. The question turns on the evidence of the three experts. Professor Creighton was unable to confirm the scar signaling FGM. Sir James Munby found Professor Creighton to be a reliable witness. In contrast, Dr Share and Dr Momoh were found to be unreliable witnesses. In his judgment, Sir James Munby found it impossible to rely upon Dr Share's and Dr Momoh's evidence of the presence of the scar indicating FGM. The local authority was unable on the evidence to establish that G either has been or is at risk of being subjected to any form of FGM.

Issue (2): If G was subjected to FGM as alleged, did this amount to significant harm?

Given the finding on issue (1), issue (2) falls away, however considering the importance of the case Sir James Munby dealt with issue (2) and (3). This will undoubtedly provide guidance for future cases involving FGM.

- Sir James Munby reiterated at para [68] that 'any form of FGM constitutes "significant harm" within the meaning of ss 31 and 100'. He cites Baroness Hale of Richmond in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 2 FLR 1075, at para [185], 'that any form of FGM, including FGM WHO Type IV, amounts to "significant harm" ' (para [67]).
- He then goes on to draw parallels between FGM and forced marriage as gross abuses of human rights that de-humanise people (para [57]).
- In his judgment, Sir James Munby distinguishes FGM from male circumcision within the provisions of s 31 of the Children Act 1989. Although FGM and male circumcision involve 'significant harm' pursuant to s 31(2)(a), the clear distinction between them is with respect to 'reasonable parenting' in accordance with s 31(2)(b)(i). FGM can never be a feature of reasonable parenting, whereas society and the law treat male circumcision as an aspect of reasonable parenting.

Issue (3): Implications

Sir James Munby concluded that:

> 'No generalisations are possible. Much will obviously depend upon the particular type of FGM in question, upon the nature and significance of any other 'threshold' findings, and, more generally, upon a very wide range of welfare issues as they arise in the particular circumstances of the specific case. Arriving at an overall welfare evaluation and identifying the appropriately proportionate outcome is likely to be especially difficult in many FGM cases. (para [75]) . . . The only further comment I would hazard is that local authorities and judges are probably well advised not to jump too readily to the conclusion that proven FGM should lead to adoption.' (para [77]).

The full judgment is freely available on the Family Law website: www.familylaw.co.uk.

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