Recent developments in the law relating to female genital mutilation

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The Serious Crime Act 2015 introduced Female Genital Mutilation Protection Orders, modelled on Forced Marriage Protection Orders, and just a few days after the Act came into force, orders were made in Re E (Children) (Female Genital Mutilation Protection Orders) *to safeguard three young Nigerian girls at risk of FGM. This commentary considers the facts of the case, which illustrate the risks that some young girls residing in the UK are exposed to; and the judgment, which reveals the benefits and the drawbacks of the law. The commentary then examines the problems that existed with the law prior to the Serious Crime Act 2015 and the reasons why the provisions of the Serious Crime Act 2015 that pertain to FGM were introduced. The paper concludes that the recent legislative reforms are to be welcomed and these, together with the package of measures that the Government has promised, should send a clear message that FGM will not be tolerated. But whether a significant reduction in its occurrence will be achieved as a result of the changes is questionable, given that previous efforts do not appear to have been successful.*

Introduction

Female Genital Mutilation (FGM) is defined by the World Health Organisation (WHO) to include: 'procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons'.[1] There are no health benefits to FGM; rather, the procedures can have serious immediate and long-term physical and psychological consequences.[2] According to the WHO, the practice is most common in western, eastern and north-eastern regions of Africa, in some Asian and middle-eastern countries and among migrants from these areas, including migrants to the United Kingdom.[3] It is difficult to assess the incidence of FGM, but it is thought that approximately 10,000 girls under the age of fifteen, 103,000 women aged between fifteen and forty-nine and 24,000 women over the age of fifty who have migrated to England and Wales are living with the consequences of FGM.[4] It is further estimated that over 20,000 girls under the age of fifteen, residing in the United Kingdom, are at risk of female genital mutilation each year.[5]

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1 WHO, *Fact Sheet No 241. FGM* (WHO, 2014): www.who.int/mediacentre/factsheets/fs241/em/. FGM is classified into four categories: Type I – clitoridectomy, Type II – Excision, Type III – Infibulation, and Type IV– other harmful procedures for example piercing.

2 Ibid.

3 Ibid.

4 A McFarlane and E Dorkenoo, *Female Genital Mutilation in England and Wales: Updated statistical estimates of the numbers of affected women living in England and Wales and girls at risk. Interim Report on Provisional Estimates* (City University London and Equality Now, 2014).

5 Home Office, *Female genital mutilation – the facts* (HO, 2011).

Specific legislation to tackle FGM has existed since the Prohibition of Female Circumcision Act 1985, which was repealed and replaced by the Female Genital Mutilation Act 2003.[6] Schedule 2 to the latter Act, which was inserted by the Serious Crime Act 2015, enables the courts to make Female Genital Mutilation Protection Orders, which are civil orders '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'.[7] The Act came into force on 17 July 2015 and just days later Hogg J granted an ex parte order to protect three young Nigerian girls living in London. The return hearing took place before Holman J on 24 July in the Family Division of the High Court. This commentary examines the facts in *Re E (Children) (Female Genital Mutilation Protection Orders)*,[8] which illustrate the risks that some young girls residing in the UK are exposed to, and considers Holman J's judgment, which reveals the benefits and limitations of the law. The paper then explores the problems that existed with the law prior to the Serious Crime Act 2015 and the reasons why the provisions of Serious Crime Act 2015 that pertain to FGM were introduced.

The facts in *Re E (Children) (Female Genital Mutilation Protection Orders)*

The applicant in this case was the mother of three girls aged twelve, nine and a half, and six when the case reached the High Court. Their parents are Nigerian citizens who met and married in Nigeria, which is one of the countries with a high concentration of female genital mutilation, with 25–50% of females subjected to the practice.[9] The mother stated that her husband is violent towards her and the children and regularly threatens to harm or kill them. The couple are now divorced and the girls live in London with their mother. The father lives in Nigeria but regularly visits England.

The mother's statement indicated that she had always known that her husband considered FGM to be 'inevitable and necessary' and in February 2015 he sent ceremonial robes to London in readiness for the procedure.[10] When the school holidays began, the father sent messages to the mother saying that he expected to see his children immediately. According to the mother, the father wanted the procedure to take place at the start of the school holidays so that the girls would have healed before the start of the new term.[11] The Multi-Agency Practice Guidelines on Female Genital Mutilation suggest that it is common practice to take girls of school age to the family's country of origin at the start of the summer holidays so that they can recover from the FGM procedure before returning to their studies.[12] The mother's statement also claimed that the two older girls had to be sent to their father as soon as possible, because he was angry that his eldest daughter was 'past the usual age for the procedure to happen'.[13] The age at which females undergo FGM varies according to the community in question, but 'the majority of cases of FGM are thought to take place between the ages of 5 and 8'.[14]

Hogg J granted the order on a 'without notice' basis, but because the father was only made aware of the return hearing a few hours before it took place, Holman J also treated the latter as a without notice hearing. The father would thus have the opportunity to make representations at a subsequent hearing on 11 August 2015.

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6 In Scotland the Prohibition of Female Genital Mutilation (Scotland) Act 2005 applies.
7 Female Genital Mutilation Act 2003, Sch 2, para 1(1).
8 [2015] EWHC 2275 (Fam), [2015] 2 FLR 997.
9 UNICEF, *Global databases based on data from Multiple Indicator Cluster Survey, Demographic and Health Survey and other national surveys 1997–2012* (UNICEF, 2013). NB It is a declining practice as several Nigerian states outlawed the practice after 1999 and in 2015 the Violence Against Persons (Prohibition) Act 2015 introduced a national ban.
10 *Re E (Children)*, above n 8, at para [5].
11 Ibid.
12 HM Government, *Multi-Agency Practice Guidelines: Female Genital Mutilation* (HM Government, 2014), at p 11.
13 *Re E (Children)*, above n 8, at para [5].
14 HM Government, *Multi-Agency Practice Guidelines: Female Genital Mutilation* (HM Government, 2014), at p 8.

Leave to apply for the order

Prior to deciding whether to extend the 'without notice' order granted by Hogg J, Holman J had to consider whether to grant the mother leave to apply for the order. Paragraph 2(2) of Schedule 2 to the Female Genital Mutilation Act 2003 provides that an application can be made by the person who is to be protected by the order, or by a relevant third party without leave of the court. Other third party applicants require leave under paragraph 2(3). The provisions thus mirror those relating to forced marriage protection orders contained in Part 4A of the Family Law Act 1996. Because the implementation date for the Serious Crime Act 2015 was brought forward, no regulations had been enacted to designate relevant third parties for the purpose of applying for FGM protection orders at the time the case was heard.[15] Local authorities have since been appointed as relevant third parties by the Female Genital Mutilation Protection Order (Relevant Third Party) Regulations 2015[16] and although most respondents to the Consultation on Female Genital Mutilation, which preceded the introduction of protection orders, were in favour of health care professionals also being appointed as relevant third parties,[17] this has not taken place. The explanatory memorandum to the regulations indicates that Ministers wished to 'follow the approach taken with regard to Forced Marriage Protection Orders'.[18]

Paragraph 2(4) of Schedule 2 provides that when the court is deciding whether to grant leave it must 'have regard to all the circumstances including . . . the applicant's connection with the girl to be protected and the applicant's knowledge of the circumstances of the girl'. Holman J did not hesitate to grant leave because 'the connection of the applicant with the girls concerned could not be a closer one, since she is their mother'.[19] Furthermore, 'her knowledge of the circumstances of the girls could not be more intimate or profound, since she is their mother and it is with her that they live'.[20] According to Holman J this was 'the plainest possible case in which to grant to the mother leave or permission to make this application'.[21] Indeed, if the mother had failed to take steps to protect her children, knowing they were at risk, and they were subsequently subjected to FGM, she could be prosecuted under section 3A of the Female Genital Mutilation Act 2003 (inserted by section 72 of the Serious Crime Act 2015) for failing to protect a girl under the age of 16 from a genital mutilation offence, as she is responsible for her daughters. The offence is subject to a maximum penalty of seven years in prison.

The decision

Paragraph 1(2) of Schedule 2 to the Female Genital Mutilation Act 2003 (as amended) requires the court to 'have regard to all the circumstances, including the need to secure the health, safety and well-being of the girl to be protected' when deciding whether to grant a protection order. On the basis of the mother's evidence, Holman J concluded that 'there is potentially, a very high risk . . . of this procedure being inflicted on one or more of these girls if they are not protected

15 *Re E (Children)*, above n 8, at para [16].
16 SI 2015/1422.
17 Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order. Summary of Responses* (MOJ, 2014), at p 10.
18 Ministry of Justice, Explanatory memorandum to the Female Genital Mutilation Protection Order (Relevant Third Party) Regulations 2015 (SI 2015/1422) (MOJ, 2015), at para 8.2.
19 *Re E (Children)*, above n 8, at para [17].
20 Ibid.
21 Ibid.

and made safe to the maximum extent possible'.[22] The order was thus justified and the girls' nationality and immigration status (the mother's visa had expired) did not affect their right to protection.[23]

Female genital mutilation protection orders can contain 'such prohibitions, restrictions or requirements' and 'such other terms, as the court considers appropriate for the purpose of the order'.[24] They can relate to conduct within and outside of the jurisdiction[25] and can apply to those who are or may become involved in committing or attempting to commit a genital mutilation offence against a girl[26] even if those persons are not expressly named as respondents.[27] Holman J repeated the term included in the 'without notice' order made by Hogg J restraining the applicant and respondent from removing any of the children from England and Wales until further order.[28] He also extended the condition that 'the respondent must not himself, or encourage, permit or cause any other people to (a) use or threaten violence against the applicant or children (b) intimidate, harass, threaten or pester the applicant or the children'.[29] Mr Samuel, acting for the applicant, further requested the inclusion of a provision preventing the father from coming within 100 metres of the children's place of residence or their school.[30] Holman J conceded that to 'prohibit the father from himself or by others practising enforced genital mutilation on these girls is not sufficient. He must, for the time being, be prohibited altogether from coming within a restricted radius of their home and when they return there next term, their school'.[31] However, Holman J emphasised that the provisions of the Female Genital Mutilation Act 2003 'which are very wide ones' must not 'get stretched to providing protection to somebody such as the mother herself in this case . . . If she in her own right needs protection from him, she has a different statutory remedy under the Family Law Act 1996'. He thus made it clear that the restrictions against the father are 'purely for the purpose of protecting these three girls from female genital mutilation and not for the purpose of protecting the mother from any feared violence from the father'.[32] Indeed, the order does not prohibit the father from coming within 100 metres of the mother herself. This is clearly correct as an FGM protection order is an order for the purpose of protecting a girl against the commission of a genital mutilation offence, or for the purpose of protecting a girl against whom any such offence has been committed, not an order for the purpose of protecting family members from domestic violence. However, the mother could have applied for a non-molestation order at the same time as the FGM protection order and the High Court could have made a non-molestation order of its own motion under section 42(2)(a) of the Family Law Act 1996 (as amended by the Serious Crime Act 2015), even if no such application has been made. Why such an order was not considered by the court, given that the mother made allegations of domestic violence, is not clear.

Paragraph 4(1) of Schedule 2 provides that 'a person who without reasonable excuse does anything that the person is prohibited from doing by an FGM protection order is guilty of an

22 Ibid, at para [14]. The immediate risk to the girls justified the order being made ex parte.
23 Ibid, at para [2].
24 Female Genital Mutilation Act 2003, Sch 2, para 1(3).
25 Ibid, para 1(4)(a).
26 Ibid, para 1(4)(b).
27 Ibid, para 1(4)(c).
28 *Re E (Children)*, above n 8, at para [24].
29 Ibid, at para [25].
30 Ibid, at para [26].
31 Ibid, at para [27].
32 Ibid, at para [27].

offence' which is punishable by up to five years in prison.[33] If the father of the three girls does anything prohibited by the protection order he will have committed an offence, provided that he is aware of the existence of the order.[34] Breach of an order also constitutes contempt of court but conduct that constitutes a breach cannot be punished under paragraph 4(1) and as contempt.[35] Again, the provisions of Schedule 2 to the Female Genital Mutilation Act 2003 replicate those contained in the Family Law Act 1996 pertaining to forced marriage (and in this instance, those relating to domestic violence). If the conduct that breaches the protection order constitutes FGM itself or amounts to aiding, abetting, counselling or procuring another to carry out FGM, a specific criminal offence is committed, which attracts a more severe penalty, as discussed below.

The offence of FGM

FGM was first made a specific crime by the Prohibition of Female Circumcision Act 1985, but there were problems with the legislation, as the offence was narrowly drafted.[36] Consequently, the 1985 Act was repealed and replaced by the Female Genital Mutilation Act 2003, section 1(1) of which provides that 'a person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris'.[37] It is not restricted to female circumcision, but the scope of offence is unclear as the word 'mutilate' is not defined in the statute. In *Re B and G (Children) (No 2)* (discussed below) Sir James Munby stated that section 1(1) prohibits WHO FGM Types I, II and III, but Type IV 'comes within the ambit of the criminal law only if it involves mutilation'.[38] Type IV FGM covers 'harmful procedures to the female genitalia for non-medical purposes eg pricking, piercing, incising, scraping and cauterizing the genital area'.[39] The President of the Family Division cited the Oxford English Dictionary definition of 'to mutilate' which is 'to deprive (a person or animal) of the use of a limb or bodily organ, by dismemberment or otherwise; to cut off or destroy (a limb or organ); to wound severely, inflict violence or disfiguring injury on'.[40] Based on this definition Type IV FGM constitutes mutilation for the purpose of the Female Genital Mutilation Act 2003 if there is a severe wound, violence or disfiguring injury. In many cases of Type IV FGM, these criteria will be satisfied, but there may be instances which do not involve a severe wound, violence or disfigurement. The President refused to determine whether Type IV FGM constituted mutilation for the purpose of the criminal law, as that is a matter for the criminal courts.[41] However, as the World Health Organisation has classified pricking, piercing, incising etc as a form a female genital mutilation, whether or not severe wounding, violence or disfigurement takes place, it can be argued that the offence contained in section 1(1) of the Female Genital Mutilation Act does cover Type IV FGM. Given that the objective of the legislation is to outlaw a practice condemned by the international community,[42] it should be interpreted in a manner that is consistent with the WHO definition. Although some might

33 Para 4(5) Schedule 2 to the Female Genital Mutilation Act 2003. 89% of respondents to the Consultation were in favour of treating breach of a protection order as a criminal offence. Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order. Summary of Responses* (MOJ, 2014), at p 12.

34 Female Genital Mutilation Act 2003, Sch 2, para 4(2).

35 Ibid, Sch 2, para 4(3) and (4).

36 Rahman and Toubia explain that the term female circumcision was used in international literature until the early 1980s. After this, the term female genital mutilation was introduced and became more widely used. A Rahman and N Toubia, *Female Genital Mutilation: A Practical Guide to Worldwide Laws and Policies* (Centre for Reproductive Law and Policy & Research Action and Information Network for Bodily Integrity of Women, 2000).

37 Section 6(1) provides that 'girl' includes 'woman'.

38 *Re B and G (Children) (No 2)* [2015] EWFC 3, [2015] 1 FLR 905, at para [11].

39 WHO, *Fact Sheet No 241. FGM* (WHO, 2014): www.who.int/mediacentre/factsheets/fs241/em/.

40 *Re B and G (Children) (No 2)* [2015] EWFC 3, [2015] 1 FLR 905, at para [12].

41 Ibid, at para [70].

42 See below.

suggest that it is inappropriate to criminalise parents who arrange Type IV FGM if the harm is relatively minor, it should be noted that that Type I FGM is often considered to be the least serious form of FGM and yet it is automatically illegal under the Female Genital Mutilation Act 2003.[43] Type I and II FGM are the most prevalent forms of the practice in Nigeria: it is therefore likely that the father's actions would be criminal if he arranged for his daughters to be subjected to FGM in Nigeria.[44]

The uncertainty surrounding the scope of section 1(1) means that it is unclear whether cosmetic genital piercing is an offence, as piercing constitutes WHO Type IV FGM. In addition, there is debate as to whether other cosmetic procedures, such as labioplasty, fall foul of the 2003 Act. Section 1(2) of the Act indicates that an offence is not committed if a registered medical practitioner performs a surgical operation that is necessary for the woman's physical or mental health or if the woman is in labour or has just given birth and the operation is for 'purposes connected with the labour or birth'. The legislation does not expressly permit cosmetic genital procedures such as labioplasty or genital piercing but, as the Royal College of Obstetricians and Gynaecologists Guidelines point out, female genital cosmetic surgery 'may be prohibited unless it is necessary for the patient's physical or mental health'.[45] The guidelines thus require surgeons who undertake female genital cosmetic procedures to 'take appropriate measures to ensure compliance with the FGM Acts'.[46]

An offence is also committed under section 2 of the Female Genital Mutilation 2003 if a person assists a girl to mutilate her own genitalia and under section 3 if a person assists a non-UK national or resident to carry out FGM overseas. Section 4 of the Act extended sections 1 to 3 to extra-territorial acts, while section 5 increased the maximum sentence from 5 years in prison to 14 years. These reforms were welcomed, but loopholes remained until recently. For example an offence was only committed under section 3, if the act of mutilation was done in relation to a UK national or permanent UK resident: those on temporary work or student visas were not therefore protected by the legislation. Similarly, sections 3 and 4 only applied to acts done by a person who was a UK national or permanent UK resident. These defects were remedied by section 70 of the Serious Crime Act 2015: the word 'permanent' has been deleted from the 2003 Act and replaced with the term 'habitual'. As explained above, the latter Act also created the offence of failing to protect a girl from the risk of genital mutilation.

To date, there has only been one prosecution for female genital mutilation in England and Wales and this resulted in an acquittal.[47] One of the reasons why there have been so few prosecutions is that victims have been reluctant to report instances of FGM, often because they do not wish to implicate family members, but also owing to the fact that they are young and/or vulnerable. The Ministry of Justice has admitted that 'these barriers to prosecution cannot easily be overcome'.[48] The Ministry of Justice and the Home Office have also pointed out that the fear of being identified as a victim of female genital mutilation is one of the reasons for the

43 TC Okeke, USB Anyaehie and CCK Ezenyeaku, 'An Overview of Female Genital Mutilation in Nigeria' (2012) 2(1) *Annals of Medical and Health Sciences Research* 70.

44 Ibid.

45 Royal College of Obstetricians and Gynaecologists, *Female Genital Mutilation and its Management – Green Top Guideline No 53* (Royal College of Obstetricians and Gynaecologists, 2015).

46 Ibid, at p 2.

47 Dr Dhanuson Dharmasena who sutured a woman after she had given birth was accused of reinfibulation, ie returning the woman to her pre-delivery FGM state.

48 Justice, *Female genital mutilation: proposal to introduce a civil protection order. Overview* (Justice, 2014): https://consult.justice.gov.uk/digital-communication/female-genital-mutilation. Date accessed: 4 September 2015.

low incidence of reporting FGM.[49] Section 71 of the Serious Crime Act 2015 provides for the lifelong anonymity of persons against whom a female genital mutilation offence is alleged to have been committed, in order to encourage more victims to come forward.[50] It remains to be seen whether this objective will be achieved.

Protection available prior to 2015

If the father in *Re E (Children) (Female Genital Mutilation Protection Orders)* had demanded to see his daughters at the beginning of the Easter holidays, ie prior to the implementation of the Serious Crime Act 2015, the mother could have utilised various non-specific civil law provisions to protect her children. For example, a prohibited steps order could have been made under section 8 of the Children Act 1989 to forbid the father from removing the girls from the jurisdiction (for the purpose of FGM). But as the Ministry of Justice points out, 'such an order could not, however, be used to prohibit FGM itself, since the purpose of the order is to prohibit people taking steps in respect of a child which in themselves would be lawful and FGM is not lawful'.[51] A prohibited steps order does not therefore make it explicit that FGM is harmful and forbidden. Additional drawbacks of prohibited steps orders are that: they cannot be used to oust a parent from the family home;[52] breach of an order does not constitute a specific offence and, of course, they cannot be used to protect adults.

If the father had attempted to remove the girls, the mother could have telephoned the police. The girls could have been taken into police protection[53] or an emergency protection order could have been obtained.[54] The local authority would have been made aware of the situation and ultimately the children could have been made subject to a care order under the Children Act 1989.[55] In *Re B and G (Children) (No 2)* Sir James Munby, President of the Family Division, confirmed that 'FGM in any form will suffice to establish 'threshold' in accordance with section 31 of the Children Act 1989'.[56] One respondent to the consultation suggested that FGM protection orders should be introduced for persons over the age of 18, but argued that they should not be 'an alternative to the existing forms of protection for children'.[57] The same respondent, did, however, point out that child protection provisions have not been used sufficiently in cases of FGM, often due to lack of awareness and training.[58] The submissions from the NSPCC and the Royal College of General Practitioners to the Home Affairs Select Committee on Female Genital Mutilation also alleged that frontline professionals fail to recognise female genital mutilation as child abuse.[59] This is corroborated by Sir James Munby, who declared that *Re B and G (Children) (No 2)* was 'the first time such an issue [FGM] has been canvassed in the context of care proceedings'.

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49 Ministry of Justice/Home Office, *Serious Crime Act 2015. Fact Sheet – female genital mutilation* (MOJ/HO, 2015): www.gov.uk/government/uploads/system/uploads/attachment_data/file/416323/fact_sheet_-_FGM_-_Act.pdf. Date accessed: 4 September 2015.

50 Section 71 inserts s 4A into the Female Genital Mutilation Act 2003. Schedule 1 to the Act contains the detailed provisions on anonymity.

51 Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order* (MOJ, 2014), at p 6.

52 See *Nottingham County Council v P* [1994] Fam 18, [1993] 2 FLR 134 and *Pearson v Franklin (Parental Home: Ouster)* [1994] 1 FLR 246.

53 Children Act 1989, s 46.

54 Ibid, s 44.

55 Ibid, s 31.

56 *Re B and G (Children) (No 2)* [2015] EWFC 3, [2015] 1 FLR 905, at para [73]. See J Hayes, 'Protecting child victims of female genital mutilation' [2015] Fam Law 239, for a discussion of *Re B and G*.

57 Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order. Summary of Responses* (MOJ, 2014), at p 7.

58 Ibid.

59 Home Affairs Select Committee, *Second Report. Female Genital Mutilation: the case for a national action plan* (HASC, 2014), at para [95].

In addition to the failure to recognise FGM as child abuse, child protection mechanisms may not always be appropriate where there is a risk of female genital mutilation. Although a girl who is subject to a care order can continue to live with her parent or parents, the local authority acquires parental responsibility for the child and this may not be necessary in cases where a girl is at risk of FGM, but not any other form of harm.[60] Indeed, it would not have been required in *Re E (Children) (Female Genital Mutilation Protection Orders)*, as there appeared to be no concern regarding the mother's exercise of parental responsibility.[61] In cases where a girl has already undergone female genital mutilation, there are further problems with care proceedings. As Sir James Munby pointed out in *Re B and G (Children) (No 2)*, 'once a girl has been subjected to FGM, the damage has been done, but on the evidence I have heard, she is unlikely to be subjected to further FGM'.[62] The President of the Family Division thus questioned how this 'reality feeds through into an overall welfare evaluation?'.[63] He also emphasised the responsibility of local authorities to take appropriate steps to prevent girls being subject to female genital mutilation and made reference to the power to make a child a ward of court, and the use of the inherent jurisdiction of the High Court.[64] In June 2015, prior to the implementation of the Serious Crime Act 2015, a three-year-old girl from South Yorkshire was made a ward of the High Court because she was at risk of FGM.[65] The consequence of this is that the girl's parents can take no important step in relation to her without the court's permission. Such an acute restriction on the mother's capacity to make decisions regarding her children would not have been necessary in *Re E (Children) (Female Genital Mutilation Protection Orders)*. However, in *Re F and X (Children)*, which was decided two months after *Re E*, the High Court made a Female Genital Mutilation Protection Order in respect of a 13-year-old girl (F) and made her and her brother (X), wards of the court.[66] The mother had unlawfully retained F and X in Sudan after their summer holiday: it was thus appropriate to utilise wardship, as well as making an FGM protection order in respect of F, because the children had been abducted.

It should be noted that the inherent jurisdiction of the High Court can be utilised to prevent FGM, without actually invoking wardship, as the court can grant declaratory and injunctive relief prohibiting a child from being removed from the jurisdiction and requiring the child's passport to be deposited with the court. The advantage of inherent jurisdiction is that it can also be utilised to protect adult women from FGM, in the same way that it was used to prevent forced marriage prior to the introduction of forced marriage protection orders by the Forced Marriage (Civil Protection) Act 2007.[67] Similarly, a non-molestation order can be obtained under the Family Law Act 1996 to safeguard both adults and children. A non-molestation order is the principal remedy for domestic violence, which according to the cross-government definition 'includes so called "honour" based violence, female genital mutilation (FGM) and forced marriage'.[68] In its response to the consultation on FGM protection orders, Ayres Waters

60 Children Act 1989, s 33(3)(a).

61 Kirsten Maclean, a lawyer for Cafcass Legal, reports a case where a child was at risk of being taken overseas for the purpose of FGM – the local authority did not wish to issue an application for a care order due to the parents' (otherwise) high level of care for the child. K Maclean, *Female Genital Mutilation: A family practitioner's perspective* (Fam Law, 2010), at pp 1109–1110.

62 *Re B and G (Children) (No 2)* [2015] EWFC 3, [2015] 1 FLR 905, at para [76]. NB this is not true of Type III FGM which may be performed every time a woman gives birth.

63 Ibid.

64 Ibid, at para [78].

65 The case reached the High Court following an investigation by South Yorkshire police. The order was made on 12 June 2015, prior to the implementation of the Serious Crime Act 2015. See: www.southyorks.police.uk/news-syp/first-female-genital-mutilation-court-order-granted-south-yorkshire.

66 *Re F and X (Children)* [2015] EWHC 2653 (Fam).

67 *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230.

68 Home Office, *Cross Government Definition of Domestic Violence – A Consultation* (HO, 2012), at p 3.

Family Lawyers indicated that (prior to the introduction of FGM protection orders) they had applied for non-molestation orders to protect victims from female genital mutilation, because their duration can be indefinite and breach of an order is an arrestable offence.[69] In fact, in the case investigated by South Yorkshire Police, the court made a non-molestation order to protect the three-year-old girl at risk of FGM, as well as making her a ward of the court, in order to ensure that her parents could be prosecuted if they breached the order. If the mother in *Re E (Children) (Female Genital Mutilation Protection Orders)* had sought legal advice prior to July 2015, she may well have applied for a non-molestation order, which could have protected herself from domestic violence and her daughters from FGM.

Those at risk of FGM may also be at risk of forced marriage, as *Re E (Children) (Female Genital Mutilation Protection Orders)* demonstrates, for the mother was subjected to FGM before being forced into marriage. Since the Forced Marriage (Civil Protection) Act 2007 came into force, those at risk of forced marriage and FGM have been able to apply for a forced marriage protection order under Part 4A of the Family Law Act 1996. Typical conditions contained in a Forced Marriage Protection Order, such as prohibiting violence against the person to be protected and depositing the latter's passport with the court to prevent overseas travel, would often serve to prevent FGM as well as forced marriage. But as the Ministry of Justice pointed out in the consultation paper on FGM protection orders, the provisions of the Family Law Act 1996 were 'not designed with FGM cases in mind and could not necessarily be relied upon to protect girls from mutilation'.[70] For example, FGM is often performed on newborn infants, but they would not usually be at risk of forced marriage: a forced marriage protection order would not therefore be appropriate in such cases. There was no evidence that the girls in *Re E (Children) (Female Genital Mutilation Protection Orders* were at risk of being forced to marry: in fact, the father intended the girls to return to school in September after healing from the procedure. A forced marriage protection order would not, therefore, have been fitting in this particular case.

The introduction of FGM protection orders and other preventative measures

The approach taken to FGM in England and Wales prior to the Serious Crime Act 2015 was criticised due to the problems associated with the non-specific provisions of the civil law and the lack of use of the criminal law. This led to allegations that the UK was in violation of its international human rights obligations, which will be discussed below, but first it is necessary to outline the development of FGM as an international human rights issue.

Following a period of campaigning and scholarship in the 1980s, female genital mutilation was expressly considered by the Committee on the Elimination of Discrimination Against Women in 1990.[71] Its General Recommendation on Female Circumcision encouraged state parties to take appropriate and effective measures with a view to eradicating female circumcision and requested state parties to include in their reports to the Committee information about the measures taken to eliminate the practice.[72] Seven years later, the World Health Organisation, UNICEF and the United Nations Population Fund (UNFPA) issued a joint statement on female genital mutilation, specifying the international human rights that are violated when FGM is committed and calling on national governments to adopt clear policies for the abolition of the

69 Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order. Summary of Responses* (MOJ, 2014), at p 13.
70 Ibid, at p 6.
71 *CEDAW General Recommendation No 14: Female Circumcision A/45/38* (CEDAW, 1990).
72 Ibid.

practice.[73] Since then, the international community has consistently demanded appropriate action to combat FGM. For example, the European Parliament Resolution of 14 June 2012 called on Member States to:

> 'ratify international instruments and implement them through comprehensive legislation that prohibits all forms of female genital mutilation and provides effective sanctions against the perpetrators of this practice . . . the legislation should also mandate a full range of preventative and protective measures; including measures to coordinate, monitor and evaluate law enforcement and should improve the conditions permitting women and girls to report cases of female genital mutilation'.[74]

Similarly, the United Nations General Assembly Resolution on intensifying efforts for the elimination of female genital mutilation urges states to enact and enforce legislation prohibiting FGM.[75]

The law in England and Wales did not, in practice, provide effective sanctions against perpetrators and legislation did not provide a full range of preventative and protective measures. As a result of these failings, the Bar Human Rights Committee, in its submission to the Home Affairs Select Committee on FGM, argued that the UK was in breach of its international obligations in failing to protect vulnerable girls.[76] Several organisations, including the Bar Human Rights Committee, the Muslim Women's Network and the Association of Chief Police Officers, called for the introduction of FGM protection orders, modelled on forced marriage protection orders, in order to protect those at risk and thus ensure compliance with international obligations. Just before the Home Affairs Select Committee released its report,[77] the Government launched a consultation on the introduction of FGM protection orders at the Girl Summit on 22 July 2014. Eighty-five per cent of respondents to the consultation supported the introduction of FGM protection orders because criminal legislation was considered insufficient and because civil protection orders 'would deter the practice of FGM and offer additional protection to victims'.[78] They are viewed 'as a flexible tool tailored to specific needs of victims'[79] but require the introduction of additional measures to ensure that they are effective. For example, several respondents to the consultation requested the establishment of a Female Genital Mutilation Unit (similar to the Forced Marriage Unit) to provide advice and assistance to those at risk. Respondents also advocated 'a joined up approach to information sharing involving key frontline professionals'.[80] The Home Affairs Select Committee demanded a national action plan to combat FGM and made a series of specific recommendations to improve FGM law, policy and practice.[81]

The Government agreed 'with the Committee's assessment that tackling FGM requires a comprehensive approach including prevention, punishment, enforcement, support and protection measures' and announced a package of measures, which includes: the establishment of an

73 WHO/UNICEF/UNFPA, *FGM: A Joint WHO/UNICEF/UNFPA statement* (WHO/UNICEF, UNFPA, 1997), at p 13.
74 European Parliament Resolution of 14 June 2012 on ending female genital mutilation (2012/2684 (RSP)).
75 United Nations, UN General Assembly Resolution 67/146 on intensifying efforts for the elimination of female genital mutilation, 20 December 2013 (UN, 2013).
76 Submission to the Home Affairs Select Committee, *Second Report – Female Genital Mutilation: the case for a national action plan – FGM 008* (HASC, 2014).
77 Home Affairs Select Committee, *Second Report – Female Genital Mutilation: the case for a national action plan* (HASC, 2014).
78 Ministry of Justice, *Consultation – Female Genital Mutilation: Proposal to introduce a civil protection order. Summary of Responses* (MOJ, 2014), at p 6.
79 Ibid.
80 Ibid, at p 14.
81 Home Affairs Select Committee, *Second Report – Female Genital Mutilation: the case for a national action plan* (HASC, 2014).

FGM Unit; increased funding to improve the way the NHS tackles female genital mutilation; improved training for frontline professionals, increased funding for community engagement projects[82] and placing the Multi-Agency Practice Guidelines on a statutory footing.[83] It is hoped that this programme of activities, together with the legislative reforms that have taken place, will raise awareness of Female Genital Mutilation and prevent it from occurring. However, there is concern that one of the measures introduced by the Serious Crime Act 2015 may not be in the best interests of the child: section 5B of the Female Genital Mutilation Act 2003, inserted by section 74 of the Serious Crime Act 2015,[84] requires persons working in a regulated profession, that is healthcare professionals, teachers and social workers, who discover that an act of FGM appears to have been carried out on a girl under the age of eighteen, to notify the chief police officer in the area that the girl resides.[85] There is a risk that the existence of a duty to report FGM may deter parents from seeking medical treatment for a child who has undergone FGM because they fear that the medical practitioner will report them to the police.

Conclusion

The facts in *Re E (Children) (Female Genital Mutilation Protection Orders)* illustrate the risks that some young girls living in the UK are exposed to and emphasise the importance of implementing a comprehensive range of measures to prevent female genital mutilation from taking place. In *Re E* FGM protection orders, which were introduced by the Serious Crime Act 2015, were made in respect of three young Nigerian girls who were at risk of female genital mutilation. These civil protection orders, which are modelled on forced marriage protection orders, were instituted because there are drawbacks to utilising non-specific civil law provisions, such as prohibited steps orders, and because the criminal law provisions that have been in place for thirty years have not been effective. The 2015 Act also remedied a defect contained in the Female Genital Mutilation Act 2003, which restricted the extra-territorial scope of the criminal offences contained in the legislation. In addition to this, the Serious Crime Act 2015 created a new offence of failing to protect a girl under 16 from female genital mutilation; provided lifelong anonymity to victims of FGM; and established a duty to notify the police of cases of FGM. These legislative reforms, together with the package of measures that the Government has promised, send a clear message that FGM will not be tolerated. But whether a significant reduction in its occurrence will be achieved as a result of the changes is questionable, given that previous efforts do not appear to have been successful.

82 See S McCulloch, 'Community development approaches: a case for female genital mutilation for a discussion of community development in the UK' in C Momoh, *Female Genital Mutilation* (Radcliffe Publishing, 2005).

83 HM Government, Government Response to the Second Report from the HASC Session 2014–15 (HC 201): *FGM: the case for a national action plan* (Cm 8979, December 2014).

84 An amendment to the Serious Crime Bill was made following the Consultation on Introducing Mandatory Reporting for Female Genital Mutilation 2014. The summary of responses was published in February 2015.

85 In contrast there is no express duty to notify the police of instances of forced marriage, even though forcing someone to marry is now a criminal offence. NB Children Act 1989, s 47 imposes a duty on local authorities to investigate if a child is suffering or likely to suffer significant harm and requires persons such as health care professionals to assist the local authority.