

Raising awareness

Anne-Marie Hutchinson and Shabina Begum consider mandatory reporting duties, legislation and the development of the case law in relation to female genital mutilation



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According to the NHS statistics in England there were 1,242 newly recorded cases of female genital mutilation (FGM) between January and March 2016 (see www.legalease.co.uk/fgm). The statistics include 11 girls who were born in the UK, and 2% of the new cases related to girls under the age of 18.

Under the Female Genital Mutilation Act 2003 (FGMA 2003) a person is guilty of an offence if they excise, infibulate or otherwise mutilate the whole or any part of a girl's labia majora, labia minora or clitoris (s1, FGMA 2003). A person is also guilty of an offence if they aid, abet, counsel or procure a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris (s2, FGMA 2003).

FGMA 2003, as originally enacted, related to acts done by UK nationals and permanent UK residents to girls or women who are also UK nationals or have UK residence. FGMA 2003 was amended by the Serious Crimes Act 2015 (SCA 2015), although notably the general offences from the 2003 Act still remain in all cases of FGM. An extra territorial aspect was added so that the provisions apply to offences relating to UK nationals, and those habitually resident, rather than only to UK nationals and permanent UK residents (s70, SCA 2015 amending ss1-3, FGMA 2003). Amendments were also made as to the anonymity of the victim, preventing any material that would lead the public knowing the identity of the victim from being published in the victim's lifetime (s71, SCA 2015).

A new offence of failing to protect girls from risk of genital mutilation was also introduced (s72, SCA 2015, inserting s3A, FGMA 2003), and relates to individuals such as parents or guardians, or those with *locus parentis*, who fail to protect girls under the age of 16 from genital mutilation. Section 3A states:

- (1) If a genital mutilation offence is committed against a girl under the age of 16, each person who is responsible for the girl at the relevant time is guilty of an offence. This is subject to subsection (5).
- (2) For the purposes of this section a person is 'responsible' for a girl in the following two cases.
- (3) The first case is where the person —
 - (a) has parental responsibility for the girl, and
 - (b) has frequent contact with her.
- (4) The second case is where the person —
 - (a) is aged 18 or over, and
 - (b) has assumed (and not relinquished) responsibility for caring for the girl in the manner of a parent.
- (5) It is a defence for the defendant to show that —
 - (a) at the relevant time, the defendant did not think that there was a significant risk of a genital mutilation offence being

committed against the girl, and could not reasonably have been expected to be aware that there was any such risk, or

- (b) the defendant took such steps as he or she could reasonably have been expected to take to protect the girl from being the victim of a genital mutilation offence.

If an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time of the FGM will be liable under this new offence. The maximum penalty for the new offence is seven years' imprisonment, or a fine, or both.

Civil remedies and mandatory reporting

By virtue of s73, SCA 2015 it is now possible to obtain civil injunctive remedies in the form of female genital mutilation protection orders (FGMPOs). Section 74 of the Act also introduced a mandatory reporting duty upon specified professionals, who must notify the police if they discover an act of FGM appears to have been carried out on a girl who is aged 18 or under. These amendments have changed the way individuals and professionals are now accountable in ensuring that girls are protected from FGM.

There is a high burden on healthcare professionals (as defined by s5B(11)-(12)), teachers and (in Wales only) social workers to protect FGM victims. Therefore in order to mitigate the risk of FGM and also to protect young girls, there is now a mandatory duty on those in a regulated profession to notify police of FGM.

When an act of FGM has been discovered, either through direct disclosure from the girl under the age of 18 or if the professional has observed the physical signs on a girl, then the notification procedure is as set out in s5B(5), FGMA 2003. An FGM notification must:

- be made to the chief officer of police for the area in which the girl resides;
- identify the girl and explain why the notification is made;

- be made before the end of one month from the time when the person making the notification first discovers that an act of FGM appears to have been carried out on the girl; and
- be made orally or in writing.

Although the legislation sets out that the notification must be made to the chief officer of police, the practical guidance (see www.legalease.co.uk/)

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fgm-reporting) states that the report can be made via a 101 call and by reporting the discovery to the local police station. Cases of failure to comply with the duty will be dealt with in accordance with the existing performance procedures in place for each profession.

New protective powers

Although FGM is a crime in the UK, as the primary victims are children, namely young girls, this matter is usually treated as a child protection issue. Therefore it would be highly unusual where there is a real threat of FGM, or where it has occurred, for the general child protection jurisdiction to not also be invoked. Therefore in England and Wales where a child is at risk of being subjected to FGM or has been subjected to FGM, the starting point would be the Children Act 1989.

Under a new s5A, FGMA 2003 (inserted by s73, SCA 2015) it is now possible to apply for a FGMPO for the purposes of protecting a girl against the commission of FGM, or protecting a girl against whom such an offence has been committed. It is a criminal offence to breach an FGMPO and the maximum penalty for the breach is five years' imprisonment, or as a civil breach punishable by up to two years' imprisonment.

An application for an FGMPO may be made by the girl who is to be protected by the order, or by a relevant third party. The potential respondents to the application would be the girl's parents/guardian, relatives, or any other person who may be a party to arranging or subjecting the girl to an FGM procedure.

An application for an FGMPO can be lodged at a county court or the High Court, and the first application will usually be an *ex parte* (without

notice) application. Where there are complex issues and ancillary orders, such as passport orders, are required, the application must be made in the High Court. Where there is a risk that a minor may be taken outside of the jurisdiction, or has already been taken outside of the jurisdiction, it is possible to make an application under the inherent jurisdiction of the High Court and, pursuant to s41, Senior Courts Act 1981, to make the minor a ward of the court.

Development of case law

Since the FGM-specific legislation was enacted there have been various cases brought before the High Court, and the court has the task of determining whether FGM is a risk and, if so, the level of risk. The tone of how FGM is viewed as an issue within the judicial remit was set by Munby J (as he then was) in *Singh v Entry Clearance Officer New Delhi* [2004], when he described the act as 'barbarous'.

Subsequently, in *B and G (Children) (No 2)* [2015], although the court found it difficult to identify that the young girl in that case had been subjected to FGM, Sir James Munby (now the president of the Family Division) took the opportunity to provide guidance on how to handle suspected cases of FGM, both for legal practitioners in care matters, and for healthcare practitioners as to how to examine

a suspected FGM survivor. The full judgment should be referred to for the detailed guidance. In summary the following points were highlighted:

- FGM-specific training and education is highly desirable;
- knowledge and understanding of the classification and categorisation of the various types of FGM is vital and, for forensic purposes,

FGM order, out of hours, from Hogg J in respect of the parties' children, aged 13, 10 and 7. The mother and the children had resided in this jurisdiction since 2012. Notably the mother's FGM allegation was made 19 days after the dismissal of her immigration appeal (on 15 July 2015), and the matter was brought before the High Court on 22 July 2015. The mother herself had undergone the procedure and she alleged that this was because

arrival in 2005. The eldest four were born in Somalia. The two eldest daughters had been subjected to FGM in Somalia almost ten years prior to the proceedings. The father said that it had taken place without his knowledge, let alone his consent, in the period after he had travelled to Britain, while the mother and the four eldest children were still living in Somalia.

At the time of the proceedings Holman J found that there was no risk of these children being genitally mutilated, however he further stated that as two of the older siblings already had been, it was impossible to exclude all future risk of FGM. Therefore in cases that involve children who are going on a planned holiday to an FGM-risk country, where there are other signs to indicate a risk of FGM, the application should be brought to a court as soon as the local authority is made aware of the holiday.

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the World Health Organisation classification should be used;

- careful planning of the process of examination is required to ensure that an expert with the appropriate level of relevant expertise is instructed at the earliest opportunity;
- whoever is conducting the examination should use a colposcope wherever possible; and
- it is vital that whoever is conducting the examination makes clear and detailed notes, recording (with the use of appropriate drawings or diagrams) exactly what is observed.

In his judgment the president strongly expressed that local authorities need to be proactive and vigilant in taking appropriate protective measures to prevent girls being subjected to FGM, and further stated that the court must not hesitate to use every weapon in its protective arsenal if faced with a case of actual or anticipated FGM.

In *E (Female Genital Mutilation and Permission to Remove)* [2016] an allegation of FGM was made in family proceedings, and then also used as the basis of an asylum claim. Proceedings were initiated by the mother who secured a without notice

the father's family had forced her to undergo FGM in order for her to marry the father. This was found to be untrue.

This case highlighted to practitioners how an allegation of FGM should be treated with caution and properly investigated. As practitioners we should be cautious when dealing with cases that *prima facie* may appear to be an 'immigration scam', but we should not overlook this opportunity to actually engage with the case and investigate whether there are wider welfare issues in relation to the children who may require protection.

Despite the fast nature and urgency of the work in this area, as practitioners it is essential that we are not too quick to judge who is perceived to be at risk without carrying out a proper investigation and engaging with any victims or suspected families. The decision in *Buckinghamshire County Council v MA* [2016] is an example of a case where all the triggers existed, but this did not necessarily mean that the relevant children were at risk of being subjected to FGM. The case involved parents of Somali background who had been brought up in Somalia. The father travelled to the UK as a refugee in 2002 and was joined by the mother, as his wife, in 2005. The parents had seven children: five daughters and two sons. Three of the children were born in England after the mother's

Conclusion

The UK has implemented legislation to prevent FGM and the progression of the case law has demonstrated the practical scope and measure required by professionals when conducting such cases.

The mandatory reporting duty has also placed a higher onus on specified professionals, who are most likely to have contact with potential victims, to report the crime. Failure to report FGM will not only risk the loss of jobs of the specified professionals, but the bigger fear is that a potential FGM victim could be overlooked.

When approaching FGM work, it must always be remembered that there are no cultural barriers or religious notions that should prevent us from saving young girls from being subjected to a cutting blade. ■

B and G (Children) (No 2)
[2015] EWFC 3
Buckinghamshire County Council v MA & anor
[2016] EWHC 1338 (Fam)
E (Female Genital Mutilation and Permission to Remove)
[2016] EWHC 1052 (Fam)
Singh v Entry Clearance Officer New Delhi
[2004] EWCA Civ 1075