Upper Tribunal
(Immigration and Asylum Chamber)

GW (FGM and FGMPOs) Sierra Leone CG [2021] UKUT 0108 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October and 14 December 2020	**On 25 February 2021**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

(1) GW (SIERRA LEONE)
(2) FM (GAMBIA)
(ANONYMITY DIRECTIONS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the First Appellant:	Ms A Weston QC and Ms G Brown of counsel, instructed by Luqmani Thompson & Partners Solicitors
For the Second Appellant:	Mr R De Mello of counsel, instructed by Fountain Solicitors
For the Respondent:	Ms C Van Overdijk of counsel, instructed by the Government Legal Department

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Law

1) *Under the Female Genital Mutilation Act 2003, as amended, a Female Genital Mutilation Prevention Order ("FGMPO") may be issued by a Family Court to protect against a domestic or extraterritorial threat of FGM.*

2) *Where a person ("P") seeks international protection in reliance on a threat of FGM in a country to which she might otherwise be lawfully removed, the fact that an FGMPO is made to protect P against such a threat is likely to be a relevant consideration in the assessment of P's protection claim. That is particularly so when the FGMPO has extraterritorial effect in the proposed country of return.*

3) *Where P is subject to immigration control, a judge sitting in the family jurisdiction cannot restrain the Secretary of State for the Home Department from removing P from the United Kingdom. That applies equally to FGMPOs as it does to other orders issued in family proceedings.*

4) *Neither the respondent nor a judicial decision-maker considering P's claim for international protection is bound by an FGMPO or by the judgment which precedes it. That decision has no precedential effect in the protection appeal: SSHD v Suffolk County Council & Ors [2020] EWCA Civ 731; [2020] 3 WLR 742.*

5) *Neither the FGMPO nor the judgment in the family proceedings provides a default position or a starting point, in the Devaseelan [2003] Imm AR 1 sense, for the assessment of the claim for international protection; and principles of judicial comity do not require a judicial decision-maker who is considering P's claim for international protection to reach the same findings of fact as the judge who made an FGMPO to protect P.*

6) *An FGMPO made in favour of P is, instead, a potentially relevant matter in the assessment of P's claim for international protection. To determine the weight which should properly be given to the FGMPO, a judicial decision-maker should consider:*
    - *(i) the extent to which the Family Court's assessment addresses ('maps over') the same or similar factual issues to those considered in the protection appeal;*
    - *(ii) the extent and the cogency of any reasons given by the Family Court for making the order; and*
    - *(iii) the similarity of the evidence before the Family Court and the judicial decision-maker in the protection appeal.*

7) *Even in cases in which it is appropriate to attach significant weight to judicial assessment in the family proceedings of the risk of FGM in the proposed country of return, it remains for the judicial decision-maker in the protection appeal to consider whether there might be a sufficiency of protection or an internal relocation alternative in that country. In considering the former question, the*

existence of an extraterritorial FGMPO might in itself provide a measure of protection on return.

8) *Where P seeks international protection in reliance on a risk of FGM and her claim is refused by the respondent, the fact that an FGMPO is subsequently made in P's favour is not a new matter for the purpose of s85 of the Nationality, Immigration and Asylum Act 2002.*

Country Guidance

9) *Sierra Leonean women are today among the most marginalized in the world, socially, economically and politically.*

10) *The Bondo society, which is extremely powerful and influential in Sierra Leone, has an entrenched role in tribal and political life in the country, and membership confers social status and respect, even opening doors to tribal chief posts and government jobs. It continues to play a leading role in the social, religious and political life of communities. It is an integral part of life in Sierra Leone. Politicians are at pains to gain the support of Bondo societies and thereby the votes of those under their influence. The power of the Bondo society and relationship between the Bondo society and politicians ensures that the authorities typically do not get involved in the issue of FGM. Male interference in Bondo Society matters is 'known' to have terrible consequences – like disease and death or developing an extended ('female') scrotum, or "elephantiasis of the testicles." Neither state courts nor members of the police are likely to intervene in cases involving initiation into Bondo which has its own laws that are more effective and inescapable than state law.*

11) *Bondo societies exist in every village and town across Sierra Leone and are a vital communications link between politicians and rural communities. Whether a girl/woman is a Christian or a Muslim has little influence on her risk of being subjected to FGM and initiated into the Bondo society. Rather, this will depend on her ethnic identity/identities and on the traditions and customs of the ethnic and local group/s she and her parents belong to. Where marriages between Fula women and Krio men are concerned, the Fula wife will often insist on maintaining her Fula traditions and customs because as a dispersed diaspora, the Fula are particularly keen on upholding their traditions also in interethnic marriages which are less common among the Fula than among other groups.*

12) *Excision takes place within the context of a secret society—the Bondo Society. Excised women and girls automatically become members of the Bondo, which is operated by "powerful" women called 'Digba' or 'Sowei' who have consistently laid claim to cultural expertise with regard to the practice.*

13) *Girls and women are expected to have undergone the Bondo initiation ceremony before marriage, and are ostracized, called names, and even abused, if they do not. It is a cultural norm in Sierra Leone. If a young woman has not been "cut" before the age of 18, she can still be subjected to the process, either forcibly or by choice.*

She is still expected to undergo the initiation and FGM in order to be eligible for marriage.

14) *Soweiship is often hereditary and handed down from generation to generation. The institution itself is synonymous with women's power, their political, economic, reproductive and ritual spheres of influence. Excision, or removal of the external clitoral glans and labia minora, in initiation is a symbolic representation of matriarchal power. The ban on FGM during the Ebola crisis is not continuing. Once the Ebola crisis was over in 2015 there was a return to 'business as usual'.*

15) *The overall effectiveness of the police in providing protection is limited by endemic corruption and a lack of resources. A number of NGOs campaign for the abolition of FGM, but these generally work in advocacy, and would not be able to provide protection. There are women's organisations in Sierra Leone making efforts to improve women's position in society, but they do not function as shelters. With millions of Sierra Leonean women suffering violence these NGOs are unable to protect women from domestic and sexual violence perpetuated against them within their own families and communities.*

16) *A young single woman without family support is at high risk of destitution, exploitation and abuse resulting from her unwillingness to adhere to the customs of the Bondo Society, which result in her marginalisation. Single women in particular are in need of family support and a male companion in order to be able to live a relatively secure life away from home, which may be impacted by the lack of initiation by way of undergoing FGM. This is true for towns and villages alike, the latter being even less accessible because people tend to live a more traditional life there than in towns. They live in clans and extended families which would have no access to and which do not let strangers become members. Whether in urban or rural areas, it is not possible for a single young woman to find protection and accommodation without a reliable kin/ethnic/social network if as a result of her decision to reject initiating to the Bondo society, thus undergoing FGM, would lead to them being marginalised by their family members and their ethnic/social network. There is an efficient civil registration system. The National Civil Registration Act 2016 establishes the National Civil Registration Authority and requires every Sierra Leonean to register. This makes it easier for people to be traced.*

17) *Those at risk of FGM with mental health problems are likely to experience stigma and discrimination and lack of appropriate treatment. Mental illness is extremely stigmatized and the one psychiatric hospital continues to suffer from stigmatizing and severe underfunding. However, this is only the case, if the stigma results from the subject's family/ethnic and social support system. And if as a result of deciding not to be initiated to the Bondo Society, the subject is marginalised to the extent that they would be unable to avail themselves of adequate access to such medical facilities by virtue of their lack of access to work, economic destitution, and their inhibited ability to secure support from their community. There are only two psychiatrists, two Clinical Psychologists and 19 Mental Health Nurses in a country of seven million people.*

18) *Women who are not compliant with or are perceived as rejecting cultural norms for women in Sierra Leone, including rejecting the Bondo society and refusing to be cut are a 'particular social group'.*

DECISION AND REASONS

A. INTRODUCTION

1. These two appeals, brought by female appellants of different nationalities, were linked because they presented an opportunity for the Upper Tribunal to consider and to give guidance upon a legal issue which was framed as follows:

   > In a protection appeal before the Immigration and Asylum Chamber, what significance, if any, is to be attached to the fact that a judge in the Family Court has made a Female Genital Mutilation Prevention Order in respect of the appellant or a relevant member of the appellant's family?

2. In the event, the respondent conceded that the first appellant's appeal should be allowed on protection grounds and that her appeal also provided an opportunity for the Upper Tribunal to revise, by consent, the guidance given by the Immigration Appeal Tribunal in RM (Sierra Leone – Female Genital Mutilation – membership of a particular social group) Sierra Leone [2004] UKIAT 00108 and by the Asylum and Immigration Tribunal in FB (Lone women - PSG – internal relocation – AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090.

B. THE FIRST APPELLANT – GW

Background

3. The first appellant is a national of Sierra Leone who was born on 12 September 1997. She is single and has no children. On 22 April 2014, she made an application in Freetown for UK entry clearance as a visitor. The application was granted, and she was issued entry clearance in that capacity from 9 June 2014 to 9 December 2014.

4. The appellant arrived in the UK on 9 August 2014. She subsequently made an application for leave to remain outside the Immigration Rules. That application was refused on 9 February 2015. The appellant appealed and her appeal was heard by the FtT on 22 January 2016. The appellant did not attend. The appeal was then withdrawn by the appellant.

Protection Claim

5. On 6 May 2016, the appellant applied for asylum. On 19 May 2016, she underwent a screening interview. She stated that she had travelled to the UK with her stepmother, BBW. She gave brief details of the basis upon which she feared return to Sierra Leone, stating that she would be forced by her stepmother to undergo Female Genital Mutilation ("FGM"). She stated that BBW was a member of the Bondo Society and that she had been consistently violent to the appellant in the past.

6. The respondent was informed by the Metropolitan Police on 22 September 2016 that there was an ongoing investigation into an allegation that the appellant was being coerced to return to Sierra Leone to undergo FGM. On 18 October 2016, she was advised by the Metropolitan Police that they had made an application at the High Court for a Female Genital Mutilation Prevention Order ("FGMPO").

7. The appellant underwent a substantive asylum interview on 2 November 2016. She submitted an email from her father in which he stated that he had decided to accede to BBW's demands and to ask the appellant to return to Sierra Leone so that she could undergo FGM. She provided further details of her stepmother's senior role in the Bondo Society and of the expectation that she would be initiated into the society by undergoing FGM. Her stepmother had spoken to her two days before they left for the UK and had told her that she was at the right age for initiation. She was a Christian and a Jehovah's Witness, however, and she did not believe in going through 'the ritual'. Her stepmother was a Muslim who was committed to the practice. She had been protected from FGM by her grandfather, but he had passed away a year before she came to the UK. Her stepmother had no children of her own and she was her father's only daughter.

8. The appellant said that her stepmother had decided that she would inherit her role in the Bondo society. Her stepmother had been in the UK and had mistreated the appellant here. A lawyer connected to her stepmother and her father had made the application for leave to remain outside the Rules and she knew nothing about it. She did not believe that she could approach the authorities for assistance or that she could relocate within Sierra Leone to avoid the threat from the Bondo Society. The appellant was asked no questions about the proceedings in the High Court.

Refusal of Asylum

9. The appellant was refused asylum on 17 November 2016. It was accepted that the appellant fell within the Particular Social Group of uninitiated indigenous females in Sierra Leone, as identified by Arden LJ (as she then was) in <u>Fornah</u> [2005] EWCA Civ 680; [2005] 1 WLR 3773; [2005] Imm AR 479 and endorsed by the House of Lords on appeal: [2006] UKHL 46;

[2007] 1 AC 412; [2007] Imm AR 247. The respondent did not accept, however, that the appellant would be forced to undergo FGM on return to Sierra Leone. That conclusion was based on what were said to be inconsistencies and inherent implausibility in the appellant's account, and on her failure to claim asylum in the United Kingdom for nineteen months. In the alternative, the respondent concluded that the appellant could avail herself of a sufficiency of protection in Sierra Leone or that she could relocate internally so as to avoid any threat from her stepmother and the Bondo Society.

10. For reasons which are unclear, the respondent's refusal letter was not sent to the appellant or her solicitors until 1 November 2017. On 13 November 2017, she appealed to the First-tier Tribunal against that decision.

FGMPO Proceedings

11. In the meantime, the application for an FGMPO had proceeded before the Family Division of the High Court. The application was made by the Metropolitan Police Service ("the MPS"). The appellant's stepmother BBW and BBW's UK-resident brother, BM, were the named respondents. The application was heard by Peter Jackson J, as he then was, over the course of a 48-minute hearing on 13 December 2016. The MPS was represented by counsel. The respondents appeared in person, with the first respondent being assisted by a McKenzie friend. The judge gave an *ex tempore* judgment, a transcript of which is before us.

12. Peter Jackson J recorded that the MPS had filed an array of evidence in support of the application. That included evidence from GW herself and from the investigating officer, DC Roberts, 'and from a variety of other sources': [2]. He set out the relevant background at [4]-[6]. He made reference to the legislative amendments which had been made in 2015 which provided for the issuance an FGMPO to protect a girl or woman against the criminal offence of FGM: [6]. He directed himself that he was to have regard to all the circumstances, including the need to ensure the health, safety and wellbeing of the girl to be protected: [7].

13. At [8], Peter Jackson J recalled what had been said by Macdonald J in London Borough of Camden v RZ & Ors [2015] EWHC 3751 (Fam) and Re E [2016] EWHC 1052: that the court is dealing with the assessment and management of risk. The court was not required, he noted, to make a specific finding of fact in relation to the central question of whether or not FGM will or will not be performed. Although some conclusions were to be drawn, it was essentially a broad canvas, considering not only what had taken place in the past but also what protection might be necessary to protect the individual in question.

14. Peter Jackson J returned to the chronology in some detail at [9]-[12], including the email from the appellant's father. He summarised the submissions made by the MPS about that email at [13]. It had been confirmed, he noted, that the email had been sent from Freetown but it might not be genuinely supportive of the risk which was said to exist. Peter Jackson J's 'best interpretation' was that it was a message from GW's father but that it referred to a threat from her mother, not her step-mother. He also took the view that it was genuinely from the appellant's father, who had subsequently sent a detailed message to DC Roberts, confirming that the risk was from the appellant's mother, not the stepmother: [14].

15. Peter Jackson J noted that there were competing accounts of relevant events and that there was some evidence which tended to suggest that the appellant's account of being at risk of FGM at her age was implausible: [15]-[19]. He carefully balanced the 'various speeches of the evidence' at [20]-[21] before concluding, at [22], that the task of providing a clear account of what had happened was an 'impossible one'. He had heard evidence from GW and from BBW but he had no means of knowing what conclusions to draw: [23]. There was, he noted, an absence of sufficient evidence and it was 'impossible for me to tell what the real family dynamics are'. The stepmother had not been legally represented and had not even had formal interpretation, although she had been assisted to present her case. In the circumstances, he was required to do his best.

16. It was on that basis that Peter Jackson J asked and answered a number of questions. He concluded that BBW had probably assaulted GW in the United Kingdom: [26]. It had not been proved that BBW was involved in FGM, whether as a cutter or in other ways: [27]. Nor did he know whether the appellant's birth mother was involved in FGM: [28]. It was quite possible that BBW had spoken to the appellant about the process but that did not necessarily mean that it was a serious threat. The appellant's father had probably written the emails and he was probably referring to the appellant's mother, not her stepmother. It was possible that the emails had been written to assist the appellant with her immigration position but he did not have the evidence to reach a final conclusion. It was possible that there was a core of truth but that it had been exaggerated for that reason: [30]. These were unsatisfactory conclusions reflecting unsatisfactory evidence: [31]. At [32]-[33], he concluded as follows:

> [32] Having reviewed matters in that way, I return to consider all the circumstances including the need to secure the health, safety and wellbeing of [GW]. I do consider, in agreement with the submission made by the police, that [GW] is a young person who requires the protection of a female genital mutilation [sic] order. She is someone who is in the middle of a family conflict that has proved very hard to penetrate. She has a mother and a stepmother who have themselves been subjected to female genital mutilation. She has a father whose

> motives and ability to protect her are not known, and her ability to remain in this country is similarly uncertain.
>
> [33] I therefore consider that there is a risk and that an order is necessary for her protection. However, I do not consider that the order should have, as a respondent, [MB]. If he was considered to be somebody who increased that risk, he would fall to be made, but in this case I do not find him to fall in that category. I will therefore make the order directed to BW. Subject to any further submissions, I consider that the order should last until [GW] is 21 years of age.

17. Peter Jackson J ordered accordingly, with his order being sealed on the same day: 13 December 2016. The order forbade BBW from taking any steps to cause, force or permit the appellant to undergo FGM or to use or threaten any violence against the appellant or any other person with the aim of causing her to undergo FGM. GW was 19 years old at that time. The order was to remain in force until she reached the age of 21.

Appeal to the First-tier Tribunal

18. GW's appeal came before the First-tier Tribunal on 26 July 2018. Judge Oliver heard evidence from the appellant and her cousin. In his reserved decision, he set out the oral and documentary evidence in some detail before reaching his findings of fact on the protection claim at [34]-[37]. He concluded that there were a number of difficulties with the appellant's account; that it had been fabricated; and that the email had been sent disingenuously by her father in order to support a false claim. In reaching those findings, he said this about the judgment of Peter Jackson J:

> [35] I find the judgement of the High Court to be of no help in establishing the genuineness of the appellant's claim because any judge, in the absence of any evidence against the making of such an order, would have made one on the receipt of any possibly credible evidence that such an abhorrent practice would be caried out.

Appeal to the Upper Tribunal

19. Permission to appeal was sought and granted by the First-tier Tribunal (Judge Buchanan). On 1 November 2018, the appeal came before Upper Tribunal Judge McWilliam, who concluded in a decision which was sent to the parties shortly thereafter that the FtT had erred in law in several respects. As contended in ground one, she accepted that the judge had erred in attaching no weight to the judgment of the Family Court. Errors were also disclosed by the remaining grounds but they need not be described here. Judge McWilliam set aside the decision of the FtT and remitted the appeal to be heard afresh at Hatton Cross.

Second FGMPO Application

20. The appellant turned 21 on 9 December 2018. She made an application to the Family Division of the High Court to extend the order which had been

made by Peter Jackson J. The application came before Gwynneth Knowles J on 11 December 2018. She considered that she was unable to extend the previous FGMPO because there was no statutory mechanism by which an order which had lapsed could be extended and the ability to vary or discharge an order could only apply to an order which remained in force: [7]. She considered that the circumstances which had obtained at the time that the first FGMPO had been made continued to obtain, however, and she was 'clear that it is necessary and proportionate for this court to make such an order to protect GW's health, safety and wellbeing'. She therefore made a further order for a period of two years: [8]. As she recorded at [9], she did so without notice to BBW, who was able to attend a further hearing after the order had been served electronically. The application duly returned before Gwynneth Knowles J on 11 January 2019. It was confirmed that the order had been served by Facebook and that there had been no response or attendance on the part of BBW. The order was consequently made final and was to remain in force until 11 December 2020.

Remitted Hearing in the FtT

21. The protection appeal returned before Judge Zahed on 2 September 2019. Presumably as a result of what had gone before, he took some care in his reserved decision to set out the salient parts of Peter Jackson J's judgment. He also mentioned that there had been a further order made by Gwynneth Knowles J. At [35], he then said this:

> I do not find that the decision by Justice Jackson [sic] to grant a FGM protection order automatically means that the appellant has a well founded fear of FGM by her stepmother if she is returned to Sierra Leone.

22. The judge then continued, over the course of [36]-[51], to explain why he had concluded that the appellant had 'fabricated her entire asylum claim to remain in the UK'. He did not accept that she was at risk from her stepmother or from the Bondo Society. The appeal was accordingly dismissed for a second time.

Second Appeal to the Upper Tribunal

23. The appellant sought permission to appeal again. It was granted by Judge Appleyard and the appeal came before Upper Tribunal Judge Stephen Smith on 9 January 2020. He concluded that the judge in the First-tier Tribunal had misdirected himself on the evidence and that he had also erred in his treatment of the FGMPOs. In the latter respect, he said this:

> [20] There are other weaknesses in the judge's analysis. In one sense, the judge must have been right to conclude at [35] that the existence of the FGMPO did not *automatically* mean that the appellant had a well-founded fear of being persecuted in Sierra Leone. The focus of

each High Court Judge's discussion was what would happen to the appellant in the United Kingdom, given each judge noted the continuing uncertainty over the appellant's immigration status. However, the position is nuanced. The territorial reach of an FGMPO is capable of extending to outside England and Wales. See paragraph 1(4)(a) of Schedule 1 to the 2003 Act, and the final recital to the first FGMPO, which recalls the extraterritorial nature of the statutory regime. While the operative analysis of the High Court was not conducted pursuant to the 1951 Refugee Convention in relation to Sierra Leone specifically, the High Court found, on two occasions, that B posed a risk to the appellant. Both constitutions of the High Court noted that B travelled between the United Kingdom and Sierra Leone. There was, therefore, a clear potential risk that the findings of fact the High Court made under the 2003 Act pursuant to an extraterritorial statutory regime could "match across" to events that were reasonably likely to take place in Sierra Leone. Those risks are particularly acute when one considers the possibility of B also returning from this country to Sierra Leone, as is her practice, according to the findings of the High Court. The First-tier Tribunal judge did not consider the statutory framework within which the FGMPOs were made, in particular the statutory findings each High Court Judge was bound to reach before making the order. Nor did the judge consider the standard of proof to which those orders were made, namely the balance of probabilities. That is a higher standard of proof than is applicable in asylum proceedings. The judge did not consider those factors. The High Court issued the orders sought by (in the case of the first FGMPO) the police, and (in the case of the second FGMPO) by the appellant, in both cases being satisfied that the relevant statutory criteria were satisfied. The First-tier Tribunal judge's failure to engage with these factors was an error of law.

24. UTJ Stephen Smith set aside the decision of the FtT once again and ordered that the appeal should be retained in the Upper Tribunal for re-making. The pandemic ensued shortly thereafter and steps were taken to case manage the appeal, including alerting the parties to the common issue which arose in this case and FM's.

Remaking in the Upper Tribunal

25. It was the Upper Tribunal's intention to hear the appeal on the same day as that of the second appellant: 8 October 2020. Bundles and skeleton arguments had been filed and served in preparation for the hearing but FM's case occupied the entire day and, in any event, Ms van Overdijk indicated that the respondent intended to instruct an expert to provide a report on the likelihood of the appellant being required to undergo FGM on return to Sierra Leone. The respondent confirmed shortly after the hearing that she had instructed the expert witness who had prepared a report for the second appellant: Professor Jacqueline Knorr. We issued directions for the filing and service of that evidence, together with

directions for the exchange of questions for the experts and other such matters.

26. The appeal returned before us on 14 December 2020, by which stage the respondent had filed and served an expert report written by Professor Knorr. She had also reviewed her position in the specific appeal in light of that report, the report from the appellant's expert (Karen O'Reilly) and a response dated by 9 November 2020 from the Home Office's Country Policy and Information Team to a specific request for information about the prevalence of FGM, the Bondo Society and the availability of protection. It was as a result of that review that the respondent contacted the Upper Tribunal on 8 December 2020 to state that she did not intend to contest the appellant's case and that she intended to make a new decision to grant the appellant leave to remain as a refugee. She did not intend, however, to withdraw her case as she still wished to make submissions on the issue of principle.

27. There followed an exchange between the representatives, the result of which was that further skeleton arguments were filed and served. It was clear from those skeleton arguments that the representatives for the appellant and the respondent agreed that the case provided an opportunity for the Upper Tribunal to issue country guidance on the issue of FGM in Sierra Leone and to revisit the earlier decisions of the IAT and the AIT on that subject. By the morning of the hearing, the latest iterations of the skeleton arguments contained suggested country guidance 'headnotes'.

28. It was in these unusual circumstances that we turned to Ms van Overdijk first and asked her to outline the respondent's position on the country situation. She stated that there had been further discussions between the advocates, that she had taken further instructions on the issue, and that there was almost total agreement between the parties on the guidance which might be issued. We suggested that agreement should be reached, if possible, and that any agreed country guidance could be communicated to the Upper Tribunal immediately after the hearing. Ms van Overdijk contacted the Upper Tribunal on the afternoon of the hearing to confirm that the parties were in total agreement that country guidance might be issued in the following terms. (We have removed the helpful cross-referencing to the expert reports which appeared at the end of each sub-paragraph.)

(a) Sierra Leonean women are today among the most marginalized in the world, socially, economically and politically.

(b) The Bondo society, which is extremely powerful and influential in Sierra Leone, has an entrenched role in tribal and political life in the country, and membership confers social status and respect, even opening doors to tribal chief

posts and government jobs. It continues to play a leading role in the social, religious and political life of communities. It is an integral part of life in Sierra Leone. Politicians are at pains to gain the support of Bondo societies and thereby the votes of those under their influence. The power of the Bondo society and relationship between the Bondo society and politicians ensures that the authorities typically do not get involved in the issue of FGM. Male interference in Bondo Society matters is 'known' to have terrible consequences – like disease and death or developing an extended ('female') scrotum, or "elephantiasis of the testicles." Neither state courts nor members of the police are likely to intervene in cases involving initiation into Bondo which has its own laws that are more effective and inescapable than state law.

(c) Bondo societies exist in every village and town across Sierra Leone and are a vital communications link between politicians and rural communities. Whether a girl/woman is a Christian or a Muslim has little influence on her risk of being subjected to FGM and initiated into the Bondo society. Rather, this will depend on her ethnic identity/identities and on the traditions and customs of the ethnic and local group/s she and her parents belong to. Where marriages between Fula women and Krio men are concerned, the Fula wife will often insist on maintaining her Fula traditions and customs because as a dispersed diaspora, the Fula are particularly keen on upholding their traditions also in interethnic marriages which are less common among the Fula than among other groups.

(d) Excision takes place within the context of a secret society – the Bondo Society. Excised women and girls automatically become members of the Bondo, which is operated by "powerful" women called 'digba' or 'Sowei' who have consistently laid claim to cultural expertise with regard to the practice.

(e) Girls and women are expected to have undergone the Bondo initiation ceremony before marriage, and are ostracized, called names, and even abused, if they do not. It is a cultural norm in Sierra Leone. If a young woman has not been "cut" before the age of 18, she can still be subjected to the process, either forcibly or by choice. She is still expected to undergo the initiation and FGM in order to be eligible for marriage.

(f) Soweiship is often hereditary and handed down from generation to generation. The institution itself is synonymous with women's power, their political, economic, reproductive and ritual spheres of influence. Excision, or removal of the external clitoral glans and labia minora, in initiation is a symbolic representation of matriarchal power. The ban on FGM during the Ebola crisis is not continuing. Once the Ebola crisis was over in 2015 there was a return to 'business as usual'.

(g) The overall effectiveness of the police in providing protection is limited by endemic corruption and a lack of resources. A number of NGOs campaign for the abolition of FGM, but these generally work in advocacy, and would not be able to provide protection. There are women's organisations in Sierra Leone making efforts to improve women's position in society, but they do not function as shelters. With millions of Sierra Leonean women suffering violence these NGOs

are unable to protect women from domestic and sexual violence perpetuated against them within their own families and communities.

(h) A young single woman without family support is at high risk of destitution, exploitation and abuse resulting from her unwillingness to adhere to the customs of the Bondo Society, which result in her marginalisation. Single women in particular are in need of family support and a male companion in order to be able to live a relatively secure life away from home, which may be impacted by the lack of initiation by way of undergoing FGM. This is true for towns and villages alike, the latter being even less accessible because people tend to live a more traditional life there than in towns. They live in clans and extended families which would have no access to and which do not let strangers become members. Whether in urban or rural areas, it is not possible for a single young woman to find protection and accommodation without a reliable kin/ethnic/social network if as a result of her decision to reject initiating to the Bondo society, thus undergoing FGM, would lead to them being marginalised by their family members and their ethnic/social network . There is an efficient civil registration system. The National Civil Registration Act 2016 establishes the National Civil Registration Authority and requires every Sierra Leonean to register. This makes it easier for people to be traced.

(i) Those at risk of FGM with mental health problems are likely to experience stigma and discrimination and lack of appropriate treatment. Mental illness is extremely stigmatized and the one psychiatric hospital continues to suffer from stigmatizing and severe underfunding. However, this is only the case, if the stigma results from the subject's family/ethnic and social support system. And if as a result of deciding not to be initiated to the Bondo Society, the subject is marginalised to the extent that they would be unable to avail themselves of adequate access to such medical facilities by virtue of their lack of access to work, economic destitution, and their inhibited ability to secure support from their community. There are only two psychiatrists, two Clinical Psychologists and 19 Mental Health Nurses in a country of seven million people.

(j) Women who are not compliant with or are perceived as rejecting cultural norms for women in Sierra Leone, including rejecting the Bondo society and refusing to be cut are a 'particular social group'.

29. In light of the agreement between the parties about the country situation and the disposal of the appellant's appeal, we indicated that we would be content to hear submissions on the issue of principle only.

Submissions for the First Appellant

30. For the appellant, Ms Weston QC invited us to adopt the approach reflected at [22]-[24] of her primary skeleton argument: where an FGMPO was in place, that should normally stand – in a protection appeal – as evidence of risk of FGM sufficient to discharge the evidential burden upon an appellant as to the presence of the risk identified by the Family Court. The Tribunal's determination of the issues before it in a protection claim

may well be determined, she submitted, by the Family Court's finding of risk but that would not always be so where the evidential findings of the Family Court did not 'map over' the issues to be evaluated by the Tribunal. Ms Weston and Ms Brown submitted at [24] of their skeleton that appropriate guidance would be as follows:

> (i) An FGMPO is conclusive evidence that a risk of FGM has been found at the date of the order for the reasons given by the court;
>
> (ii) The duration of the order granted by the court establishes a presumption that during the order there is risk of FGM such that protection is required.
>
> (iii) Such presumption may only be displaced by evidence of a material change in circumstances.
>
> (iv) The Secretary of State should review any immigration decision materially affected by the fact of the FGMPO in light of such order before any hearing before the FtT; and
>
> (v) The FtT should evaluate any related protection claim issues before it treating the FGMPO as evidence of a sufficient extant risk to meet the lower standard (as above at points (i) and (ii)); but
>
> (vi) Such evidence may or may not be determinative of the issues before the Tribunal at the date of the hearing before it.

31. Ms Weston submitted that the decision to make an FGMPO was to be considered in its proper context, which was provided by the statutory framework and the statutory guidance issued under s5C(1) of the Female Genital Mutilation Act 2003: *Multi-agency statutory guidance on female genital mutilation*, dated July 2020. The Family Court's function was a protective one, as was reflected in that guidance. The functions of the Family Court and the IAC were totally different. A family or criminal court was required to have regard to the guidance in the exercise of its functions. A pubic authority should follow that guidance unless there was good reason not to do so. The guidance listed at 1.4 a number of underpinning principles which applied to all agencies in relation to identifying and respondent to those at risk of FGM.

32. It was to be noted that the application for an FGMPO in GW's case had been made not by her or by her representatives but by the Metropolitan Police Service. The Secretary of State might properly consider whether to be joined as an intervener in FGMPO proceedings where immigration considerations arose. In deciding whether to make an FGMPO, a court was required to have regard to all the circumstances of a case, including the need to secure the health, safety and wellbeing of the potential or

actual victim: [3.3] of the guidance referred. Chapter 4 of the guidance showed that all agencies were required to work together and adopt a victim-centred approach. The Family Court had access to a wide field of information and was under a duty – as were other agencies – to safeguard those at risk. That was to be contrasted with a hearing before the Immigration and Asylum Chamber of the First-tier Tribunal in an appeal against the refusal of protection; there was no safeguarding obligation in that context. A court considering an application for an FGMPO would often be assisted by expert evidence and the court would not be concerned with points which had been taken against an individual's credibility in a decision refusing protection status; the enquiry undertaken by the court was not undertaken against a background of the refusal of such a claim. The court would focus, instead, on the risk factors which appeared at Annex B of the statutory guidance. Upon the making of the order, it had been established to the satisfaction of a specialist court that a specific risk had been found.

33. It was accepted by Ms Weston that the function of the FtT did not end with considering an FGMPO and reading across the conclusions upon which it was based into the protection enquiry. It was critical to determine, in any given case, the extent to which the findings made by the Family Court 'mapped over' the assessment to be undertaken by the refugee status decision maker. It was also accepted that not all FGMPOs attracted the same weight in the IAC's assessment. There might, for example, be an absence of reasons given by the Family Court for the making of the order. Ms Weston recognised that a refugee status decision maker (whether the Secretary of State or a judge) might not be particularly assisted by an FGMPO which had been made without reasons, and it might be appropriate for the Protocol on Communications Between the Family Court and the IAC to be invoked.

34. Ms Weston also accepted that information might come to light which entitled the respondent or a judge in a protection appeal to depart from a reasoned judgment on an FGMPO application in the Family Court. Equally, a refugee status decision maker may conclude that a risk which had been found to exist in the Family Court had ceased to exist. A judge in the IAC was not entitled to depart from the reasoned conclusions reached by the Family Court merely because adverse matters had arisen during the oral testimony of an appellant or a witness, however. That would represent an impermissible attempt to re-open a matter which had already been decided by the court. There must, Ms Weston submitted, be truly supervening events or a lapse of time which undermined the conclusions reached by the Family Court. Because the functions of the two judicial bodies were different, the IAC was required to treat the findings made by the Family Court as determinative of the issues which were before it. The IAC was required to treat those findings as a 'fixed

point', subject to the considerations above. This was a familiar exercise for the FtT and the Upper Tribunal, which had been receiving and considering themselves bound by best interests assessments in the Family Court for many years.

Submissions for the Respondent

35. For the respondent, Ms van Overdijk invited us to endorse the approach to FGMPOs adopted in the respondent's guidance note entitled *Gender issues in the asylum claim*, version 3.0, issued on 10 April 2018. In her skeleton, she particularly highlighted the following passage:

> In cases where there is a protection order the detail of the individual protection order must be carefully considered, for example you may see cases which involve an FGM Protection Order (FGMPO) or Forced Marriage Protection Order. The fact that a protection order has been made by the Family Court may provide strong evidence of risk of persecution or serious harm. However, the order may not provide evidence about risk on return to their country, so does not in itself mean that refugee status should automatically be granted. The asylum claim must still be considered on its individual merits, taking into account that the Family Court has made an order and the reasons for it doing so. Such orders must be considered in the round and given appropriate weight in reaching your decision on future protection needs.

36. The ultimate question, Mr van Overdijk submitted, was the weight which was to be attached to the FGMPO. It was not correct to submit that the FGMPO created a rebuttable presumption that international protection was required, or even that it provided a starting point for the assessment of a refugee status decision maker. To adopt that approach would be to fetter the discretion of the IAC, she submitted. It was accepted by the respondent, however, that the order could not merely be ignored or side-lined, as had previously occurred in these appeals. The correct approach was to consider the basis upon which the order was made and to assess the weight which it should carry in the holistic assessment which the refugee status decision maker was required to undertake.

37. Ms van Overdijk noted that it had been submitted by the Secretary of State in SSHD v Suffolk County Council & Ors [2020] EWCA Civ 731; [2020] 3 WLR 742 ("the Suffolk County Council case") that the assessment of risk undertaken by the FtT (IAC) is to be taken as the starting point or default position in any subsequent assessment of risk by the Family Court in considering whether to make an FGMPO. That submission had been rejected by the President of the Family Division – Re A [2019] EWHC 2475 (Fam) – and then by the Court of Appeal. The reasons given by the Court of Appeal for rejecting the Secretary of State's submission in that appeal applied equally in the reverse situation. The Family Court had not made a decision in rem. There was no issue estoppel or cognate principle which

prevented the Secretary of State or the IAC from reaching conclusions different from those in the Family Court. Judicial comity was a relevant consideration but that had also been considered by the Court of Appeal.

38. It was said by the appellants that there was a direct comparison to be drawn between the circumstances presently under consideration and those in which an assessment of a relevant child's best interests had been made by the Family Court. In truth, there was no real comparison. It was also relevant to recall that the IAC and the Family Court were not courts of coordinate jurisdiction. In GW's case, it was clear that Peter Jackson J had made a finding in the round, notwithstanding his clear concerns about aspects of the evidence and his explicit conclusion that the appellant had not shown that her stepmother was a 'cutter'.

39. The respondent agreed with the appellant that it was necessary, in any given case, to determine the extent to which the findings made by the Family Court 'mapped over' the assessment which was to be conducted by the IAC. Even where the factual basis on which the FGMPO was made mapped over the IAC's assessment precisely, however, there was no reason for there to be a rebuttable presumption that the former assessment should govern the latter, or even that former represented a starting point. The reality, as was clear from the judgment in GW and the order in FM, was that the proceedings in the Family Court were inquisitorial and that the accounts given were often not fully tested.

40. Addressing a question from the bench, Ms van Overdijk confirmed that the respondent accepted that the making of an FGMPO was not a new matter as defined in s85(5) of the 2002 Act, providing the claim for protection was based on a fear of FGM. That was to be contrasted with the position in which the protection claim was based on a different reason (political opinion, for example) and an FGMPO came to be made subsequently.

Submissions in response

41. Ms Weston made five short points in response. She submitted, firstly, that the appellant's main, underlying submission was that the IAC should recognise the specialist function of a court which made an FGMPO. Secondly, it was accepted that the Family Court could not injunct the Secretary of State. The authorities recognised that clear demarcation of functions. Nothing which was said in the Suffolk County Council case was inconsistent with the appellant's suggested approach. Thirdly, it was correct and accepted that the conclusions of the Family Court in this case were such that there was still a relevant enquiry to be undertaken by the IAC. It was not open to the FtT, however, simply to reach its own conclusions in the absence of evidence which warranted departure from those reached by the Family Court. There had to be a proper reason –

rooted in evidence which was not before the Family Court – to justify departure from its conclusions. Fourthly, it was critical in any given case to consider the extent to which the findings which led to the FGMPO mapped over the assessment which was to be undertaken by the IAC. It would be open to a refugee status decision maker (whether the respondent or a judge in the IAC) to consider that the findings of the judge in the Family Court were determinative of certain questions and then to make his own findings on issues which were not considered by the Family Court. Fifthly, this case represented a good opportunity for the Upper Tribunal to provide guidance on how the Family Court and the IAC might assist each other in cases such as this. Any guidance to the Family Court should underline the importance of ensuring that the factual basis upon which an FGMPO was made was made clear.

42. Responding to a question from the bench, Ms Weston accepted that paragraph 24(ii) of her skeleton should be amended by the insertion of the word "its", so as to read as follows:

> The duration of the order granted by the court establishes a presumption that during the order there is risk of FGM such that [its] protection is required.

43. She had not sought to submit, she explained, that the existence of an FGMPO created a rebuttable presumption that international protection was required; the existence of an extant FGMPO instead established a presumption that the protection of the FGMPO was required. Ms van Overdijk observed that this had not been the respondent's understanding of the appellant's position.

44. We reserved our decision on the issue of principle.

C. THE SECOND APPELLANT

Background

45. The second appellant is a national of The Gambia who was born on 3 February 1979. Her two daughters, ZN and AN, who were born in 2008 and 2011 respectively, are dependent upon her claim. Her husband, and their father, occupies a senior diplomatic position, having previously risen to a senior rank in the Gambian military. The appellant is the second of his two wives. The appellant has an older daughter – FS, born in 2002, - from a previous marriage.

46. The appellant is from the Wolof tribe. Her husband is from the Serere Tribe. They are both Muslims.

47. On 17 March 2015, the appellant was granted entry clearance to the United Kingdom as a visitor, valid until 17 March 2017. ZN and AN also received

entry clearance in that capacity. The appellant's husband had been posted to Turkey in 2012. The appellant lived with him, his first wife, and their children in Ankara from that point onwards, and their entry clearance was issued in Turkey.

48. The appellant first came to the UK with ZN and AN in summer 2015. They stayed with her husband's half brother for two months or so before returning to Turkey. They returned to the UK on 22 December 2016 and claimed asylum on 11 July 2017.

Protection Claim

49. The appellant claims that her daughters are at risk of FGM in The Gambia. The claim was outlined in the appellant's screening interview on 11 July 2017 and detailed in a witness statement dated 21 August 2017 and an asylum interview which took place on 29 November 2017.

50. The appellant stated she had met her husband in 2005, at a hospital where she worked as a laboratory attendant. She had been tending to his father, who was an inpatient at the time. The appellant's husband exchanged contact details with her after a conversation. A relationship developed and they married. Apart from his father, she did not meet any other members of his family before they married.

51. It was only when the appellant fell pregnant with ZN that she first learned of the family's views on FGM. Her sister-in-law and her mother-in-law had both been cut and the former told the appellant that she was praying for her to have a girl so that the 'haraf' could be performed upon her. The appellant – who has not had FGM because it is not common amongst the Wolof – made her own views on the subject clear and there was a disagreement between the two of them. Six months after ZN's birth, there was a physical fight between the appellant and her sister-in-law because she had insisted that ZN would have to have FGM. The appellant's mother-in-law sided with her own daughter. When he returned home, the appellant's husband refused to become involved.

52. The appellant stated that husband's eldest daughter (from his first wife) had already been 'cut' and it would also happen to his other two daughters from that relationship. They are from the Mandinka tribe, in which FGM is widely practised. The practice in the appellant's husband's family was to perform the procedure on all female children every five years. ZN and AN were too young in 2012 but there was due to be another ceremony in 2017. The daughters of the husband's first wife were due to undergo the procedure at that time, most likely in the school summer holidays. The appellant's husband and his family expected ZN and VN to be cut at the same time. The appellant did not consider that the prohibition on FGM in The Gambia would serve to protect her children.

53. The appellant had come to the UK with her children in December 2016, ostensibly to attend her niece's graduation. She had initially lived at her cousin's address. Her husband came to visit in May. He stayed for a few days and they had an argument about FGM. She had taken the precaution of hiding the children's passports, lest her husband sought to abduct them. She reported the threat to the police and the local authority after he had left the country. He sent her a text message at the end of June 2017. It was in the following terms:

> I have been trying to let you understand the importance of the tradition for almost a year but you refused to allow the kids to perform the rites. I also visited you to discuss further on the matter, but the situation provided difficult as you continue to refuse my parents request. As tradition demands it, the kids in the future will have to perform it anytime they visit The Gambia. As it stands now, the situation has caused a serious rift between my parents and me as they consider me as someone who goes against our tradition. I want you to consider this to avoid future problems. Get back to me soon.

54. It was three weeks after this message that the appellant claimed asylum. Her contact with her husband was said – at the time of the interview – to be by way of telephone calls two or three times per week, although he just asked to speak to the children. She had not seen him since he left the UK in June 2017. She was not in contact with his family, although she was in contact with her own mother, who she had told of her fears.

Refusal of Asylum

55. The respondent refused the appellant's protection claim on 9 January 2018. She accepted that the appellant was a national of The Gambia and that she was married to a senior diplomatic figure from that country but she did not accept that ZN and AN were at risk of FGM on return. It was not accepted that the removal of the appellant and her children to The Gambia would place the United Kingdom in breach of her obligations under the Refugee Convention or the European Convention on Human Rights ("ECHR").

56. The appellant appealed against this decision to the First-tier Tribunal on 22 January 2018.

FGMPO Proceedings

57. Nine days after the refusal letter, the appellant made an application to the Family Court in Wolverhampton for a Female Genital Mutilation Prevention Order ("FGMPO"). The order was sought against the appellant's husband. She completed form FGM001 with the assistance of the solicitors who have represented her in the asylum proceedings. The form itself contained the most limited information but appended to it was

a statement which was signed by the appellant on 19 January 2018. There was a good deal of commonality between this statement and the statement submitted to the respondent in support of the asylum claim. The appellant added, however, that she had received 'numerous telephone calls' from her husband and his family, pressuring her to return to The Gambia so that the children could undergo the procedure. The most recent such call was said to have been on 16 January 2018. It had been made clear to her, she said at [28] of the statement, that the children would have to undergo the procedure at any time that they returned, despite the five year cycle which usually governed the occurrence of the procedure in the family. The appellant stated that she was being constantly 'harassed, pestered and emotionally pressured' by her husband and his family; that she was caused stress and anxiety by this; and that she was concerned that he or his family members would try to take the children abroad. She sought the protection of an FGMPO accordingly.

58. On 9 February 2018, the application for an FGMPO was heard by HHJ Clayton, sitting in the Family Court in Birmingham. The appellant was legally represented. The application was made without notice to the respondent father. HHJ Clayton heard the appellant's legal representative and read the statement described above. On the same date, the judge made an FGMPO 'for the immediate protection of the children'. The material part of the order is in the following terms:

> [7] The respondent must halt any arrangement for the procedure of Female Genital Mutilation to be carried out on the children: [names and dates of birth given].
>
> [8] The Respondent shall not attempt to commit, or conspire to commit, a Female Genital Mutilation Offence whether in this or any other jurisdiction, on the children: [names and dates of birth given].
>
> [9] The Respondent must not arrange for any medical or surgical procedures, and must not perform any procedure to cause injury to the genitalia, or genital organs of the children, whether in this or any other jurisdiction, on the children: [names and dates of birth given].
>
> [10] The Respondent must not take the children: [names and dates of birth given] out of England and Wales, without consent of the Applicant in writing or permission of the Court.
>
> [11] The Respondent must not harass, pester or put pressure on the Applicant in respect of the children: [names and dates of birth given] undergoing the procedure of Female Genital Mutilation.
>
> [12] The Respondent shall not apply for any travel documents, either new or replacement document, in the names of the children: [names and dates of birth given] for any other documents that shall enable

> the children [names and dates of birth given] to be removed from the jurisdiction.
>
> [13] The Respondent must not instruct or encourage anyone else to do any of the above (paragraphs 7-12).

59. The judge recorded, at [6], that the appellant had given an undertaking to serve the application and the supporting evidence (seemingly, therefore, the statement) upon her husband in Turkey by signed Air Mail. HHJ Clayton ordered that the matter should return to court on 9 March 2018 so that consideration could be given to the renewal of the order and any other matters, including further orders and further directions.

60. The matter returned before HHJ Clayton on 9 March 2018. She ordered on that date that her earlier order was to continue to apply until further notice. For present purposes, however, it is important to record that the recitals to the order included the following:

> UPON IT BEING RECORDED THAT the respondent [name given] confirmed through an email that he received the order of the 9th February 2019 and that he agreed with the terms thereof and did not want to attend any further hearings.
>
> […]
>
> AND UPON it being recorded that the respondent was unable to attend court as he received the papers on the evening of 8th March 2018 and that he resides in Turkey but that he does not have notice of the hearing today.

Appeal to the First-tier Tribunal

61. The appellant's appeal against the refusal of her protection claim was then heard by a judge of the First-tier Tribunal on 11 May 2018. She heard oral evidence from the appellant and her cousin. She received the FGMPOs made by the Family Court. She also had an expert report from Professor Jacqueline Knorr, who had been instructed by the appellant's solicitors to opine on the threat of FGM. In her reserved decision, which was sent to the parties on 25 June 2018, the judge reached similar conclusions to the respondent. She found that the FGMPO did not 'of itself' establish that the children were at risk of FGM and that the orders 'cannot be taken as an indication that the children are at risk of FGM'. On the contrary, she held that there were proper reasons to conclude that the appellant's account was not capable of belief. At [38], she summarised her conclusions in the following way:

> In conclusion, because of all of the above factors which render the appellant's claim not credible, I conclude that the appellant is not a truthful witness. I find the appellant has fabricated the account of

> receiving threats from her husband's family simply to enable her to make an asylum claim in the UK. I do not accept that on return the appellant's children are reasonably likely to face the threat of FGM either from her husband or his family. This is because I do not accept the appellant's account of her husband's family practising FGM.

Appeal to the Upper Tribunal

62. The appellant sought permission to appeal against the decision of the FtT. Six grounds of appeal were settled by Mr de Mello, who had not appeared at first instance. It was only the first of those grounds which persuaded Upper Tribunal Judge Grubb to grant permission to appeal. He considered it arguable that the judge had erred in her assessment of the relevance of, and weight to be given to, the FGMPOs. He considered the remaining grounds to be unarguable.

63. The appeal to the Upper Tribunal first came before UTJ Allen, sitting in Birmingham on 12 July 2019. Judge Allen concluded that the appellant's first ground of appeal disclosed an error of law on the part of the FtT. He considered that the judge had erred in concluding that she should attach no weight to the FGMPOs. As a consequence, he decided, 'there will have to be a revisiting of this issue and this issue only, before the Upper Tribunal.'

64. The appeal returned for a resumed hearing before Nicol J and UTJ Blundell on 19 November 2019. Noting that the FGMPOs were said to be central to the evaluation which was to be conducted, the Upper Tribunal was concerned that it did not have before it, at that stage, either the evidential basis upon which HHJ Clayton had made those orders or any note of the reasons she had given for so ordering. In particular, the Upper Tribunal did not have the statement which had been made in the Family Court or any note of the oral evidence given by the appellant before that court. The proceedings were accordingly adjourned so that the Upper Tribunal could invoke the *Protocol on communications between judges of the Family Court and the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal* (19 July 2013) with a view to obtaining those documents.

65. On 15 January 2020, the Designated Family Judge for Birmingham (HHJ Thomas) made an order disclosing to the Upper Tribunal the FGM001 application form and the statement made by the appellant on 19 January 2018. Further copies of the FGMPOs were also provided. The appeal was due to return before the Upper Tribunal, sitting at Field House on 20 March 2020, but was adjourned due to the pandemic.

Remaking in the Upper Tribunal

66. The appeal returned – before this constitution of the Upper Tribunal - on 14 October 2020. The appellant and her cousin were physically present, as

was the respondent's legal team. Mr de Mello was unable to travel to Field House during the pandemic. He participated remotely, via Skype for Business, and we are satisfied that the proceedings were conducted fairly in this way.

67. At the outset of the hearing, Mr De Mello submitted that the appellant's appeal should be considered *de novo*, rather than being limited in the way which had been ordered by Upper Tribunal Judge Allen. He submitted, in summary, that an assessment of credibility must be undertaken holistically and that the error of law which Judge Allen had accepted vitiated the FtT's decision as a whole. For the respondent, Ms van Overdijk opposed that course, submitting that the Upper Tribunal could consider the significance of the FGMPO and re-evaluate the appellant's credibility in the light of the preserved findings. We retired to consider the competing submissions and indicated upon our return that we preferred Mr de Mello's submissions. The error of law which had been identified sufficed, in our view, to undermine the entirety of the FtT's assessment and the proper course was for the appeal to be reconsidered de novo.

68. That indication having been given, the parties were content that the appeal should be retained in the Upper Tribunal and counsel were ready to put questions to the appellant and her witness despite the broader canvas of analysis required.

69. We heard oral evidence from the appellant through a Wolof interpreter. She confirmed that she was able to converse freely with him and no problems of interpretation arose during the hearing. She adopted her statements and was asked a small number of additional questions by Mr de Mello before being cross examined at length by Ms van Overdijk. She was not re-examined. After the short adjournment, we heard evidence from the appellant's cousin, NB. She adopted her witness statement and was cross-examined by Ms van Overdijk. There was no re-examination of this witness. She was asked two clarificatory questions from the bench. We do not propose to rehearse the oral evidence in this decision. We will return to our evaluation of it below.

Submissions for the Respondent

70. Ms van Overdijk relied upon her skeleton argument. She accepted that the appellant's claim engaged the Refugee Convention and that Female Genital Mutilation existed in The Gambia. The factual question which the Upper Tribunal had to resolve was whether this particular appellant's daughters were at risk of FGM at the hands of her husband and his family. Although the FtT's findings of fact had been set aside, the points taken against the appellant by the judge in the FtT remained cogent and were adopted by the Secretary of State. The following points were particularly

potent. It was unlikely that the appellant would not have known about her husband's belief in FGM before they married, as the FtT had found at [22]. The appellant's expert also suggested that this would have been the case. The points made at [29]-[33] of the FtT's decision, regarding the appellant's delay in claiming asylum and her behaviour at that time were also strong.

71. Additional concerns arose, in Ms van Overdijk's submission, from the oral evidence which had been given by the appellant's cousin. Her account had been discrepant as regards the disagreement which had supposedly taken place between the appellant and her husband when the latter came to visit. She had variously stated that she had been physically present and that she had only been told about the argument. It remained unclear, in any event, why the appellant and her cousin had not sought to alert the police to these events.

72. Ms Van Overdijk submitted that the claim should not succeed even if it was taken at its highest. The appellant had accepted when the point was put to her in cross-examination that the risk to her daughters would not crystallise until the end of the five-year cycle, in 2022. That was different from the account she had given in the past but the fact remained that the threat was too remote. The appellant had given no evidence that the threat had been re-affirmed by her husband and she had completely cut ties with him and his family. She did not even know whether he was in Turkey or The Gambia. The appellant contended that the risk subsisted but there was no evidence of any such risk. The respondent submitted that there was no real risk of the children being subjected to FGM in 2022.

73. As regards the legal issue which arose in both appeals, Ms van Overdijk submitted, firstly, that the making of an FGMPO in the Family Court could not bind the respondent: GD (Ghana) [2017] EWCA Civ 1126; [2018] Imm AR 1, at [47]-[51] and Re A [2019] EWHC 2475; [2020] 1 FLR 253, at [53] *et seq*. The other cases which had been included in the authorities bundle were for background only. It was to be recalled that the Family Court and the Immigration and Asylum Chambers of the FtT and Upper Tribunal were tasked with very different functions. It was accepted, however, that some weight should be given to the making of an FGMPO in the Family Court, and that the FtT in the instant case had erred in its approach. It was also accepted by the respondent that more weight should properly be given to the making of an FGMPO when the issues considered by the Family Court and the IAC overlapped. That was properly recognised and reflected in the respondent's guidance entitled 'Gender issues in the asylum claim', version 3.0, published on 10 April 2018. Ms van Overdijk commended that guidance and invited the Tribunal to endorse it.

74. It was to be submitted by the appellants that the making of an FGMPO in the Family Court represented at least a starting point, in the Devaseelan [2003] Imm AR 1 sense. That was not the correct approach and decision makers in protection cases should, instead, consider the making of the FGMPO in the round, as part of the evidence. The Secretary of State had submitted in the Suffolk County Council case that the Family Court should take the IAC's conclusions as its starting point when deciding whether to make an FGMPO. That submission had been rejected for a raft of cogent reasons. That conclusion – and the reasoning which underpinned it – applied equally in the opposite direction.

75. Drawing the two threads of her submissions together, Ms van Overdijk submitted that the weight which could be attached to the FGMPO in this appeal was minimal. It was apparent that the order had been made without any substantive consideration of the facts, which had also not been tested in any way. The Family Court had expressed no view on the credibility of the appellant's account and it could not properly be said – as Mr de Mello sought to submit – that the appellant's husband's response to the Family Court's initial order bore any weight. The Upper Tribunal was able to consider evidence which was not before the Family Court and to reach a considered view on her oral and written testimony.

76. There was a final point, which was potentially of significance in this case and others of its kind. The FGMPO had extra-territorial effect and had been sent to the appellant's husband. As a senior diplomat, it was unlikely that he would wish to contravene the order of a foreign court and the order was likely, in those circumstances, to afford the appellant's children some protection in The Gambia, even if there was a threat of some description to them. The extent to which an FGMPO served to offer protection upon return was an issue to be considered in any such case.

Submissions for the Second Appellant

77. For the appellant, Mr de Mello adopted the written and oral submissions on the law made by Ms Weston QC and Ms Brown. On the facts of the appellant's case, he submitted as follows. The respondent was wrong to submit that there was no evidence of an extant threat to the appellant's daughters. The appellant had consistently described the extant nature of the threat in her various witness statements. It was understandable that her husband was not presently taking action, given the FGMPO which was in place, but different considerations applied on the girls' return to The Gambia. The respondent had submitted that the appellant had not called the police in the face of the threat from her husband, but it was clear from her statement in the Family Court that she had in fact done so. It could not be thought that the appellant and her husband had somehow colluded in order to secure asylum for her and the children. The appellant's husband had been served with the FGMPO out of the

jurisdiction and had accepted both receipt of the order and its terms. It was unlikely that he would have taken those steps if he was colluding with the appellant.

78. The FGMPO which had been made in this case was made in order to protect the appellants' daughters from a risk which had been found by the Family Court to exist. That order provided the starting point for the IAC's assessment and it was for the respondent to adduce evidence to displace the conclusions of the Family Court. It was accepted that the FGMPO did not fetter the discretion of the Secretary of State for the Home Department. The order was specifically concerned, however, with the welfare of the children in the event that they were removed from the jurisdiction to the country of their nationality and it was binding on the parties to that extent. The Family Court had made a finding of fact on the balance of probabilities and it had before it the same type of evidence as was considered by the IAC. It was open to the respondent to submit, as Ms van Overdijk had, that an FGMPO might, in a given case, reduce the risk of FGM on return but the position in this case was clear: there was a real risk that the appellant's husband or his family would take matters into their own hands in The Gambia and there would be no effective recourse to the authorities, irrespective of the existence of the order.

79. We reserved our decision in the second appellant's case at the conclusion of the hearing on 8 October. It had been hoped that the first appellant's case would follow but that was not possible as the court day was drawing to a close. We issued directions for the progression of the other case and it was duly relisted for 14 December.

80. In light of the inevitable delay between the hearing of this appeal and the issuing of a decision upon it, we were conscious of the need to reflect promptly upon the credibility of the appellant's account. We did so as a panel and agreed, subject to the resolution of the legal issue at the centre of this case, that we had each formed an adverse view of the evidence given by the appellant and her cousin.

D. THE LEGAL FRAMEWORK

81. A specific offence of female genital mutilation was enacted by section 1 of the Female Genital Mutilation Act 2003 ("the 2003 Act"). Section 2 created an offence of assisting a girl to mutilate her own genitalia. Section 3 created a further offence of assisting a non-UK person to mutilate overseas a girl's genitalia. From 3 May 2015, s3A created another offence of failing to protect a girl from a risk of FGM. From the same date, s4 extended ss1-3A to extra-territorial acts or omissions.

82. From 17 May 2015, provision was made at s5A for the making of Female Genital Mutilation Prevention Orders. Section 5C permits (but does not require) the Secretary of State for the Home Department to issue guidance about the effect of the Act or other matters relating to FGM. By s5C(2), a person exercising public functions must have regard to that guidance in the exercise of those functions but, by s5C(3), nothing in the section permits the Secretary of State to give guidance to any court or tribunal.

83. By s5A, it is schedule 2 to the 2003 Act which makes detailed provision for the making of FGMPOs. For present purposes, only paragraph 1 need be set out in full:

(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).

84. Provision is made in paragraph 2 for the court to make FGMPOs with or without specific application being made, and for applications to be made by various people, whether as a part of family proceedings or not. Paragraph 3 concerns the circumstances in which a criminal court might make an FGMPO. Paragraph 4 creates an offence of failing to comply with an FGMPO. Paragraph 5 concerns the circumstances in which an FGMPO might be made without notice to the respondent. Paragraph 6 governs the variation or discharge of an FGMPO. Paragraphs 7-15 concern the arrest, detention and bail of those suspected of breaching an order. Paragraph 16 makes clear that the availability of an FGMPO does not affect any other protection or assistance which is available to a potential victim of FGM. Paragraph 17 contains four definitions, including the definition of "the court", which means the High Court or the Family Court in England and Wales, except where the power to make an FGMPO is exercisable by a criminal court. Paragraphs 18-31 make like provision for Northern Ireland.

85. There was some reference to the statutory guidance before us. As noted above, the guidance is issued by the Secretary of State under s5C of the 2003 Act. The current guidance runs to 89 pages and provides invaluable information to relevant agencies about the practice of FGM and the legislative and other measures which are in place in an attempt to eradicate it. We do not propose to precis the document. We note that page 11 provides percentages of girls and women aged 15-49 who have undergone FGM in Africa, the Middle East and Indonesia. The percentage in Somalia is given as 98%. In the two countries with which we are concerned, Sierra Leone and The Gambia, the percentages are 90% and 75% respectively. Section 3 of the guidance, to which Ms Weston referred, provides guidance on the law in England and Wales. Paragraph 3.3 provides particular guidance on FGMPOs, emphasising the court's protective role in making such an order. Section 4 is entitled *Working Together to Tackle FGM* and emphasises the need for multi-agency co-operation to reduce the incidence of FGM.

E. ANALYSIS

The Authorities

86. The relationship between the Family Courts (including the Family Division of the High Court), the Secretary of State for the Home Department and the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal (and their predecessors) has been the subject of a great deal of authority. At [33] of R (Anton) v SSHD [2004] EWHC 2730 (Admin); [2004] EWHC 2731 (Fam); [2005] 2 FLR 818, Munby J (as he then was) drew on authority dating back to 1968 in holding that:

> 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.

87. At [42], however, Munby J underlined a point made by Hoffman LJ (as he then was) in R v SSHD ex parte T [1995] 1 FLR 292:

> Clearly, any order made or views expressed by the 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.

88. Anton was cited by the Upper Tribunal (McFarlane LJ, Blake J and UTJ Martin) in Nimako-Boateng [2012] UKUT 216 (IAC). The Upper Tribunal held that orders in relation to children made in family proceedings did not bind the Secretary of State in immigration proceedings but that informed decisions of a family judge were likely to be of value to a judge of the Immigration and Asylum Chamber.

89. Nimako-Boateng and RS (India) [2012] UKUT 218 (IAC) (which was decided by the same senior constitution of the Upper Tribunal) were endorsed by the Court of Appeal in Mohan v SSHD [2012] EWCA Civ 1363; [2013] 1 WLR 922; [2013] Imm AR 210. It was in the wake of these decisions that the Protocol on Communications Between Judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal was signed by The President of the Family Division (Munby LJ) and the Senior President of Tribunals (Sullivan LJ) on 19 July 2013.

The FGMPO Authorities

90. It was submitted by the applicant in Re A (a child: FGM: asylum) [2019] EWHC 2475 (Fam); [2020] 1 FLR 253 that the 2015 amendments to the 2003 Act signalled an intention to depart from these settled principles, albeit to a limited extent. It was submitted that Parliament had 'plainly intended' that the Family Court could make an FGMPO to prevent the Secretary of State from removing an individual, even if removal directions had been set and to do so would frustrate the intention of the Home Office and the IAC: [25].

91. The President of the Family Division (McFarlane LJ) reviewed the authorities, including Anton and SSHD v GD (Ghana) [2017] EWCA Civ 1126; [2018] Imm AR 63, before confronting the submission made by leading counsel for the applicant that the court should draw a 'firm

distinction' between FGMPOs and the orders with which the existing case-law was concerned: [29]. It was also submitted by Ms Monaghan QC, for the applicant, that it was the Family Court, and not the Immigration and Asylum Chamber, which had been tasked by Parliament with conducting risk assessments in FGM cases: [29]. She also emphasised, in support of her position, '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.': [32].

92. The President of the Family Division rejected these arguments at [44]-[54], holding that there is no jurisdiction for a Family Court to make an FGMPO against the Secretary of State for the Home Department to control the exercise of her jurisdiction with respect to matters of immigration and asylum. He considered that the authorities to which we have referred above applied equally to the situation in which a Family Court was asked to make an FGMPO and, at [49], that there was

> …. 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.

93. At [51], McFarlane LJ said this, echoing the point made by Hoffman LJ in *ex parte* T:

> [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.

94. At [55]-[56], McFarlane LJ gave short shrift to a separate argument which had been advanced by the Secretary of State, who had intervened in the proceedings. She had submitted that the Family Court was obliged to take any prior assessment of the risk of FGM by the FtT as its starting point or 'default position' in deciding whether to make an FGMPO. In that applicant's case, the FtT had not accepted that there was a risk of FGM. The appellant had subsequently failed to secure permission to appeal and

had exhausted her rights of appeal against the FtT's decision. It was this finding which was submitted by the Secretary of State to represent the proper starting point for the assessment of whether an FGMPO should be made.

95. McFarlane LJ considered the Secretary of State's submission not to be supported by authority. It was clear from authority that the approach to risk assessment in a family case was a different exercise from that undertaken in the context of immigration and asylum. The Family Court had a duty under the 2003 Act to have regard to all the circumstances and, to discharge that duty, it had to consider all the relevant evidence before deciding any facts on the balance of probability and then move on to assess the risk and the need for an FGMPO. It would 'necessarily take note' of the FtT's assessment but the assessment undertaken in the IAC was not a compatible process with that required in the Family Court. The court had 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.": [56].

96. McFarlane LJ therefore discharged the part of the order which restrained the Secretary of State and replaced it with a 'request' that the Secretary of State should restrain enforcement of the immigration decisions until the conclusion of the FGMPO application and 'thereafter to re-consider the immigration determination in the light of any risk assessment undertaken by the Family Court.'

97. The Secretary of State appealed to the Court of Appeal against the conclusions which McFarlane LJ had reached at [55]-[56]. She repeated her submission that the IAC's assessment was to be taken as the starting point or default position for the Family Court. In a judgment delivered by the Senior President of Tribunals, the Court of Appeal (Ryder, King and Hickinbottom LJJ) unanimously rejected that submission. The basis upon which it did so was a primary focus of the written and oral submissions before us and it is necessary to consider the reasoning in some detail.

98. The court set out what had been said by McFarlane LJ at [55]-[56] of his judgment and the salient parts of Re H (A Child) [2016] EWCA Civ 988, on which he had based those conclusions. It noted that A's application had subsequently returned for a three-day hearing before Newton J, after which he had made an FGMPO and had observed that it was 'difficult to think of a clearer or more serious case' of a risk of FGM.

99. At [25], the court summarised the submissions made by the Secretary of State. It was not submitted that the decision of the FtT was binding on the Family Court but, instead, that its decision should be the starting point for the court before whom the application for an FGMPO was made. The

reasoning was in three parts. Firstly, that the Family Court must respect the decision of the IAC in respect of the risk of FGM in the country of return and must consider that conclusion as part of its analysis of all the circumstances. Secondly, whilst the Family Court was still required to consider an application for an FGMPO, the starting point should be the IAC's decision that the risk does not provide a basis for the person to remain in the UK. Thirdly, that although the Family Court might in exceptional circumstances take a different view from the IAC, that should be rare and there would need to be a material basis, identified by the court, for doing so. Evidence leading to a change in circumstances might, for example, justify that course. At [26], it was noted that leading counsel for the respondent was unable to support these arguments with authority but he sought to support them with reference to judicial comity and proportionality.

100. The Senior President considered, however, that there were three anterior matters which provided a complete answer to the appeal. They were as follows. Firstly, that the proceedings before the IAC were adversarial, and not in rem. It was only the parties to that appeal who were bound by the decision of the FtT. He added:

> We accept that an assessment of risk made by one court or tribunal may be a relevant consideration for a subsequent assessment by a different court or tribunal: but, whether it is relevant at all and, if so, the weight to be given to the earlier assessment, are matters for the subsequent court or tribunal. They will depend upon (among other things) the degree of similarity/difference between the precise assessment in which each court or tribunal is involved, the available relevant evidence and any particular rules (evidential or otherwise) that apply.

101. Secondly, the Family Court's role in FGMPO proceedings was given in statute, and it was required by the 2003 Act to have regard to all the circumstances. That statutory language neither required nor permitted 'any limitation, presumption or assumption in the task to be performed'. The only starting point in law was that all the circumstances included the need to secure the health, safety and wellbeing of the girl to be protected. Thirdly, a Family Court considering an application for an FGMPO might be required to consider the evidential basis on which a prior decision of the IAC had been made and the nature of any further evidence, including expert evidence which might be necessary to assist the court to resolve the proceedings. There was no need for any additional gloss on that rule.

102. At [31]-[38], the court considered the Secretary of State's reliance on the principle of judicial comity. No support for the argument was to be found in the decision of Holman J in A v A (FGMPOs: Immigration Appeals) [2018] EWHC 1754 (Fam); [2018] 4 WLR 105, which was not an application

of the principle of comity as between the court and the IAC but careful avoidance of what would otherwise have been a tactical attempt to use the Family Court to interfere in the jurisdiction of the IAC: [33]-[34]. The exercise performed in the two jurisdictions was largely distinct and separate and driven by very different policy considerations: [36]. It was not even clear that the Family Court and the FtT(IAC) could be considered to be courts of coordinate jurisdiction. Neither the Family Division of the High Court nor the Family Court could make a decision which had 'precedential effect' in either the FtT(IAC) or the UT(IAC). The proceedings in the IAC are adversarial whereas those under the 2003 Act were essentially investigatory: [38].

103. The respondent's arguments on proportionality were dismissed as missing the point at [39]-[41]. Even where the evidence presented to the Family Court and the IAC was the same, the context and nature of the decision-making process were materially different. The child would be separately represented and would have her own voice in FGMPO proceedings but that would not be the case before the IAC. Her interests would be the paramount consideration before the Family Court but not before the IAC. The statutory schemes had a different focus and function. At [43], the court concluded materially as follows:

> When a Family Court comes to consider an issue upon which it is said a tribunal has already opined, including, for example, a tribunal's specialist view about third country risk, the relevance of the tribunal's conclusion, any intermediate findings of fact, and the nature and extent of the evidence upon which these are based will be examined as part of all the circumstances in accordance with paragraph 2 of schedule 2 of the FGMA 2003.

104. We should note, before leaving the decision in Suffolk County Council, the Court of Appeal's *obiter* endorsement, at [15], of McFarlane LJ's conclusion that an FGMPO could not be made to restrain the Secretary of State in the exercise of her immigration jurisdiction. That conclusion was said to reflect correctly the marked differences in functions between a Family Court in FGMPO proceedings and those of the Secretary of State and the IAC in the exercise of their functions under the Immigration Acts.

Discussion

105. There is, to our knowledge, no authority which bears directly on the question at issue in the present proceedings, which is the obverse of that considered by the President of the Family Division and the Court of Appeal in the Suffolk County Council case. We do, however, consider that much of the reasoning in that decision applies equally to the situation in which a judge in the Family Court (or the Family Division of the High Court) has made an FGMPO in favour of a person (or their dependant)

who subsequently comes before the IAC in a protection appeal which concerns the risk of FGM.

106. We do not understand it to be controversial between the parties that a judge in the IAC must first assess the relevance of an FGMPO or any findings of fact which were made in the Family Court. Ms Weston suggested that a judge in the IAC should consider the extent to which the findings and the order made by the Family Court 'map over' the assessment which is to be undertaken by the IAC. We consider that to be a useful shorthand for the assessment which must first be undertaken by the judge in a protection appeal (or, for that matter, by the Secretary of State herself in circumstances where she is notified that an FGMPO has been made in favour of a person awaiting a decision on a protection claim).

107. The paradigm case, in which an FGMPO maps neatly over the assessment to be undertaken by the IAC, is as follows. A girl who is in the United Kingdom with limited leave to remain is said to be at risk of FGM at the hands of her family in her country of nationality. The child's father wishes for her to undergo the procedure, the mother does not and she seeks the protection of an FGMPO in order to restrain the father from removing the child from the jurisdiction so as to safeguard her against the risk in that country. The Family Court is satisfied that there is a risk and makes the order. When the mother's protection appeal comes before the IAC, she relies upon the risk to her child at the hands of the father's family. The risk of treatment contrary to Article 3 ECHR[1] which has been found to exist by the Family Court is therefore the same risk which is at issue before the judge in the IAC.

108. In other cases, the FGMPO and the findings upon which it is based might map over the IAC's assessment very little, if at all. A child might, for example, be found to be at risk of FGM from a person based solely in the United Kingdom, who has no connections to the child's country of origin and might not even be permitted to enter that country. Consider, for example, a child of mixed Somalian / Cameroonian parentage. The Somalian father is present in the United Kingdom as an overstayer. The mother – who is separated from him and has sole custody of their daughter – claims asylum on the basis that her daughter is at risk of FGM in Cameroon, where the incidence of the practice is 1% (according to the Multi-Agency Statutory Guidance). She also seeks an FGMPO to protect her daughter from the risk of FGM at the hands of her father, who seeks to abduct her and take her to Somalia, where the incidence of FGM is 98%. Were the Family Court to make an FGMPO to protect the child in the

[1] In A Local Authority v M [2018] EWHC 870 (Fam); [2018] 4 WLR 98, Hayden J noted that Article 3 ECHR was not raised expressly in the 2003 Act but that it was 'self-evidently intrinsic to it': [22].

United Kingdom and in Somalia, such an order would have little, if any, bearing on the assessment to be undertaken by the IAC in the mother's protection appeal, since the IAC's assessment would focus on the risk to the child in Cameroon.

109. The real issue between the parties is the significance to be attached to the FGMPO in a case where the Family Court's conclusions map directly over the assessment to be undertaken by the IAC.

110. It cannot properly be suggested that the Secretary of State or the IAC is bound by the conclusions reached, or the order made, by the Family Court. In fairness to the appellants' counsel, no such argument was advanced in oral submissions before us, although there was a glimmer of it in Mr de Mello's skeleton argument. In this respect, we can do no better than to return to what was said by the Court of Appeal in the Suffolk County Council case. The proceedings before the Family Court are not in rem; the outcome of those proceedings is not binding on a non-party, including the Secretary of State. And, as has been made clear in the long line of authority which we have mentioned above, it would be an error of law for a judge making an FGMPO to injunct the Secretary of State so as to restrain her in the exercise of her functions as regards immigration and asylum. And the Family Court cannot, as the Senior President explained in the Suffolk County Council case, make a decision which has 'precedential effect' in the IAC.

111. Nor, for the same reasons, could it properly be submitted that it would be an abuse of process for the Secretary of State to submit in a protection appeal that a judge of the IAC should reach a different conclusion from that of a Family Court judge as to the existence of an FGM risk in any given case. She is not bound by the conclusions reached in the Family Court and she is entitled to invite the judge in the IAC to reach a different conclusion.

112. There are practical and evidential considerations which also militate against any suggestion that the Secretary of State or the IAC are bound by the FGMPO. As illustrated by the two cases before us and by the reported decisions from the Family Division, the protection claim and the application for an FGMPO will often not march in step. An FGMPO might be made whilst a protection claim is under investigation. The judge in the Family Court might not, as a result, have access to the applicant's asylum interview or other material which would ordinarily be considered in a protection claim. It would be absurd if the respondent was prevented, at a hearing before the IAC, from making submissions on the impact of material which was not available to the judge in the Family Court, whether because it had not been filed with the court or simply because it had not come into existence.

113. As we have stated above, it was not seriously suggested by the applicants in this case that the respondent or the IAC is bound by the assessment undertaken in the Family Court. Ms Weston's submission on the law – which was adopted by Mr de Mello - was more nuanced. She invited us to place significance on the fact that the Family Court is a specialist body, tasked under the 2003 Act with the protection of children from FGM. She emphasised the essentially investigatory powers of the Family Court under the 2003 Act and the fact that it is obliged to consider all the circumstances in order to secure the safety of the applicant for an FGMPO.

114. We accept all of these points but we do not consider that they can lead us properly to conclude that the obligation on the Secretary of State or a judge in the IAC is anything more than to weigh the significance of an FGMPO as part of the evidence in a protection claim. We are unable to accept, in particular, that the making of an FGMPO creates a rebuttable presumption in the IAC that there is a relevant risk of FGM, or even that the Family Court's assessment should be taken as a starting point, in the sense envisaged in Devaseelan [2003] Imm AR 1. Many of the reasons given by the Court of Appeal for rejecting the Secretary of State's submission in the obverse situation apply with equal force here. In deciding a claim for international protection, the Secretary of State or the IAC considers whether the removal of the individual in question would breach the United Kingdom's obligations under the Refugee Convention. Just as the 2003 Act requires the Family Court to consider all the circumstances in deciding whether to make an FGMPO, there is no statutory mechanism – whether in Part 5 of the Nationality, Immigration and Asylum Act 2002 or elsewhere – which delimits the scope of that enquiry in a case in which an FGMPO has been made. Also, as the Court of Appeal observed in the Suffolk County Council case, the IAC and the Family Courts are not courts of coordinate jurisdiction. Judicial comity provides no reason why the decision of the specialist Family Court should be afforded automatic 'starting point' status in the assessment of the specialist IAC whilst it is conducting an assessment under a different statutory scheme which is driven by very different policy considerations.

115. A further, practical difficulty with affording an automatic status – whether as a 'starting point' or as a default position – to the decision of the Family Court is highlighted very clearly by the two cases before us. In the case of the first appellant, there is a reasoned judgment from a judge in the Family Division of the High Court, followed by another reasoned judgment of another puisne judge after the appellant reached the age of 21. But as the second appellant's case shows, an FGMPO might be made without a reasoned judgment, or indeed any record of the factual conclusions reached by the judge in the Family Court. If some form of automatic status were to be given to the decision of the Family Court in such a case, a

judge in the IAC would be required simply to assume in the latter type of case that certain findings of fact had been made, and to take those findings as a starting point in the assessment of a claim for international protection.

116. The correct approach, in our judgment, is that the assessment in the Family Court is not to be afforded any automatic status. It is not binding on the respondent or the IAC. Nor does it establish a starting point or a default position. Instead, the significance of the FGMPO and the findings of fact upon which it was made are to be weighed by the Secretary of State or a judge in the IAC in considering a protection claim. Our conclusion in this regard accords with the Secretary of State's policy, as helpfully highlighted by Ms van Overdijk and reproduced at [35] above.

117. There is, we think, a spectrum of cases. At one end of that spectrum lies a case in which an FGMPO is demonstrably made on nothing more than the ipse dixit of the applicant. A judge of the Family Court might in such a case have accepted the superficially attractive submission which was made (and rejected by Lieven J) in AB v AN & BN [2020] EWHC 2048 (Fam): that there is no harm in granting such an order. The weight which can properly be afforded to such an order is necessarily very limited, and possibly nil.

118. At the other end of the spectrum is a case in which there is one or more fully reasoned judgments from the Family Court, setting out detailed findings of fact on the balance of probabilities. Such a judgment might be the product of extensive investigation on the part of the court. It might have heard contested evidence from the applicant and the respondent(s). It might have received expert evidence on the prevalence of FGM in the country of origin, or even of the prevalence of the practice amongst a specific ethnic group. It might even have considered all of the evidence which is to be considered by the IAC in the course of the appeal against the refusal of international protection. In such a case, the weight which might properly be given to the assessment undertaken in the Family Court and the findings of fact reached in the course of that assessment is likely to be significant. That is not because the Family Court's assessment has any special legal status before the IAC, whether as a precedent, a starting point or a decision to which principles of judicial comity should apply; it is simply in recognition of the fact that cogently reasoned findings have been made by a specialist judge who has considered evidence which is similar to that before the IAC. The decision in the FGMPO proceedings in such a case becomes a persuasive, possibly even highly persuasive, part of the evidence before the IAC. It might properly be thought to go much of the way to discharging the burden of proof upon the appellant. What it cannot do is to cast the burden of proof upon the respondent to disprove the existence of the risk in the order.

Assessments Not Coextensive

119. There is a further point which must be made about the assessments undertaken in FGMPO proceedings in the Family Court and in a protection appeal before the IAC. In FGMPO proceedings, the court is likely to be focussed on the existence of a risk of FGM in the UK or overseas. In respect of the overseas assessment, there might well be a degree of commonality with the investigation undertaken in the IAC. The Family Court will not necessarily proceed, however, to consider the avenues of redress which might be available to an applicant in order to mitigate any such risk in their country of origin. A judge in the Family Court might not, in other words, consider whether there might be a sufficiency of domestic protection or a viable internal relocation alternative. Whilst a judge considering an application for an FGMPO is required by statute to consider all the circumstances, we have not been shown and are not aware of any authority in which these established aspects of refugee status determination have come to feature in the analysis of whether an FGMPO should be made. Even where the assessment of risk in the Family Court maps over that which is to be undertaken in the IAC, it might well be that the former will be entirely coextensive with the latter.

120. As Mr de Mello recognised in his submissions, it is likely to be appropriate for a judge hearing a protection appeal which features an FGMPO to consider the extent to which the order might itself provide extra-territorial protection against FGM. The order is made against named individuals against whom penal sanctions might be imposed in the event of a breach. The existence of such an order might, depending on the facts, operate to reduce or to obviate the risk under consideration in the IAC. That might particularly be the case where the respondent named in the order is resident in the United Kingdom or travels regularly to the United Kingdom. Any such respondent would have the most cogent of reasons to take steps to ensure that FGM was not carried out on a girl protected by an FGMPO. All will naturally depend on the facts, including an assessment of whether the named respondents are likely to be deterred by the FGMPO and the extent of any risk from persons not named in the order.

121. Given the concession made by the respondent that the first appellant's appeal should be allowed on international protection grounds, it is unnecessary for us to examine or to reach detailed findings on her claim. Her case does, however, provide one of two real examples to illustrate how in practice a judge of the IAC might decide on the weight to be attached to an FGMPO. The first question, as we have explained, is to consider whether if at all the FGMPO maps over the assessment to be undertaken by the IAC. The orders made by Peter Jackson J and Gwynneth Knowles J clearly map over the protection assessment to a significant extent. The appellant claimed to be at risk of FGM in Sierra

Leone and Peter Jackson J was satisfied that there was such a risk and that an order should be made.

122. It is then necessary to consider the intermediate findings of fact made by Peter Jackson J and Gwynneth Knowles J, and the nature and extent of the evidence upon which these are based. Certain findings of fact made by Peter Jackson J are of the utmost significance. Into that category falls his finding – based on the investigations conducted by the Metropolitan Police – that the emails relied upon by the appellant were sent from Sierra Leone, and that they were genuinely sent by her father.

123. Had we been required to determine the appellant's application for international protection, we would however have observed the notes of caution sounded repeatedly by Peter Jackson J. He found that the task of providing a clear account of what had happened was an 'impossible one': [22]. He noted that there was an absence of sufficient evidence: [23]. BBW was not legally represented and had not even had formal interpretation: [24]. He did not know whether BBW was involved in FGM but it had 'certainly not been proved in this proceeding': [27]. He simply did not know whether BBW had spoken to the applicant about FGM: [29]. He noted that the findings he was able to reach were unsatisfactory and that they reflected the unsatisfactory nature of the evidence. It was on that basis that he considered, in agreement with the police, that GW required the protection of a FGMPO.

124. This was a reasoned assessment made by a High Court judge on the balance of probabilities but it was an assessment made after a forty eight minute hearing with evidence which was considered unsatisfactory in various respects. We consider that the FtT clearly erred, on both occasions that it heard the case, in attaching no weight to the decisions of the High Court. Some weight was clearly to be attached to those decisions, and particularly the decision of Peter Jackson J. Importantly, however, no assessment was made by the High Court on either occasion about the questions of internal relocation or sufficiency of protection. Even if – as we think – weight was properly to be attached to the rather cautious conclusions expressed by the High Court as to risk, it would remain for a judge in the IAC to consider those matters for herself.

Guidance to the Respondent and the Family Court

125. We were invited by Ms Weston to issue guidance to the respondent and to the Family Court. She invited us to state that the respondent should be required to reconsider an adverse decision in a protection claim when an FGMPO was subsequently made. We decline to issue any such guidance. As we have endeavoured to explain, the weight which is to be attached to an FGMPO varies according to a range of considerations. The order might not map over the assessment which has already been undertaken by the

respondent. The findings of fact upon which the order was based may be clear, unclear or even absent. The evidence considered by the Family Court might be similar or different from that considered by the respondent. Even if there was a mechanism by which we could require the respondent to reconsider a decision under appeal (which we doubt), it would place an unduly onerous burden on the respondent, given the limited weight which might properly be attached to some FGMPOs.

126. It is also necessary to consider, in this context, the additional delay which might be occasioned by such a requirement. The respondent would be entitled to a reasonable period in which to reconsider, during which time any appeal before the IAC would have to be adjourned, potentially causing unnecessary distress to an appellant. It is undesirable, for all of these reasons, for any such guidance to be issued. Although we decline to issue any such guidance, it will doubtless be recognised by the respondent that there are cases – including the first appellant's – in which weight can properly be attached to the reasoned basis on which an FGMPO was made and in which reconsideration in light of that decision might save time and public expense.

127. We also decline Ms Weston's invitation to issue guidance to the Family Court on the content of its decisions. It is for the Family Court to issue guidance to its judges on the extent of the reasons given for concluding that an FGMPO should or should not be made. We do note, however, that the Protocol on communication between the two jurisdictions represents an agreed mechanism by which further information about the making of such an order can be requested. It was that mechanism which was used by Nicol J and UTJ Blundell in the second appellant's case.

F. DECISIONS IN THE INDIVIDUAL APPEALS

Remaking the Decision in GW's Appeal

128. GW's appeal is allowed on protection grounds by consent. We have recorded above that the parties were not only content with that course but that we were also urged by Ms van Overdijk and Ms Weston to issue country guidance in the terms we have recorded in full at [28] above.

129. Having considered the expert evidence and the other background material before us, we are satisfied that it is appropriate to do so. We are also satisfied that the time has come to make it plain that RM (Sierra Leone) and FB (Sierra Leone) are no longer to be relied upon for what they say about FGM in that country. Neither of those decisions is a country guidance decision to which the principles discussed at [208]-[211] of SMO & Ors (Iraq) CG [2019] UKUT 400 (IAC) apply and we need not consider whether there has been well-established and durable change in Sierra

Leone. We are satisfied that it is appropriate to issue country guidance in the terms suggested by the parties.

Remaking the Decision in FM's Appeal

130. Having resolved the legal issues as we have above, we move on to consider the case of the second appellant. We begin by considering the weight which can properly be attached to the interim and final FGMPOs made by HHJ Clayton. Mr de Mello submitted in his skeleton argument that 'the weight to be given to the FGMPO is a heavy one'. We disagree. Whilst the order seemingly maps over the appellant's protection claim to an extent, naming her husband as the respondent and prohibiting him from removing the children or subjecting them to FGM, it is clear on the face of the orders that they were made on the thinnest conceivable evidential basis and, with respect to HHJ Clayton, that no reasons were given for making the order. The initial order of 9 February 2018 was made without notice to the respondent father. It was based – according to its first page – on a sworn statement which was made by the applicant on 19 January 2018 and submissions from her representative. Given the terms of the order, it was presumably accepted by HHJ Clayton that it was necessary for the purpose of protecting a girl against the commission of a genital mutilation offence, but there are no reasoned conclusions supporting that apparent acceptance.

131. The application returned before HHJ Clayton on 9 March 2018, by which stage the initial order had been sent to the respondent father. He had then confirmed by email that he had received the order and "that he agreed with the terms thereof and did not want to attend any further hearings". It was on that basis that the order was made final. Again, there were no findings of fact recorded. The inference is that these were simply uncontested proceedings – for whatever reason – and that the judge made the order because there was nothing to gainsay the application.

132. In making these observations, we hope that it is clear that we intend no criticism whatsoever of HHJ Clayton. Nor do we intend to suggest that she was not entitled to make the order on the basis that she did. In gauging the weight which can properly be attached to that order in this appeal, however, we come to the clear conclusion that it is deserving of very little weight indeed, for reasons which will already be clear. Seemingly in recognition of the difficulties with the orders, Mr de Mello submitted that significant weight might nevertheless be given to them because of the appellant's husband's emailed response to the court. We have not seen that response; it was not provided to the Upper Tribunal with the disclosure from the Family Court, nor does it feature in the appellant's bundle. On any proper view, however, that email might have been sent for any one of several reasons. It might have been sent because the appellant's husband wished his daughters to undergo FGM but he is

willing to abide by the terms of the FGMPO because he is a senior diplomat who would not wish to contravene an order made by an English court. It might have been sent because he is in favour of his daughters being subjected to FGM and he simply does not care what the English court does or does not order. It might have been sent because he would like the appellant and his daughters to secure asylum in this country so that he can join them here. In contrast to the position in GW's case, the Family Court's decision sheds no light on which of these possibilities was thought by HHJ Clayton to be the case. It seems likely that she thought it was the first or the second possibility but we simply cannot know. In the circumstances, we are unable to accept the submission made by Mr de Mello that the email from the appellant's husband makes any material difference to the weight which can properly be attached to the FGMPO in the holistic assessment we are required to undertake.

133. In addition to the FGMPO, we have taken careful account of the expert evidence relied upon by this appellant. We take it that the author of that report - Professor Knorr - is accepted by the respondent to be entitled to provide her opinion on the appellant's claim, given that she was instructed by the respondent to provide her opinion on the case of the other appellant. She is eminently well qualified to do so as the Head of a research group which focuses on Integration and Conflict along the Upper Guinea Coast and in West Africa at the Max Planck Institute for Social Anthropology in Halle/Saale, Germany. Prof Knorr was brought up in the region and has conducted extensive field research there.

134. We have taken account of the whole of the report but we are grateful to Mr de Mello for his concise summary of it at [14] of his skeleton argument, which is as follows:

> Parents who object to FGM were unable to protect their daughters. The ethnic identity of mothers is of minor importance in this context. The husband and his family determines whether FGM should take place. Living within the Mandinka community heightens the risk of FGM. Not being genitally cut puts Serere girls at a considerable disadvantage in terms of being considered as potential wives. The risk of abduction and forced FGM by kin is high in order to make the girls marriageable. The effect of the FGMPO on the girls is to subject them to discriminatory treatment (as they are taken out of the marriage market) and subjected to abuse and to expose the appellant to ostracism amounting to discriminatory treatment. The appellant is herself at risk of FGM. Relocation is not a realistic option. There is a lack of state protection at every level for such females. State courts have less effect than Islamic courts in this area of concern. Female access to justice is illusory. Police protection is lacking. The FGMPO is a writ in water.

135. We note that Prof Knorr states that 75% of women in The Gambia have been subjected to FGM. She states that it remains a persistent feature of society for a variety of reasons, including the preservation of income and status for those involved and the desire to reduce the occurrence of pre-marital and extra-marital sex. FGM is practised only slightly less amongst more educated women, she states, citing a UNICEF report from 2007. Prof Knorr states that the Serere, the appellant's husband's ethnic group, represents only 2% of the population of The Gambia. Intermarriage with other ethnic groups is commonplace amongst the Serere. Figures concerning the prevalence of FGM amongst the Serere in The Gambia vary from 46% to 64%. Amongst the Wolof, the appellant's ethnic group, the incidence is around 17.5%. The area of origin influences the likelihood of a girl being required to undergo FGM, and those of Serere or Wolof backgrounds might be subjected to the practice along with the girls belonging to the majority group in their village. This is the case, she states, with the appellant's husband's family, which lives in a Mandinka area. The occurrence of FGM in that ethnic group is between 94% and 97%. Prof Knorr considers that the risk will exist – as a result of familial abduction to perform the ritual – throughout the country, and that the children will be at risk for as long as they have not been initiated. She opines that the initiation interval (of every five years in the case of the appellant's husband's family) depends upon the number of girls deemed ready and on the financial resources available, not only for the ceremony but also for the festivities which accompany it. Prof Knorr summarises her conclusions in this way:

> Due to the importance attached to initiation and FGC among [FM's] husband's and her daughter's paternal family and community, it is very likely that her daughters would be forced to undergo FGC. She and her daughters could neither live with her husband nor with her own (maternal) family without facing a severe risk of FGC being performed on the daughters. For the reasons stated, [FM] would not be able to protect her daughters from genital cutting. She would have to live an illegal existence and go into hiding in The Gambia to prevent her daughters' initiation. In hiding, [FM] would not be able to find legal and non-exploitative employment to provide for her own and her daughter's needs who would therefore all face a severe risk of socio-economic destitution and of suffering exploitation, discrimination and violence. The risks described cannot be avoided by turning to state authorities or NGOs for support and protection or by relocating within The Gambia.

136. Prof Knorr's conclusions on the background situation in The Gambia essentially chime with the conclusions reached in the extant country guidance decision of <u>K & Ors (FGM) The Gambia</u> CG [2013] UKUT 62 (IAC). The Upper Tribunal in that decision concluded that there was unlikely to be a sufficiency of state protection or a viable internal relocation alternative for a woman at risk of FGM. It also concluded that

the assessment of whether there was such a risk was highly fact-sensitive. The starting point is to consider the incidence of the practice amongst the ethnic group(s) in question and then to consider the variables which might affect the risk. Those variables were described as follows at (6) of the headnote:

> (a) In the case of an unmarried woman, parental opposition reduces the risk. In the case of a married woman, opposition from the husband reduces the risk. If the husband has no other "wives", the risk may be reduced further. However, it should be borne in mind that parental/spousal opposition may be insufficient to prevent the girl or woman from being subjected to FGM where the extended family is one that practises it, although this will always be a question of fact.
>
> (b) If the prevalence of the practice amongst the extended family is greater than the prevalence of the practice in the ethnic group in question, this will increase the risk. Conversely, if the prevalence of the practice amongst the extended family is less than the prevalence of the practice in the ethnic group in question, this will reduce the risk.
>
> (c) If the woman is educated (whether she is single or married), the risk will reduce.
>
> (d) If the individual lived in an urban area prior to coming to the United Kingdom, this will reduce the risk. Conversely, if the individual lived in a rural area prior to coming to the United Kingdom, this will increase the risk.
>
> (e) The age of a woman does not affect the risk measurably; it is an issue upon marriage. Amongst the Fula, FGM has been carried out on babies as young as one week old. The average age at which FGM is carried out appears to be reducing and this may be due to concerns about the international pressure to stop the practice. Although there are statistics about the average age at which FGM is carried out on girls and women for particular ethnic groups, the evidence does not show that, in general, being above or below the relevant average age has a material effect on risk. It would therefore be unhelpful in most cases to focus on the age of the girl or woman and the average age at which FGM is carried out for the ethnic group of her father (if unmarried) or that of her husband (if married).

137. We have also considered the background material which is to be found at section G of the appellant's consolidated bundle, including the detailed, if

now rather old, Country Policy and Information Note on FGM in The Gambia, dated December 2016. Paragraph 6.3 of that report highlights – with reference to 2013 data – the way in which the prevalence of FGM varies not only by ethnicity but also by region of origin. In the Upper River Region of Basse, for example, the prevalence is recorded as 99%. In Banjul, where the appellant and her husband were previously based[2], the prevalence is 56.3%. Medina, where her husband's family is based, is in the Kerewan Local Government Area, in which the prevalence is the lowest in the country: 49.2%.

138. Applying the guidance in K & Ors and considering the background material to which we have referred, including the report of Prof Knorr, we consider the most relevant statistics to be the following. Since the appellant is married, it is the prevalence of FGM amongst her husband's ethnic group – the Serere – which is most significant. Dr Knorr states that the prevalence amongst that group is 43%-64%. The respondent's CPIN states at 6.4.8 that the prevalence is 43%. The most significant geographical statistic – given what is said to be the influence of the appellant's husband's family – is the prevalence in Kerewan which, as noted, is a little less than 50%. These are obviously only statistics, but they form a starting point for our analysis of the likelihood of the appellant's children being at risk of FGM. The picture which emerges is that it is likely but by no means inevitable that the appellant and her children would be required by a family such as her husband's to undergo FGM. Much therefore depends upon our assessment of the appellant's evidence; this is not simply a case in which the appellant's ethnic origin, or that of her husband, speaks for itself in dictating the risk to which the children will be exposed on return. The evidence shows, in short, that approximately half of the families in the relevant area and of the relevant ethnic group choose to avoid the practice. The question is whether the appellant's husband and his family fall into that group or whether, as claimed by the appellant, they are proponents of FGM.

139. We have serious concerns about the appellant's evidence, for the following reasons.

140. Firstly, we note that the account given by the appellant in support of her application for an FGMPO contrasts markedly with the account given to the respondent and the IAC in support of her claim for international protection. In her interview with the respondent, which took place on 29 November 2017, she was asked whether she had any contact with her husband. In answer to question 71, she stated that he called her two or three times a week and that she did not have much to say to him. He

[2] The appellant gave this account of locations at [4] of her statement in response to the reasons for refusal letter, dated 6 February 2018, stating that his family lived in Medina, he was living in Bakau and she was based in Wellingara when they first met.

called her to speak to the children and she would pass the phone to the children so that they could have a word with him. There was further reference to this contact via telephone at questions 94, 100 and 158.

141. At question 100, the appellant was asked when her husband had last threatened to take the children. She said that he had threatened this on the telephone before he came to London and that there were further discussions about it when they saw each other in person. The appellant's husband was in the UK between 27 May and 5 June 2017, according to the answer given to question 72 of the same interview. We also note that she stated in answer to question 96 that she did not speak to her husband's family.

142. The appellant's account at interview was therefore of a threat of abduction being made before and during her husband's visit to London but of no threats being made thereafter. Indeed, she was content at the time of the interview to receive her husband's calls and to pass the phone to the children. And there was no suggestion whatsoever that she had been contacted or threatened by her husband's family.

143. The account given in the statement made in support of the application for the FGMPO was very different, however. The statement was made on 19 January 2018, ten days after the refusal of asylum by the Secretary of State. In the statement made to the Family Court, the appellant described how she had received 'numerous telephone calls from [her husband] and his family pressurising me to return to Gambia for the children to undergo the FGM Procedure' since June 2017. The account given to the respondent and that given to the Family Court are flatly contradictory.

144. We also note that the appellant made no suggestion in the statement which accompanied her application for the FGMPO that her husband was in regular contact with their children, using her telephone and with her permission. In various important respects, therefore, the written evidence given to HHJ Clayton and the account given in the asylum interview were contradictory.

145. Secondly, a further concern arises from the appellant's evidence about the five-yearly basis upon which she maintains that FGM is performed in her husband's community. Ms van Overdijk asked a number of questions about this cycle of FGM, and the appellant maintained that the next point in time when the risk would manifest itself would be in 2022. She said that the children had missed the ceremony in 2017 and that it would therefore occur in the summer of 2022. The account she gave in oral evidence conflicts with the account she gave in her statement in support of the FGMPO. In that statement, she referred to the five-year cycle but she went on, at [28], to say that it had been made clear to her by her husband

that the children would be subjected to FGM whenever they returned to The Gambia, 'despite the five year deadline'. There was no suggestion whatsoever during the appellant's oral evidence before us that the risk would manifest itself before 2022.

146. Thirdly, we are concerned by the timing of the appellant's decision to involve the British police. She claims that her husband came to the UK at the end of May and that he threatened to abduct her children and to take them to The Gambia so that they could be subjected to FGM against her will. She made no contact with the police at that point and it was only after he had left the country that she chose to do so. The appellant has been unable to explain satisfactorily why she did not report the threat to the police when it was supposedly at its most acute, or why she did so after they would have been powerless to take any action. The timing of the report suggests an attempt to bolster her asylum claim, collusion on the part of her husband, or both.

147. We heard oral evidence from the appellant and her cousin. Both gave evidence about the argument which is said to have been instrumental in the appellant's decision to claim asylum. In the statement which she signed in May 2018, the appellant's cousin stated that she had 'witnessed' the appellant's husband threatening to abduct the children when he stayed at her house, with the appellant and the children, during his visit in May/June 2017. She said that she tried to calm the situation and speak to the appellant's husband rationally, telling him that 'what he was doing was not right'. In answer to questions from Ms van Overdijk about this argument, however, the appellant's cousin stated that she had merely been told about it by the appellant; there was no suggestion that she had witnessed the argument, much less that she had actually intervened. Upon the difference in the two accounts being put to her, she attempted to suggest that she had been a witness to the argument because it had happened in her house. This made no sense and served to compound our concern, not to address it. It caused us to doubt that this central event in the appellant's protection claim had ever taken place.

148. Fifthly, there are serious difficulties with the appellant's failure to claim asylum at an earlier point. She claimed asylum on her second visit to the UK and fails to explain with any degree of cogency why she did not claim asylum when she first came. It is to be recalled that she has claimed all along that she was aware of the threat of FGM from the time that she was pregnant with her first child, and that she had a physical fight with her sister-in-law, about FGM, when her first child was a baby. When she came to the UK for a second time, having supposedly left Turkey due to her husband's wish to take the girls to The Gambia for FGM, she did not claim asylum for some time. The decision to claim asylum was

supposedly prompted by the argument during his visit to the UK, the account of which is unreliable for the reasons set out directly above.

149. Sixthly, the appellant's claim that she was not aware of her husband's family's beliefs about FGM cannot be reconciled with other aspects of her account and the expert evidence. It is said in the expert evidence that those who practise FGM believe it to be a precursor to 'sisterhood' and that those who have not undergone the procedure are shunned by those who believe in it. The appellant's husband's family are said to be staunchly in favour of the practice, to the extent that the appellant fears her children being kidnapped in order to undergo the procedure. Seen through the prism of the country evidence, therefore, the appellant's claim that there was never any enquiry about whether she had herself undergone the procedure, is of concern.

150. Taking a step back, and considering the evidence as a whole, we do not accept the appellant's account that her husband and his family have determined that her daughters should be subjected to FGM, whether in 2022 or at all. He is from a tribe and an area in which the incidence of FGM is comparatively low. He did not insist that the appellant should undergo the procedure before they married, nor did his family. There are serious difficulties with her account, which lead us not to accept that account on the lower standard and to conclude that the appellant has colluded with her husband (and her cousin) in order to secure status in the United Kingdom. We do not accept that the appellant's husband's family are staunchly in favour of FGM. Nor do we accept that his first wife and her children have undergone the procedure. Instead, we think the reality is that the appellant's husband's family are well-educated people who are content for members of the family, such as the appellant, not to have undergone the procedure.

151. In light of those primary findings of fact, we will not consider whether the appellant and her children could relocate internally or whether they might be adequately protected in The Gambia, whether by the state or by the FGMPO which remains in place. Her appeal will be dismissed on protection grounds because we do not accept that her daughters are at risk in The Gambia. We do not consider there to be any impediment to the appellant and her daughters returning to The Gambia to re-join their family in that country. To expect them to do so would not place the respondent in breach of her obligations under the Refugee Convention or the Human Rights Act 1998.

Notice of Decision

The decisions of the First-tier Tribunal having been set aside, we re-make the decisions on the appeals as follows. The first appellant's appeal is allowed on

Refugee Convention grounds. The second appellant's appeal is dismissed on all grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. We make this direction owing to the nature of the appeals and because this decision contains extracts from family proceedings.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 April 2021

ANNEX

DOCUMENTARY EVIDENCE BEFORE THE UPPER TRIBUNAL

Item	Document	Date
1	Canadian Immigration and Refugee Board: Sierra Leone: *The practice of FGM; the government's position with respect to the practice; consequences of refusing to become an FGM practitioner in Bondo Society, specifically, if a daughter of a practitioner refuses to succeed her mother*	27.03.09
2	Business Insider UK: *Secret societies in Sierra Leone are perpetuating one of the most heinous traditions imaginable*	24.08.15
3	Huffington Post: *Teen dies during FGM procedure in Sierra Leone*	18.08.16
4	Awoko.org: *Sierra Leone News: 28 year old forcefully initiated into the Bondo Society in Kenema*	22.09.16
5	FORWARD research article: *If you go into the Bondo Society, they will honour and respect you*	Oct. 2017
6	28 Too Many (UK): *Sierra Leone: The Law and FGM*	01.09.18
7	European Asylum Support Office, COI Query Response: *Sierra Leone: The Ojeh/Oje Society*	29.10.18
8	Social Institutions and Gender Index (OECD Development Centre: *Country Profile, Sierra Leone*	07.12.18
9	The Borgen Project (USA): *Ending FGM in Sierra Leone*	15.03.19
10	Johanna Horz: *Dissecting the link between FGM and politics in Sierra Leone*	03.05.19
11	Reuters: *Sierra Leone's first lady confronted over FGM controversy*	06.06.19
12	The Conversation: *Why it's so difficult to end FGM*	05.02.20
13	US State Department: *2019 Human Rights Report on Sierra Leone*	11.03.20
14	PLOS One research article: *Understanding the association between parental attitudes and the practice of FGM among daughters*	21.05.20
15	Expert report of Karen O'Reilly	01.06.20
16	HM Government, *Multi-agency statutory guidance on FGM*	July 2020
17	Wikipedia page: *FGM in Sierra Leone*	14.09.20
18	Country Policy and Information Team response to an information request regarding "Sierra Leone, Bondo, Protection".	09.11.20
19	Expert report of Prof Dr Knorr	30.11.20