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COMMENTARY

A DANGEROUS MUDDYING OF THE WATERS?

THE 'SIGNIFICANT HARM' OF RE B AND G (CHILDREN) (CARE PROCEEDINGS) [2015] EWFC 3

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ABSTRACT

The academic debate rages on as to whether male circumcision really is in the best interests of the child or if it constitutes an abusive practice. This commentary discusses the recent case of *Re B and G (children) (care proceedings)* [2015] EWFC 3, delivered by the current President of the Family Division of the High court, Sir James Munby. Two key issues are raised by this judgment. First, that President Munby's obiter comments constitute an attack on the legally accepted act of male circumcision by suggesting a similar nature between the illegal act of female genital mutilation (FGM) and that of male circumcision as well as the suggestion that male circumcision can be classed as a significant harm. Second, that this case reflects the woefully unprepared condition of the UK medical profession in dealing with FGM.

I. INTRODUCTION

The recent case of *Re B and G (children) (care proceedings)*,[1] delivered by the current President of the Family Division of the High Court, Sir James Munby generated much controversy when Munby J. likened male circumcision to female circumcision and suggested that both practices constituted 'significant harm'. Furthermore, this case reflects the woefully unprepared condition of the UK medical profession in dealing with female genital mutilation (FGM).

1 *Re B and G (children) (care proceedings)* [2015] EWFC 3.

II. THE FACTS AND DECISION IN RE B AND G

This case consisted of care proceedings in relation to two children; B, a boy, and G, a girl, both of who were under the age of 5 years. The family was of African origin, as well as being practising Muslims. Questions were raised over whether the daughter G had been subjected to some form of FGM after blood was discovered by staff at the nursery she attended. After the seeming abandonment of G in the street both children were placed in foster care and, after further questions of FGM were raised, care proceedings commenced.

The local authority's case was that G had been subjected to a form of 'Type IV' FGM, as classified in the World Health Organisation's (WHO) 2008 publication 'Eliminating Female Genital Mutilation'.[2] Of the four classifications found within the WHO's typology, 'Type IV' is the lowest on the spectrum, acting as a means to catch 'all other harmful procedures' that are not specified within the other classifications and thus includes 'minor' injuries; for example, pricking, piercing, incising, scraping, and cauterisation. Thus, the court was required to not only discern whether any form of FGM had occurred, but also what impact this would have on the future of both children. Before any evidence was discussed, the Court clarified that the WHO typology of FGM, though not the only way of categorising FGM, was the correct one to be applied in future cases. During the trial, three expert witnesses gave reports regarding G's medical condition. The three experts consisted of S, a consultant community paediatrician; M, a midwife with expertise in certain aspects of FGM; and C, a professor with significant experience in the field, as well as being a consultant obstetrician and gynaecologist in the only specialist paediatric FGM clinic in the country. All three came to an agreement that if G had been subjected to some form of FGM, it took the form of a scar. However, there was significant division of opinion over whether this was actually the case.

When it came to examination of the child, S and M were both able to examine the child first hand, while C was only able to review the recordings made by S and M during their examinations. S reported seeing a scar; M simply reported that G's vulva did not appear normal, while C could not confirm the presence of a scar at all. To confuse matters further S, although confirming in her oral evidence that she had used the WHO typology, had earlier admitted to using the United Nations International Children's Emergency Fund (UNICEF) typology.[3]

The cross-examination of the three experts was revealing as to the current lack of awareness within the medical profession in dealing with cases of FGM. In particular, the evidence submitted by S and the fact that it changed several times between the initial examination and the trial reflected a poor grasp and lack of training with regard to FGM.[4] Furthermore, M's expert evidence was described as '*confused, contradictory and wholly unreliable*'.[5] On the facts at hand, the court found that evidence supplied

2 WHO, 'Eliminating Female Genital Mutilation: An Interagency Statement' (2008) <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> accessed 8 October 2015.

3 UNICEF, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change*, 2013, p. 48 <http://www.unicef.org/media/files/UNICEF_FGM_report_July_2013_Hi_res.pdf> accessed 8 October 2015.

4 *B and G*, para. 40.

5 *B and G*, para. 42.

by S and M could not be depended on due to the lack of reliability and consistency. Thus, taking this into account and balancing it with the other evidence, including the reasoned judgment of C, it could not be shown that G had undergone any form of FGM.[6]

In determining whether FGM had occurred, Munby J. examined whether FGM constituted '*significant harm*'.[7] Munby J. reaffirmed FGM was a criminal offence with no basis in any religion.[8] He repeated assertions made in the earlier case of *Singh v Entry Clearance Officer, New Delhi*[9] describing FGM as a '*barbarous practice which is beyond the pale*'[10] and made reference to comments made in another earlier case[11] in relation to the practice of forced marriages.

However, Munby J. then muddied the waters by conflating male circumcision with female circumcision—despite the fact that the former is legal, whereas the latter is criminally prohibited. Munby J. concluded that no distinction could be drawn between 'FGM Type IV' and 'male circumcision' and that, in some cases, certain forms of FGM Type IV were actually less invasive and no more traumatic.[12] Munby J. stated that '*In* [his] *judgment, if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision*'[13] finding that both practices could merit the application of a care or supervision order under the Children Act 1989.[14] The application of such orders are only possible if the local authority can show '*significant harm*'[15] attributable to parental care and that this falls below what would be '*reasonable to expect*'[16] of a parent. Continuing, Munby J. felt that although male circumcision, like FGM, could be categorised as a significant harm, it did not fall below the reasonable expectations of a parent. Thus, Munby J. felt that

> Society and the law, including family law, are prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms.[17]

The final comments of the case returned to the matter of FGM with Munby J. calling for local authorities and all relevant bodies to act in a more proactive manner, taking measures to prevent FGM, and that the judiciary would use '*every weapon in its protective arsenal if faced with a case of actual or anticipated FGM*'.[18]

Other than the evident deficiencies in the medical profession, two central issues emerge from this judgment; whether male circumcision and FGM bore any

6 *B and G*, para. 53.
7 *B and G*, para. 54.
8 *B and G*, para. 55.
9 See *Singh v Entry Clearance officer, New Delhi* [2004] EWCA Civ 1075.
10 *B and G*, para. 55.
11 *NS v MI* [2006] EWHC 1646.
12 *B and G*, para. 60.
13 *B and G*, para. 69.
14 Children Act 1989 s.31(2).
15 s.31(2) (a).
16 s.31(2) (a) (i).
17 *B and G*, para. 72.
18 *B and G*, para. 78.

resemblance to each other, and whether male circumcision could be correctly identified as causing 'significant harm'.

III. ANALYSIS

A. A Medical Profession in Disarray

Other than the reasoned comments of C, the 'professional' and 'expert' witnesses fell below the reasonable standard that is to be expected, something highlighted by the Court itself.[19] Munby J. stated that there is a '*dearth of medical experts in this area, particularly in relation to FGM in young children*'.[20] According to C's testimony, there are, at present, only 12 specialist FGM clinics throughout the country, of which 6 are in London, and she is employed at the only specialist paediatric FGM clinic in the country.[21] FGM continues to become an increasing problem with growing immigration. The most recent data regarding FGM highlights a rise in the number of immigrants from countries that practise FGM entering the UK.[22] Furthermore, it is now believed that 1.5% of all women giving birth in England and Wales have undergone FGM.[23] These data underline the urgency of creating robust plans to not only support the victims but also to safeguard their daughters and prevent other women from having this serious harm inflicted.

This judgment makes it clear that the WHO classification is the appropriate system to use and that wherever possible a colposcopy, as well as clear and detailed notes, should be applied to allow for a referral to the specialist institute to be performed. The Court, most likely in an attempt to avoid future confusion, sought to clarify correct procedures recommended by C to avoid repeating the inadequacy displayed by the witnesses in *B and G*.[24] By adhering to a single classification system, medical professionals can avoid misunderstandings in future cases. The WHO classification offers the most all-encompassing and recognisable classification, for example, it is used by the National Health service (NHS),[25] and thus clearly should be applied over other typologies.

B. The Distinction Between FGM and Male Circumcision

Munby J. stated that FGM Type IV could not be distinguished from male circumcision and could in fact be less invasive in some cases. It was this 'similarity' that the Court felt merited the classification of all types of FGM and some forms of male circumcision as being capable of 'significant harm'. However, this categorisation fails to fully grasp the inherent differences between the two very distinct practices. Male

19 *B and G*, para. 45.
20 *B and G*, para. 79.
21 *B and G*, para. 79.
22 A Macfarlane and E Dorkenoo, *Female Genital Mutilation in England and Wales: Updated Statistical Estimates of the Numbers of Affected Women Living in England and Wales and Girls at Risk* (City University: London, 2014).
23 Ibid.
24 *B and G*, para. 79.
25 NHS Choices, Female Genital Mutilation <http://www.nhs.uk/conditions/female-genital-mutilation/pages/introduction.aspx> accessed 8 October 2015.

circumcision has its basis in religion, being a fundamental tenant of both the Jewish and Islamic faiths and is thus protected under Articles 8 and 9 of the European Convention on Human Rights (henceforth ECHR).[26] As Munby J. correctly identified,[27] FGM has no basis in religion and at most could be argued as a ritual significant to some cultures. The case of *Chapman v the United Kingdom*[28] highlights that certain cultural elements can be protected. In that case, the Court was required to examine the lifestyles of gypsy families. It was recognised that Article 8 protected the right to maintain a minority identity and to lead one's private and family life in accordance with that tradition. The Court stated

> there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle . . . , not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[29]

This did not confer total immunity onto minorities from the laws of the land, something explicitly recognised by the Court,[30] but did offer scope for wide protection. In the case of *Diaz v Spain*,[31] which discussed the legality of Roma marriages, the Court found that when taking into consideration the fact that the applicant belonged to a well-established community, that according to its own rites and traditions accepted Roma marriage, and that this had never been disputed or regarded as contrary to public order by the State; then, the practice must be considered protected by Article 8. It held that '*the Court takes the view that the force of the collective beliefs of a community that is well defined culturally cannot be ignored*'.[32]

Male circumcision, meanwhile, can be distinguished from FGM. As well as the religious and cultural elements there is also evidence, though contested in the academic field, to suggest that male circumcision offers health benefits.[33] As Benatar and Benatar correctly argue, given the ambiguous nature of the scientific data at hand regarding the medical acceptability of male circumcision, it is impossible to say that circumcision represents a medically harmful attack on a child's body.[34] This becomes even clearer when it is considered that the WHO itself advocates male circumcision in certain parts of the world.[35] Clearly, the cultural benefits of

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26 Article 9 ECHR.
27 *B and G*, para. 72.
28 *Chapman v the United Kingdom* (2001) 33 E.H.R.R. 18.
29 Ibid, p. 73.
30 Ibid.
31 *Diaz v Spain* [2010] 1 F.L.R. 1421.
32 Ibid.
33 For examples of the advantages and disadvantages see 'NHS Choices, Advantages and Disadvantages of Circumcision' <http://www.nhs.uk/Conditions/Circumcision/Pages/Advantages-and-disadvantages.aspx> accessed 8 October 2015.
34 M Benatar and D Benatar, 'Between Prophylaxis and Child Abuse; The Ethics of Neonatal Male Circumcision' (2003) 3 AJOB 35, 48.
35 See n 43.

male circumcision exist for those children born into a faith such as Judaism[36] and Islam,[37] which both consider the practice as an intrinsic element to the faith. The social and cultural elements when balanced against the lack of clear medical evidence of harm suggest that circumcision is reasonable.

The procedure of FGM, in contrast, has no basis in religion, has no medical benefits for the woman, and is in fact extremely dangerous for her.[38] Thus, male circumcision stands on much more acceptable and rational foundations than FGM. FGM is an abhorrent act of physical and emotional abuse, violating the rights of the child and of women, continuing to be globally recognised as a horrific crime.[39] These distinctions were acknowledged by Munby J. when he stated

> There are, after all, at least two important distinctions between the two. FGM has no basis in any religion; male circumcision is often performed for religious reasons. FGM has no medical justification and confers no health benefits; male circumcision is seen by some (although opinions are divided) as providing hygienic or prophylactic benefits. Be that as it may, 'reasonable' parenting is treated as permitting male circumcision.[40]

Diminishing the differences between the practices results in an underestimation of the benefits inherent within male circumcision and creates a false impression that the practices can be placed on equal footing. It is this difference that will have an impact on whether or not male circumcision can be considered a significant harm.

C. Is Male Circumcision Really a 'Significant Harm'?

To argue that male circumcision did not amount to significant harm would, in the President's view, seem '*almost irrational*'.[41] Before continuing, it is worth reminding ourselves that the President did add a caveat to his claim that male circumcision could be a significant harm. He found that the second limb of the test required by s.31 of the Children Act 1989[42] could not be satisfied by male circumcision unless something '*more was done*'[43]; what this amounted to was not set out in the case. It could be suggested that this is a subtle nod towards the disquiet surrounding certain procedures such as the mitzitzah,[44] which some academics have argued should be banned.[45]

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36 King James Bible, 2014, Genesis 17:12–13.

37 Circumcision is not mentioned in the Qur'an, but it is highlighted in Sunnah. The Prophet Muhammed venerates the actions of Abraham, who was circumcised and requires that Muslims follow the ways of Abraham; Qur'an 16:123.

38 The procedure has been linked to several negative effects including sever pain, blood loss, and an inability to urinate. For further information see NHS, 'Female Genital Mutilation' (2014) <http://www.nhs.uk/Conditions/female-genital-mutilation/Pages/Introduction.aspx> accessed 8 October 2015.

39 *Fornah v Secretary of State for the Home Department* [2006] UKHL 46.

40 *B and G*, para. 72.

41 *B and G*, para. 69.

42 s.31(2)(b), the second limb of the test, questions what is 'reasonable to expect' of a parent.

43 *B and G*, para. 73.

44 Metzitzah b'peh consists of the mohel repeatedly taking wine into his mouth and then applying his mouth to the circumcised wound, spitting the mixture of wine and blood into a receptacle.

45 H Ben-Yami, 'Circumcision: What Should Be Done?' (2013) 39 J Med Ethics 459, 462.

Nonetheless, this analysis is beyond the scope of this commentary. What is clear is that FGM, irrespective of the degree of mutilation, cannot be considered '*reasonable parenting*', unless for the medical benefit of the child,[46] while male circumcision continues be an acceptable practice.

What constitutes significant harm is unclear—the Children Act 1989 itself does not define 'significant', only stating

> Where the question of whether harm suffered by a child is significant turns on the child's health and development, his health or development shall be compared with that which could reasonably be expected of a similar child.[47]

Unfortunately, this is a difficult situation, and its vague nature has been highlighted before.[48] One key question is what factors should be taken into account when considering the surrounding circumstances of the child. Reference to judicial decisions does not help to clarify the matter. In *Re D (Care: Threshold Criteria: Significant Harm)*,[49] Wilson J. doubted whether the cultural context of a family should be taken into account.[50] However, in the case of *Re K; A Local Authority v N*,[51] Munby J. believed that the court must always be sensitive to the cultural, social, and religious circumstances of the particular child and family.

Interestingly, the court in *B and G* seemed to suggest that simply because of how invasive the procedure is and the amount of flesh that was excised it could be considered a significant harm.[52] Clearly, the degree of pain suffered by the child or the amount of flesh removed is not the sole factor that makes something a significant harm, though it will influence the decision. Removing a child's appendix, for example, is a considerable surgery that far outstrips circumcision, in terms of physical harm and pain that occurs. However, it is not considered a significant harm due to the contextual features, the surgery being necessary to secure the child's best interests. Obviously, a range of factors must be taken into account when considering what amounts to significant harm.

Munby J. did not enter into discussion of the requisite elements of 'significant harm'; is it limited to one set of criteria such as the medical benefits of a child's wellbeing, for example, or is it more holistic, including cultural and religious values? An act must be looked at in its correct context when considering what amounts to significant harm. Consider the comments of Lord Templeman in *R v Brown*[53] in which he stated

> Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily

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46 Female Genital Mutilation Act 2003 s.2 allows an approved person (governed by s.3) to perform a surgical operation for the benefit of the patient.

47 s.31(10).

48 C Cobley and NV Lowe, 'Legislative Comment, The Statutory 'Threshold' Under Section 31 of the Children Act 1989 – Time to Take Stock' (2011) LQR 127, 396.

49 *Re D (Care: Threshold Criteria: Significant Harm)* [1998] Fam.Law 656.

50 Ibid.

51 *Re K; A Local Authority v N* [2005] EWHC 2956 (Fam).

52 *B and G*, para. 69.

53 *R v Brown* [1993] 2 W.L.R. 556.

> harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.[54]

Another example that clearly shows Munby J. should not have considered male circumcision as significant harm is also made by him when discussing forced marriage. Marriage itself would not be considered harmful by most. What makes forced marriage wrong is exactly what is in the name; it is 'forced'. The contextual factors here are what define this act as impermissible and wrong. It is the opinion of this author that forced marriage is correctly condemned, regardless of the cultural support, as the respect for cultural practices does not strike a sufficient balance with the restriction of the woman's autonomy. Comparisons can be drawn between FGM/male circumcision and forced marriage. A balance must be made between the respecting of a cultural practice while ensuring that a harm does not befall the individual.

Thus, when considering the contextual factors surrounding male circumcision, it becomes clear that such a procedure with specific purpose, either medical or religious, does not create any form of significant harm but in reality actually creates a benefit for the child. Though the medical benefits are not accepted by all, the religious and cultural benefits clearly exist. Should circumcision be withheld from those children born into families that belong to a religion practising circumcision the loss of an integral part of their cultural identity and ability to express their religious beliefs could cause '*significant harm*' whether in the form of an internal suffering or, as is more likely, the failure of the child to bond with peers or a community due to the failure to adhere to a religious doctrine.[55]

Of course, some would argue that this argument allows FGM, as it also has a degree of cultural influence. However, the balancing of the procedure and its ramifications for the individual, against the perceived cultural benefits that the child will receive comes to a different result. FGM's medical disadvantages alone far outweigh any perceived benefit. It could be argued that should male circumcision be performed without a purpose, whether medically or religiously necessitated, it could then be considered a significant harm.[56] The question that must be asked is whether the action taken is in the best interests of the child?

President Munby failed to delve into a discussion on the limitations and general ambit of the 'significant harm' threshold. An explanation of the balancing of factors is needed as well as an understanding that these factors would not be restricted to the medical benefits and risks, but also include the social and religious/cultural elements.

IV. CONCLUDING THOUGHTS: A DANGEROUS DECISION?

This case clearly reflected the inadequate nature of the medical profession's ability to deal with cases of possible FGM. This point was not missed by Munby J, who highlighted the inadequate nature of the medical profession in dealing with FGM. His condemnation of all forms of FGM was clear. However, his conflation of male circumcision and FGM as similar practices that amount to 'significant harm' raises real

54 Ibid, para., per Lord Templeman.

55 For discussion see J Mazor, 'The Child's Interests and the Case for the Permissibility of Male Infant Circumcision' (2013) 39 J Med Ethics 421, 428.

56 Ibid, p. 425.

concerns. Perhaps Munby J. should have stopped his discussion at the barbaric practice of FGM. The slightest suggestion that male circumcision is in any way similar to FGM or constitutes *significant harm* risks banning a ritual that is fundamental to many families' lives. Male circumcision is in the child's best interests in many cases and should only be restricted when the balancing of harms tips towards not circumcising. The governing principle is that the welfare of the child is paramount.[57] A balancing exercise must be performed between a range of factors such as medical, cultural, religious, and social factors, contextualising such procedures. Though Munby J. made it clear that male circumcision failed to meet the requirements of the second limb of the significant harm test, the damage to male circumcision's position within the law had already taken place. Such a suggestion fails to consider the religious and cultural elements at the heart of male circumcision. For those brought up within a community attached to a faith that advocates for male circumcision, the harm that would befall the child who did not conform to the religious doctrine could be far more severe than a simple circumcision. This case risks muddying the waters of male circumcision and could open the door for those opposed to such a practice to argue, incorrectly, that there is no legitimate basis to allow male circumcision if, as Munby J. suggested, it amounts to a 'significant harm'. Clarification is now much needed.

57 Children Act 1989 s.1.