Neutral Citation Number: [2020] EWCA Civ 731

Case No: B4/2019/2608

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION OF THE HIGH COURT
Sir Andrew McFarlane, President of the Family Division
NR18F5001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2020

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LADY JUSTICE KING
and
LORD JUSTICE HICKINBOTTOM

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Between:

The Secretary of State for the Home Department	**Appellant**
- and -	
Suffolk County Council	**1st Respondent**
-and-	
Respondent Mother	**2nd Respondent**
-and-	
Respondent Child	**3rd Respondent**
-and-	
Respondent Father	**4th Respondent**

Mr John McKendrick QC and Ms Claire van Overdijk (instructed by **Government Legal**) for the **Appellant**
Ms Amanda Weston QC, Mr James Holmes and Ms Naomi Wiseman (instructed by **Suffolk Legal**) for the **Respondent Local Authority**
Ms Karon Monaghan QC and Ms Charlotte Proudman (instructed by **Duncan Lewis**) for the **Respondent Mother**
Ms Deirdre Fottrell QC, Ms Kathryn Cronin and Ms Artis Kakonge (instructed by **Miles & Partners**) for the **Respondent Child**
The Respondent Father neither appeared nor was represented

Hearing date: 12 March 2020

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Approved Judgment

Sir Ernest Ryder, Senior President:

Introduction:

1. This is an appeal against the decision of the Rt Hon Sir Andrew McFarlane, President of the Family Division ('the President') who, in the exercise of the family court's jurisdiction to make a female genital mutilation protection order under paragraph 1 of Schedule 2 of the Female Genital Mutilation Act 2003 ('the FGMA 2003'), held that a family court is not bound to take, even as a starting point, a previous assessment or determination of risk of female genital mutilation ('FGM') made by the Immigration and Asylum Chamber of the First-tier Tribunal ('FtT (IAC)') in its determination of an asylum application based upon the risk of FGM on return. His decision was made on 25 September 2019 and is reported as *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475 (Fam). Although this appeal was heard in public, an order was made to protect the identity of the child concerned.

2. The appeal to this court raises an issue of importance concerning the relationship between these two distinct jurisdictions and, in particular, the overlap which it is said may exist when the risk of FGM is assessed for the purposes of a decision in each of those jurisdictions.

3. The President concluded in *Re A* that family courts have the broad discretion described in the FGMA 2003 to take into account all of the relevant circumstances when considering whether to make a protection order. In other words, a family court is not constrained by any prior conclusion of the FtT (IAC) and can give it such weight as it might consider appropriate in its own assessment. The Secretary of State for the Home Department challenges this conclusion and submits 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 a protection order.

4. The conclusion of this court is that the President's decision is correct and the appeal should be dismissed. This is the judgment of the court.

Background to the appeal:

5. The President set out the factual circumstances of the young woman who is the subject of the proceedings in his judgment in *Re A* at [1] to [7], inclusive, and we gratefully adopt that description which is not in issue in this court. For the purposes of this judgment, the following description of the facts suffices.

6. The appeal concerns a young woman, whom we shall continue to refer to as 'A' who is now 11 years old. She was born in 2009. She is a Bahraini citizen of Sudanese origin who entered the UK as a visitor with her parents and four older brothers on 18 August 2012. On 30 August 2012 her father left for Bahrain and has not returned to the UK. He is believed to have been detained in a military prison in Bahrain.

7. On 31 August 2012 A's mother made her first asylum application in the UK. She withdrew this in early 2013 and applied for 'Assisted Voluntary Removal'. She withdrew that application in January 2014.

8. On 2 September 2014 A's mother made a fresh asylum application. A and her brothers were dependents for the purposes of that application. No separate asylum application was made on behalf of A. A's mother claimed that she was at risk on return because of her conversion from Sunni to Shia Islam and that A was at risk of FGM. Although her account has at times differed, A's mother claimed that A's father and his extended family were in favour of FGM and wanted A to undergo the practice. A's mother had undergone FGM as a child in Sudan, and reported that two of her sisters died as a result of the practice which continues in the extended family so that three of her nieces have also been subjected to it.

9. That asylum application was refused by the Home Office on 16 December 2016. The mother's appeal against that decision was dismissed by the FtT (IAC) on 25 July 2017, the parties to the appeal being the mother (as appellant) and the Secretary of State (as respondent). The judge in the FtT (IAC), Judge Monson, did not find the mother to be a credible witness and, in respect of A, held that "there are not substantial grounds for believing that there is a real risk of her being subjected to any form of FGM". Permission to appeal was refused by both the FtT (IAC) and the Upper Tribunal ('UT'); and, on 14 May 2018, Holman J refused the mother's application for leave to apply for judicial review of the UT's decision. The mother's appeal rights were accordingly exhausted and, on 18 September 2018, she was served with directions for the family's removal to Bahrain, with the deportation date set for 27 September 2018.

10. Suffolk County Council ('SCC'), the relevant local authority with safeguarding responsibilities, had become involved with the family when A's mother had proposed to return with the children to Bahrain. An assessment was undertaken by Barnardo's in 2017 which recommended the making of a FGM protection order under the FGMA 2003 if the proposed return was to be pursued. The engagement by Barnardo's and SCC ended when the family remained in the UK, because it was considered that there is no risk of FGM to A while she resides in the UK.

11. On 26 September 2018, SCC was contacted by A's school because A had informed the school that she was due to be removed to Bahrain on the following day. A's mother believed they would be refouled from Bahrain to Sudan because of the effect of new rules which it is said removed citizenship from nationals who had been away from Bahrain for 5 years. SCC again sought advice from Barnardo's who remained of the view that there was a high risk of FGM if A was removed and advised SCC to seek a FGM protection order. SCC issued an application in the family court for a FGM protection order in accordance with the FGMA 2003 on 27 September 2018.

12. HHJ Richards considered the application on 1 October 2018 and made the following order in respect of A:

> "1. The First Respondent [A's mother] is prohibited from leaving the jurisdiction of England and Wales with or in the company of [A].

> 2. The Secretary of State for the Home Department or anyone acting on his behalf are prohibited from removing, instructing or encouraging any other person to remove [A] from the jurisdiction of England and Wales.
>
> 3. The Secretary of State for the Home Department or the First Respondent are prohibited from obtaining a Passport or any other Travel Document for [A], if one has not already been obtained."

13. The next hearing took place on 31 October 2018 before Newton J. The Secretary of State joined issue with the local authority and argued that Judge Richard's order was made in excess of jurisdiction and the injunctions against him should be discharged. The Secretary of State agreed, however, not to set removal directions for a period of six weeks and the injunctions remained in place against both A's mother and the Secretary of State pending transfer of the case for hearing before the President of the Family Division on 30 and 31 January 2019.

14. Newton J identified the following issues for determination:

    a) "Whether a judge of the Family Division and/or the family court can lawfully injunct or restrain the exercise of the Secretary of State for the Home Department's immigration powers in relation to a mother and child by making a FGM protection order (issue 1).
    b) The role of the Family Division in assessing the risk of a child being subjected to FGM in circumstances where the risk has been assessed by the Immigration and Asylum Tribunal and dismissed as a basis for asylum with all appeal rights exhausted (issue 2).
    c) The duty on a local authority in meeting its statutory obligations under the FGMA 2003 in these circumstances (issue 3).
    d) Whether the FGM protection order (darted 1 October 2018) should be continued or discharged" (issue 4).

    Those were the issues which came before the President.

15. In respect of issue 1, the President held at [53] and [54]:

    > "There is no jurisdiction for a family court to make a FGM protection order against the Secretary of State for the Home Department to control the exercise of her jurisdiction with respect to matters of immigration and asylum. […] The extent of the family court's jurisdiction in such matters is to invite the Secretary of State and/or the relevant tribunals to consider any determinations made by the court in FGMA proceedings."

    That conclusion is not in issue in this appeal; but we should say that we respectfully agree with it. It reflects the marked difference in functions between a family court in the exercise of its jurisdiction in respect of FGM protection orders, and those of the Secretary of State (and, in its turn, the FtT (IAC)) in the exercise of their functions under the Immigration Acts. The family court's function is to investigate, in accordance with the provisions of the FGMA 2003 and the Family Procedure Rules, whether an order should be made for the protection of a girl against FGM. The FtT (IAC)'s function is to determine whether an applicant has proved a risk on return

sufficient to make a finding of refugee status, in accordance with the Refugee Convention, the Immigration Acts and the Immigration Rules.

16. This appeal concerns only issue 2, in respect of which the relevant parts of the President's judgment are to be found at [55] and [56]:

> *"(b) Relevance of previous FTT evaluation in Family Court risk assessment*
>
> 55. Turning to the second issue, namely the role of the family court in assessing risk in FGMA proceedings where the risk has previously been assessed by the FTT, I am unable to accept the Secretary of State's submission that an FTT assessment must be the 'starting point' or default position for the court and that the court should only deviate from the FTT assessment if there is good reason to do so.
>
> 56. The Secretary of State's submission is not supported by any authority. In fact, as the helpful observations from Black LJ (as she then was) in *Re H* (see paragraph 32 above) demonstrate, the approach to risk assessment in a family case is a different exercise from that undertaken in the context of immigration and asylum. The family court has a duty by FGMA 2003, Schedule 2, paragraph 1(2) to 'have regard to all the circumstances' and, to discharge that duty, the court must consider all the relevant available evidence before deciding any facts on the balance of probability and then moving to assess the risk and the need for an FGM protection order. Although the family court will necessarily take note of any FTT risk assessment, the exercise undertaken by a FTT is not compatible with that required in the family court. It is not therefore possible for an FTT assessment to be taken as the starting point or default position in the family court. The family court has 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."

17. The citation from Black LJ came from *Re H (A Child)* [2016] EWCA Civ 988 and is as follows:

> "25. In approaching an asylum/humanitarian protection claim, the Home Office looks to see whether the person concerned has a well-founded fear of persecution or is at real risk of serious harm for a non-Convention reason. The approach to risk is not the same as that taken in a family case. In a family case, establishing risk is a two-stage process. First, the court considers what facts are established on the balance of probabilities; then it proceeds to consider whether those facts give rise to a risk of harm, see *Re J (Children)* [2013] UKSC 9 […] In contrast, in an asylum/humanitarian protection claim, the material presented by the claimant is looked at as a whole with a view to determining whether there is a well-founded fear of persecution or substantial grounds for believing that a person would face a real risk of serious harm, a reasonable degree of likelihood of serious harm being what is required. There is no comparable process of searching for facts which are established on the balance of probabilities."

18. Subsequently, a final hearing took place on 9, 10 and 11 December 2019 before Newton J. Evidence not previously before the court or the tribunal was considered. A FGM protection order in relation to A was made by the judge who concluded that:

> "It is difficult to think of a clearer or more serious case where the risk to A of FGM is so high. I find without hesitation overwhelmingly that there is a high risk of FGM to A, and I accordingly make the order sought."

Legal framework:

19. The relevant legal framework concerning the authorisation of FGM protection orders is contained in the FGMA 2003. In accordance with section 1(1) of the Act, a person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris. This includes all forms of FGM as defined by the World Health Organisation as FGM types I, II, and III.

20. Section 2 of the Act establishes the offence of assisting a girl to mutilate her own genitalia, where a person "aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris." Section 3 extends this to "assisting a non-UK person to mutilate overseas a girl's genitalia".

21. The Serious Crimes Act 2015 introduced a change in the class of protected persons. The FGMA 2003 was originally framed to protect UK citizens and permanent residents from FGM offences, however the term 'permanent' was deleted and substituted for by the Serious Crimes Act 2015 part 5 section 70(1)-(2)(c) so that the protection was extended to those who are habitually resident in the United Kingdom. No issue is taken before this court that A is habitually resident and that the protection applies to her.

22. Schedule 2, para 1 of the FGMA 2003 provides the court with the power to make a FGM protection order (emphasis added):

> "(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
>
> (b) […]
>
> (2) <u>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.</u>
>
> (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 a 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
>
> […]"

23. Schedule 2 FGMA 2003 also identifies which courts are responsible for the assessment of risk of FGM. Schedule 2, para 17 ("interpretation") provides that:

> (1) "In this part of the Schedule -
> "the court" except as provided in sub-paragraph (2), means the High Court, or the family court, in England and Wales
> […]
> (2) Where the power to make an FGM protection order is exercisable by a court in criminal proceedings under paragraph 3, references in this Part of this Schedule to "the court" (other than in paragraph 2) are to be read as references to that court"

24. It is settled law that the practice of FGM involves questions that engage and may constitute breaches of articles 2, 3 and 8 of the ECHR. No submissions are made to this court in respect of these questions that assist the Secretary of State.

Discussion:

25. In oral submissions ably presented to us by Mr McKendrick QC on behalf of the Secretary of State, it was (rightly) not suggested that the FtT (IAC)'s assessment of risk of FGM was, as a matter of precedent, formally binding on the family court. Rather, his submissions flow from the premise that the family court must take as its starting point in its assessment of risk of FGM a prior FtT (IAC) assessment of that risk where one has been undertaken. In his written submissions, the reasoning is as follows:

    a) The family court must respect any determination of the FtT (IAC)/UT in respect of the risk of FGM in the country of return and consider that as part of the analysis of all the circumstances in determining whether to make a FGM protection order.

    b) Where the FtT (IAC) has dismissed the risk of FGM as founding refugee status, the family court is still required to consider any application for a FGM protection order; but the starting point must be the FtT's determination that the risk does not provide a basis for the person to remain in the UK.

    c) While in exceptional circumstances the family court may take a different view from the FtT (IAC), this should be rare, and the court would need to identify a material basis for that conclusion, such as evidence pointing to a change in circumstances in the country of origin that was not before the tribunal. No such basis arises in the present case.

26. Mr McKendrick makes the appropriate concession that the President was correct when he held that there is no direct authority in support of these submissions, but he nevertheless submits that he is able to justify his reasoning and make good his position from first principles before this court on two bases: comity and proportionality. We shall take each in turn. However, before doing so, it would be helpful to deal with three anterior matters, one initially raised by the parties and the others by the court in the course of the hearing, which, in our view, provide a complete answer to this appeal.

27. First, proceedings before the FtT (IAC) are adversarial, and not *in rem*: the conclusions of the FtT (IAC) bind the parties to that appeal (in this case, A's mother and the Secretary of State) and no-one else. Mr McKendrick did not suggest otherwise. Even if it could be argued that the tribunal proceedings might create some form of judgment estoppel as between the same parties, this would not apply to an intermediate finding of fact (such as a finding of risk). Again, Mr McKendrick did not suggest otherwise. 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.

28. Second, the FGMA 2003 describes how the court's powers in respect of an FGM protection order are to be exercised. In language that is unambiguous, plain and in mandatory form, in deciding whether to exercise its powers and, if so, how, the family court <u>must</u> (our emphasis) have regard to all the circumstances. While, as we have described, a prior assessment of risk may be such a circumstance, that statutory language neither requires nor permits any limitation, presumption or assumption in the task to be performed. There is no starting point or default position save that provided by the statute, namely that all the circumstances include "the need to secure the health, safety and well-being of the girl to be protected". As a matter of statutory construction, that provides a substantive answer to the Secretary of State's challenge.

29. The third issue is procedural. The admission of evidence before a family court is governed by the Family Procedure Rules 2010. The admission of evidence is considered by a judge during case management. There is no right to file and serve evidence without the family court's permission (see, for example, rule 25.4(2)). Quite apart from the application to that exercise of the overriding objective in rules 1.1, 1.2 and 1.3 and the active case management principles in rules 1.4 and 4.1, which are mirrored and described in detailed practice directions, there is a specific and simple test which family courts must apply relating to the admission of expert evidence which can be found in part 25 at rule 25.4(3). That test is whether the evidence is "necessary to assist the court to resolve the proceedings". We accept that may require a family court exercising its power to make a FGM protection order to consider, in the light of a prior finding by a tribunal in a different context, the nature and extent of the evidence upon which that earlier finding was made; and whether (and, if so, what) further evidence is required. However, there is no need for any additional test, alternative wording or any gloss on the rule that is applicable to the circumstances of this case, as the Secretary of State suggests.

30. We make it clear that the three issues we have considered above are, in our view, sufficient to determine this appeal – by dismissing it – but, in deference to the extensive written materials presented to us, it is appropriate to consider some of the other questions that were raised.

31. As we understand it, the Secretary of State does not seek to persuade this court that the responses we have given to these three issues are wrong but nevertheless argues

that the principle of comity applies between the FtT (IAC) and the family courts, such that the latter should not depart from a prior factual finding or assessment of the former unless convinced it is wrong. Or, as the Secretary of State put it: the principle of judicial comity prescribes that the family court should take the FtT (IAC)'s assessment of the risk of FGM as its starting point and only embark on a further enquiry if compelling or exceptional reasons demand it. In our judgment, that cannot be right for the reasons which follow.

32. In support of the proposition upon which the Secretary of State relies she cites, *inter alia*, Lord Goddard CJ in *Police Authority for Huddersfield v Watson* [1947] K.B 842 where it was held that:

> "[T]he modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity."

33. The Secretary of State seeks to derive some support for her position from the decision of Holman J sitting in the family court in *A v A (FGMPOs: Immigration Appeals)* [2018] EWHC 1754 (Fam), [2018] 4 WLR 105, where an application for a FGM protection order was refused and at [7] the court held that the "making of a genital mutilation order in this case might be seen as impacting upon or influencing" the determination of the appeal tribunal. Holman J added at [8] that he was hesitant to do anything that "might be seen as impacting on, or influencing, the discretionary decision [to be taken by] the immigration appeal tribunal".

34. The context of the observations of a judge experienced in both jurisdictions needs to be considered carefully. *A v A* involved an application that was made urgently and prematurely by a mother not by or with the support of a local authority acting in the performance of its safeguarding responsibilities. What the decision demonstrates is not an application of the principle of comity as between the family court and the immigration and asylum tribunal but rather the careful avoidance of what would otherwise have been a tactical attempt to use the family court to interfere in the jurisdiction of the immigration and asylum tribunal.

35. That there can be overlap between the issues and evidence that family courts and tribunals have to consider is patent. There have been a number of working parties and protocols over the years to try and ensure that disclosure between the jurisdictions is properly considered at an early stage of proceedings in both jurisdictions and that issues are sequentially case managed and determined (for a helpful discussion, see 'Immigration issues in children law proceedings' January [2020] Fam Law 88).

36. But that is not to say that the exercises performed in each of the jurisdictions are the same. The statutory schemes under which they operate are substantially different – driven by very different policy considerations – and even the factual issues and assessments are not the same. Indeed, such assistance as there is in the authorities indicates that the functions of the family courts and the immigration and asylum tribunals are largely distinct and separate: see *Mohan v Secretary of State for the Home Department* [2012] EWCA Civ 1363, [2013] 1 WLR 922 approving the Upper Tribunal in *RS (immigration and family court proceedings) India* [2012] UKUT 218

(IAC) per McFarlane LJ, Blake J. (President) and Upper Tribunal Judge Martin. As Black LJ remarked in *Re H* supra, even the approach to the exercise of judgement or risk evaluation is different. Furthermore, by section 55 of the Borders, Citizenship and Immigration Act 2009, the interests of a child are not paramount in the tribunal, they are a primary issue that does not take precedence over other issues. That of itself necessarily constrains the tribunal from understanding questions of risk in the same way as the family court where a child's welfare is paramount (assuming as in this case, the application being made is in respect of a child).

37. There is ample first instance jurisprudence to support both the President's approach and the reliance he placed on *Re H*: see, for example, *R (MN) v Secretary of State for the Home Department and the Aire Centre* [2018] EWHC 3268 (QB) at [48] per Farbey J., *Re A* [2003] EWHC 1086 (Fam) at [53] per Munby J. and *Nimako-Boateng* [2012] UKUT 00216 (IAC). There is nothing identified to this court that supports the Secretary of State's proposed approach.

38. It is not even clear that the family court and the FtT (IAC) can be considered to be courts of coordinate jurisdiction. The point has not been fully argued before us and we do not purport to express a concluded view on the question; but, on the face of it, there are significant relevant differences. Whereas the family court is a court of record, the FtT (IAC) is not. The FtT has the features of a court but is quintessentially an independent judicial tribunal which is a specialist administrative law decision maker. The UT is a superior court of record that is able to bind itself and the FtT (IAC) but neither the Family Division of the High Court nor the family court can make a decision that has precedential effect in either the FtT (IAC) or the UT. And, as we have remarked, the FtT (IAC) is adversarial while, when exercising its powers under the FGMA 2003, the family court is essentially investigatory.

39. The Secretary of State also relies on the principle of proportionality. She submits that the President's decision "effectively risks litigation on largely the same factual issue taking place in both the FtT (IAC) and the family courts with conflicting decisions being taken on the question of overseas risk of FGM. This in turn risks uncertainty, delay in decision making and, put bluntly, a waste of public expenditure." In particular, she relies upon the specialist knowledge that the FtT (IAC) brings to bear in coming to a conclusion about third country risk. She submits that the family court has embarked upon a disproportionate and unwarranted inquiry.

40. The challenge of the Secretary of State on this question, with respect, misses the point. Even if the evidence presented to the court and the tribunal is the same (at least on the FGM issue) and even if on that issue their different methods of risk evaluation might benefit the appellant (about which we express no concluded opinion), the context and nature of the decision-making process is materially different. A child or young person in proceedings in the family court for a FGM protection order will be separately represented. She will have her own voice. That is not the case in the tribunal in a case like this where a young person is not making her own asylum application but, like A, is the dependent of an adult who is. As we have remarked, whether a person's interests are a primary or paramount consideration can and sometimes does lead to a different decision on the same facts. Furthermore, the assessments of risk being conducted are different. That is not a question of

proportionality, but rather is a reflection of the different focus and function of the statutory schemes.

41. Furthermore, in so far as it was suggested that the President failed to have regard to the argument we summarise above, that is difficult to accept given the reliance the President placed on the decision of Black LJ in *Re H* at the core of his reasoning. To recollect, Black LJ identified the establishment of risk in a family case as a two stage process, the first of which involves the court finding facts on the balance of probabilities before it evaluates risk, whereas an immigration and asylum tribunal considers humanitarian protection claims, *inter alia*, on the basis of a reasonable degree of likelihood of serious harm. We do not consider that the Secretary of State has established that the differences between these two methods of evaluation supports her appeal.

42. As we indicated at the beginning of this judgment, Mr McKendrick appropriately limited in his oral submissions the challenge that the Secretary of State makes to the President's decision. In the discussion with counsel of the mischief that the Secretary of State sought to provide for, the relevance of part 25 of the Family Procedure Rules in the context of the family court's statutory function described in paragraph 2 of schedule 2 of the FGMA 2003, was explored. This provides a sufficient answer to the problem that it is said may arise.

43. 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. Whether further evidence is required by the family court to undertake its separate function in respect of a FGM protection order will depend on the application of the test in rule 25.4(3) FPR which is whether the expert evidence is necessary to assist the court to resolve the proceedings. There is no need to add any gloss to that test. The application of the Rules in the context of the legislation already provides a solution to any asserted tendency not to have regard to what other courts or tribunals may have said on what may be a related issue.

44. For these reasons we dismiss the appeal.