Neutral Citation Number: [2024] EWCA Crim 714

Case No: 202400909 A5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
MR JUSTICE BRYAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2024

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE COCKERILL
and
MR JUSTICE LINDEN

- -

Between :

NOOR	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Nneka Akudolu KC and Amanda Hamilton (instructed by **H.P. Gower Solicitors**) for the **Appellant**
Deanna Heer KC (instructed by **Criminal Appeals Unit**) for the **Respondent**

Hearing dates : 7 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Pursuant to section 4A and Schedule 1 of the Female Genital Mutilation Act 2003 no matter likely to lead members of the public to identify a person against whom an offence under the Act has been committed may be included in any publication during her lifetime. We shall refer to the person concerned in this case as Jade. That is the same anonymisation as that adopted by the trial judge.

Lord Justice William Davis :

Introduction

1. On 26 October 2023 Amina Noor was convicted after a trial at the Central Criminal Court of assisting a non-UK person to mutilate overseas a girl's genitalia whilst outside the United Kingdom. On 16 February 2024 Ms Noor was sentenced by the trial judge, Mr Justice Bryan, to seven years' imprisonment. Her application for leave to appeal against the sentence has been referred by the Registrar to the full Court.

2. Ms Noor was represented before us by Nneka Akudolu KC and Amanda Hamilton. The prosecution were represented by Deanna Heer KC. All counsel appeared in the court below. We were assisted by their detailed written and oral submissions.

3. Since offences under the Female Genital Mutilation Act 2003 are very rarely prosecuted, it is appropriate for use to give leave to appeal to allow full consideration of the approach to sentencing in such cases. We shall refer to Ms Noor hereafter as the appellant.

The Female Genital Mutilation Act 2003

4. Female genital mutilation ("FGM") has been a specific criminal offence in the UK since 1985 when the Prohibition of Female Circumcision Act 1985 was passed. Under the 1985 Act it was an offence "to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person….or….to aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body". In England and Wales (and Northern Ireland) the 1985 Act was replaced by the 2003 Act. Sections 1 and 2 of the 2003 Act in practical terms replicated the offences created by the 1985 Act. The maximum penalty was increased from five years' imprisonment to fourteen years' imprisonment. Section 3 of the Act created a new offence, namely the offence of assisting a non-UK person to mutilate overseas a girl's genitalia. This offence also carried a maximum sentence of fourteen years' imprisonment.

5. The 2003 Act was amended by the Serious Crime Act 2015. Section 3A was added to the 2003 Act. It created the offence of failing to protect a girl under the age of 16 from the risk of genital mutilation. The maximum sentence for the offence was seven years.

6. Despite this legislative activity prosecutions under the 2003 Act have been rare. Two cases were prosecuted in 2019, one of which resulted in a conviction and sentence. That case was tried before Mrs Justice Whipple (as she then was). Sentence was imposed in March 2019 for an offence of mutilating a three year old child. Until the appellant's case that was the only instance of a sentence being imposed for an offence contrary to the 2003 Act.

7. After the 2003 Act was amended to create the offence in section 3A, the Sentencing Council issued a guideline in relation to that offence effective from 1 January 2019. There is no guideline in relation to the other offences in the 2003 Act.

8. FGM involves procedures which include the partial or total removal or other mutilation of the external female genital organs for non-medical reasons. When carried out illicitly

the practice is extremely painful. It is likely to have serious health and social consequences both at the time of the mutilation and in later life. There is no set age at which mutilation will be carried out. However, it is most likely to affect young or very young girls.

9. The World Health Organisation has classified FGM into four types:

Type I: Clitoridectomy: partial or total removal of the clitoris and/or the prepuce;

Type II: Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora;

Type III: Infibulation: narrowing of the vaginal opening through the creation of a covering seal by cutting and repositioning the labia minora/majora;

Type IV: Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing.

The 2003 Act does not divide the act of genital mutilation in this way. Section 1(1) defines the act as being committed if a person "excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris".

10. Section 3 of the Act insofar as is relevant reads as follows:

> (1)A person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom.
>
> (2)An act is a relevant act of female genital mutilation if—
>
> (a)it is done in relation to a United Kingdom national or United Kingdom resident, and
>
> (b)it would, if done by such a person, constitute an offence under section 1.

The section criminalises the act of a person who assists the carrying out of FGM outside the UK in relation to a UK national or resident. It is not necessary that the offender is outside the UK. Aiding, abetting, counselling or procuring may cover a multitude of factual circumstances. Where the offender is present at the time of the FGM and provides immediate assistance, culpability will be akin to that of the direct perpetrator of the FGM.

11. Section 3A is a very different type of offence. It is of significance in this case because of the reliance placed by the appellant on the Sentencing Council guideline for the offence. So far as is relevant section 3A reads:

> (1)If a genital mutilation offence is committed against a girl under the age of 16, each person who is responsible for the girl at the relevant time is guilty of an offence.

> (2)For the purposes of this section a person is "responsible" for a girl in the following two cases.
>
> (3)The first case is where the person—
>
> (a)has parental responsibility for the girl, and
>
> (b)has frequent contact with her.
>
> (4)The second case is where the person—
>
> (a)is aged 18 or over, and
>
> (b)has assumed (and not relinquished) responsibility for caring for the girl in the manner of a parent.

The element of risk as part of the offence arises because it is a statutory defence for the defendant to show that they did not think that there was a significant risk of FGM and could not reasonably have been expected to be aware of any such risk. It is also a defence for a defendant to show that they took all reasonable steps to protect the girl from FGM. It follows that the offence does not involve any act on the part of the defendant. In the guideline issued by the Sentencing Council, high culpability is present when the defendant fails to respond to interventions or warnings or fails to take any steps to protect the victim from the FGM offence.

The factual background

12. The appellant was born in Somalia. She left Somalia when she was 8 and went to live near Mombasa in Kenya. In about 2000 when she was 16 she came to the UK. She was naturalised and given UK citizenship in 2005

13. Between March and May 2006 the appellant travelled to Kenya. She was accompanied by others including a three year old whom we refer to as Jade. The appellant and Jade stayed at the appellant's mother's home in a village outside Mombasa. The evidence of what happened in Kenya almost exclusively came from what the appellant herself said. In January 2019 she was interviewed twice: first by a social worker at the National FGM centre; second a day later by the police. She gave evidence at the trial in October 2023.

14. In the interviews in 2019 the appellant said that the practice of FGM was commonplace in Kenya. It had been carried out for many years for cultural reasons. The appellant did not know why it had to be done. It had happened to her when she was a baby. Her sisters and other family members had undergone the procedure. Once in Kenya the appellant's mother had convinced the appellant that Jade should be subjected to FGM. The appellant's mother and another female family member told the appellant that Jade needed to be "gudniin". The appellant referred to the procedure she understood was to be performed as "sunnah", that being the term used by her mother. Her understanding was that this was a generic term for female circumcision rather than for removal of the clitoris.

15. The appellant said that she had gone with Jade and a friend of the family by tuk-tuk to what she said was "a clinic place". The clinic was a private house. The appellant told

the social worker that an African lady had invited her to accompany Jade when she went into the house. She said that she had declined to do so because she was "scared and worried". In the police interview the appellant said that she had been told to wait outside and had not been allowed to accompany Jade. In the interview with the social worker the appellant stated that she had not known what was going to happen. To the police she said that she had been told that the procedure would involve a minor injection or piercing. Jade was only in the house for about five minutes.

16. The appellant told the police that Jade was ok after the procedure. Jade did not start crying until about 3 a.m. the following day. The appellant's mother had said that this was because Jade had gone to the toilet. In the interview with the social worker the appellant said that Jade had cried the whole night. The appellant's mother had bathed Jade's vaginal area with warm water. Cotton wool had been put onto that area. It had dried and got stuck. The water was used to soothe the area and to ease off the cotton wool. She said that she had not looked at the area in which the procedure had taken place. She did not want to do so.

17. What in fact had occurred was that Jade's clitoris had been removed using some kind of sharp instrument. In November 2018 (by which time she was aged 16) Jade told a teacher at her school that she had been subjected to FGM. As a result, Jade was examined by doctors at a hospital in London. They found that Jade's clitoris had been totally removed. The appellant was present at the examination. She appeared shocked and upset. She denied knowing that this had happened. Although she had taken Jade to have the procedure carried out, she had not thought that this was what was intended to happen. The interviews with the social worker and the police were as a result of this medical examination.

18. In her evidence at trial the appellant said that she had been pressurised by her family into allowing Jade to be subjected to a procedure. Her mother had threatened to disown her if she did not agree. The words "gudniin" and "sunnah" had been used. The appellant said that at the time she had not understood the words. She believed that Jade would simply be "touched" albeit in a manner that would involve some bleeding. Had she known Jade's clitoris was to be removed, she would have refused to take Jade to the so-called clinic. She would have returned to the UK. As it was, she resisted for four days and only agreed when her mother said that she would take Jade to the clinic without her. Once at the "clinic" the appellant's evidence was that she had remained outside the house. She had given no assistance or encouragement to the person carrying out the procedure. Afterwards Jade was quiet but otherwise normal. At her mother's home the only pain suffered by Jade was when she went to the toilet. She did not look at Jade's wound at any time. She never noticed anything abnormal in Jade's genitalia.

19. The jury were provided with agreed facts in relation to the incidence of FGM in Kenya and Somalia (the countries in which the appellant had lived prior to coming to the UK). They read as follows:

"There is a long history of the practice of FGM in Kenya. Data collected on the UNFPA Female Genital Mutilation "dashboard" indicates that, as of 2014:

<u>Prevalence of FGM</u>

a. 21% of the female population aged between 15 and 49 had been subject to FGM.

b. 11% of the female population aged between 15 and 29 had been subject to FGM

c. 3% of girls aged 0-14 in Kenya had been subject to FGM. .

d. 27% of the total Kenyan population had undergone FGM, with the largest area of prevalence in the North East of the country.

e. Those of Somali ethnicity were most likely to undergo FGM. The prevalence rate of FGM in the most affected ethnic group in the country was 94%.

Type of FGM

f. 87% of women and girls who had undergone FGM in Kenya had their genitalia cut, with some flesh removed.

FGM in Somalia

FGM rates in Somalia are the highest rates in the world and according to the UN and UNICEF the overall rate is 99%. The prevalence of FGM is highest in rural, nomadic, less educated and poor groups. FGM is extremely normalised in Somali culture, and is perceived as being akin to male circumcision. The procedure is also widely believed to be a religious obligation, necessary for the family's honour (because it is seen to preserve a daughter's virginity) and necessary in some cases for a man's pleasure. The practice of FGM is sufficiently entrenched in Somali culture and custom that girls who have not undergone it are typically shunned and ostracised, or considered unmarriageable. The rejection of FGM (including the rejection of cutting) is seen as rejecting Somali, Muslim and African culture.

In Somali "Gudniin" is a general term for FGM and "Sunnah Gudniin", which is sometimes abbreviated to "Sunnah", is specifically FGM Type 1. The words have different meanings but can be used interchangeably when talking about FGM Type 1."

The agreed facts in relation to the cultural context of FGM were confirmed and supplemented in oral evidence from Professor Karen O'Reilly who had direct experience of FGM as practised in East Africa.

Material relating to the appellant available to the judge

20. The appellant was aged 40 at the date of sentence. She had no previous convictions. She lived with her husband and their seven children in London. Her husband worked as a mechanic. The three youngest children – aged 13, 8 and 2 – were girls. The older children were 16 and upwards. They were completing their secondary education or in higher education. The judge had statements from the older children describing their mother as the bedrock of the family. In their view she held the family together. They felt that their homelife and futures would be destroyed were their mother to go into custody. More than one of them described their mother as the victim. They argued that it would not be appropriate to send the appellant to prison.

21. The pre-sentence report confirmed the appellant's family circumstances. She was someone of very limited education who had never had paid work. Her life revolved around looking after her family. She had limited English. She had never been apart from her children. The appellant told the author of the report that, were she to be sent

to prison, her husband and her older children would take on the care of the younger children. She expressed her concern for the family were that to be the situation since they had never been apart from her. The author of the report noted that the appellant had been brought up in a particular cultural environment. As such, so the author opined, she was susceptible to pressure from family members whom she was taught to respect and to obey and not to question. The report also suggested that, because the appellant herself had been subjected to FGM from which she did not believe she had suffered any ill-effects, she may have considered that Jade would recover without any memory of the procedure. In that event, she may have taken the view that it was a custom she wished to continue.

22. There was a joint psychiatric assessment of the appellant. She had spent her early years in Somalia witnessing violence and the death of family and close friends. She experienced constant grief and terror. The opinion of the psychiatrists was that the appellant had suffered and continued to suffer from complex post traumatic stress disorder ("PTSD"). This caused her to have nightmares. It had an impact on her ability to maintain trusting relationships. The appellant also suffered from a recurrent depressive disorder. She experienced low mood, lack of energy and suicidal ideation. This disorder had been present for over 20 years. Finally, the opinion of the psychiatrists was that the appellant suffered from generalised anxiety disorder. The appellant had sought help from her general practitioner. She had been prescribed appropriate medication. She had attended therapeutic sessions. The psychiatrists considered that the appellant would be vulnerable were she to be sent to prison. The appellant told them that "her world will end" were that to happen.

23. The psychiatric assessment drew on the content of the appellant's general practitioner's notes and records. The appellant's general practitioner, Dr Anne Murphy, provided a letter setting out the significant features of her medical history. As well as the psychiatric issues, Dr Murphy set out the appellant's long history of gynaecological problems. Her opinion was that the likely cause of these problems was the FGM to which the appellant had been subjected when a baby. Dr Murphy reported that the chronic pain which was a part of the problems had worsened in recent years. The appellant had been diagnosed with fibromyalgia, a chronic pain condition.

The sentencing hearing

24. Both the prosecution and the defence provided the judge with a sentencing note. The prosecution identified the aggravating factors beyond those implicit in the offence as breach of trust and particular vulnerability of the victim. They suggested that the mitigating factors were delay, cultural pressures on the appellant, the appellant herself having been a victim of FGM and the impact of any prison sentence on the appellant's children. The defence in their sentencing note agreed with the prosecution's analysis of the various aggravating and mitigating factors. No other factors were advanced.

25. In the absence of an offence specific guideline, the prosecution submitted that there were analogous offences for which there were Sentencing Council guidelines. They identified the relevant guidelines and category of offence as follows: causing grievous bodily harm with intent – Category 1A; causing or allowing a child to suffer serious injury – Category 2B; child cruelty – Category 1A or 1B; failing to protect a girl from the risk of FGM – Category 1A. The prosecution also referred to the sentence imposed by Mrs Justice Whipple in *R v N* (8 March 2019) and the domestic abuse guideline.

26. The defence argued that the factual basis for sentencing the appellant should be that she had understood that Jade was to undergo Type 4 FGM. The prosecution noted that the appellant's expectation at the time was a relevant factual issue which fell to be determined by the judge. The defence also submitted that the only analogous guideline was failing to protect a girl from the risk of FGM. It was conceded that the equivalent category in that guideline was Category 1A which provided a starting point of 5 years' custody and a category range of 3 to 6 years.

27. The judge set out the reasons for his sentence in lengthy and comprehensive sentencing remarks. At the outset he confirmed that he had read all the material provided to him and considered the submissions made by the prosecution and the defence. Insofar as he did not mention a particular feature of the case, that did not mean that it had not been taken into account.

28. The judge began with a review of the practice of FGM and what it meant in practical terms for the victim. He described the potential long-term consequences of FGM by reference to what had been before the jury in the agreed facts and what Baroness Hale said in *K v Secretary of State for the Home Department* [2007] 1 A.C. 412 at [92] to [94]. He then turned to the circumstances in which Jade had been subjected to FGM. The judge accepted that the appellant had come under pressure to agree to the procedure. He rejected the evidence given by the appellant that she had been threatened with being disowned. This was not something she had mentioned in her police interview. He noted that there had been no threat of violence towards the appellant.

29. In relation to the events on the day of the FGM procedure, the judge found as a fact that the appellant had gone into the house where the procedure was conducted. It was a lie when she had said that she did not. Moreover, so the judge found, the appellant had gone into the room where Jade was subjected to FGM. The judge was sure that the appellant knew and intended that Jade was to undergo Type 1 FGM. He relied, amongst other things, on the word used by the appellant to describe the procedure – "Sunnah" – which he said demonstrated that she knew that Jade was to have her clitoris removed. The judge was satisfied that the appellant saw what happened to Jade as it happened. He was also satisfied that she saw the wound later on the evening of the procedure. The judge said that the evidence of the appellant to the contrary "defies belief". He pointed to the appellant's use of the word "wound" when she was interviewed by the social worker.

30. The judge acknowledged that the appellant had facilitated the examination of Jade in 2018 at the hospital. He accepted that she had been distressed when it was confirmed that Jade's clitoris had been removed. He concluded that this was the reaction of someone trying to distance herself from what she already knew. The distress came from the realisation that the true nature of the FGM undergone by Jade now was out in the open.

31. The judge then turned to consider the guidelines to which he had been referred. He determined that the guideline of particular relevance was that for causing grievous bodily harm with intent. The injury sustained by Jade was "particularly grave" so that harm was in Category 1. Culpability was high because Jade was vulnerable due to her age. The starting point for a Category 1A offence – 12 years' imprisonment with a range of 10 to 16 years' imprisonment – required downward adjustment to allow for

the longer maximum sentence for the offence of causing grievous bodily harm with intent.

32. The judge said that the guideline for causing or allowing a child to suffer serious physical harm was of some assistance. He noted that there were numerous high culpability factors which justified categorising culpability as very high. Harm was in Category 2 because Jade had suffered serious physical harm with a substantial or long term effect. The starting point for a Category 2A offence was 9 years' imprisonment with a range of 7 to 12 years' imprisonment. As a result of the increase introduced by the Police, Crime, Courts and Sentencing Act 2022, the maximum sentence for the offence now was 14 years' imprisonment. The Sentencing Council guideline was revised to take account of the increase in sentence.

33. The judge did not consider that the offence of cruelty to a child was analogous to the same extent as the other offences he had considered. Insofar as it was of value, he concluded that it would have been an offence of very high culpability because of the extreme nature of the degradation to which Jade was subjected. Because there was serious physical harm, it would have been a Category 1A offence with a starting point of 9 years' imprisonment and a range of 7 to 12 years' imprisonment. The maximum sentence had been increased to 14 years at the same time as the increase in the maximum sentence for causing or allowing a child to suffer serious physical harm.

34. The judge rejected the argument that the only analogous guideline was the one relating to the offence contrary to section 3A of the 2003 Act. First, it was not an offence which existed in 2006. Second, it was a far less serious offence than the offence contrary to section 3 of the Act. The maximum sentence was only half that for the offence of which the appellant had been convicted. Third, it was an inapt comparison in terms of culpability. The appellant had not merely failed to take steps to protect Jade from FGM. She had provided positive assistance and encouragement. The judge noted that it was accepted on behalf of the appellant that the case fell into Category 1A in the section 3A guideline. That was because the appellant had failed to take any steps to protect Jade from FGM and Jade had suffered serious physical harm which had had a substantial or long term effect. A Category 1A offence has a starting point of 5 years' imprisonment with a range of 3 to 6 years' imprisonment.

35. The final guideline to which the judge referred was the overarching principles: domestic abuse. The guideline makes specific reference to FGM as domestic abuse. Offending in a domestic context is more serious because it represents a violation of trust.

36. The judge considered the sentencing remarks of Whipple J in 2019 in *R v N.* The facts of that case were different. The extent of the mutilation was greater. The child (also aged 3) suffered significant blood loss which resulted in emergency hospital admission. The offence committed was contrary to section 1 i.e. the defendant had mutilated the child's genitals in their home in the UK. The sentence imposed was 11 years' imprisonment. The judge repeated and adopted Mrs Justice Whipple's description of FGM as "a barbaric practice and a serious crime".

37. Taking into account the purposes of sentencing as set out in section 57 of the Sentencing Code 2020 the judge said that offences involving FGM required very substantial terms of imprisonment as appropriate punishment and to deter others. He considered that, by reference to general principles, both culpability and harm were very high. He decided

that the appropriate starting point before any adjustment for mitigating factors was 9 years 6 months' imprisonment. The judge accepted that there were aggravating factors as outlined by the prosecution. He said that he had taken them into account when setting the starting point in order to avoid the risk of double counting. When he used the term "starting point", that is what he meant. We shall do the same even though it is not strictly an accurate use of the term.

38. The judge set out the mitigating factors. The appellant was only 22 when she committed the offence. She was herself the victim of FGM. She was under cultural and family pressure when in Kenya with Jade though the judge said that the appellant could and should have stood up to such pressure. She knew that she soon was to return to the UK where she would have had the support of her husband. The appellant had no convictions or cautions. She was the mother of 7 children, at least three of whom were very young. In respect of her position as a mother, the judge had regard to *Petherick* [2012] EWCA Crim 2214, *Carla Foster* [2023] EWCA Crim 1196 and the Equal Treatment Bench Book at [131] to [135]. He also had regard to the statements from the appellant's older children which emphasised her importance to the family. The judge expressly excluded as irrelevant what those children said ought to happen vis-à-vis sentence.

39. The judge, by reference to the pre-sentence report and a letter from the relevant local authority, concluded that the appellant's husband and her older children would be able to cope with the care of the younger children without any need for the older children to give up their education in order to achieve this. The local authority had set up a family group conference to which wider family members were to be invited to ensure a robust support plan. The judge accepted that there would be some interference with family life. He said that it would be proportionate given the nature of the offence.

40. Turning to the appellant herself, the judge said that, with her limited command of English, life would not be easy for her in prison. She had suffered lifelong gynaecological problems. She now suffered from fibromyalgia. The judge noted the issues raised in the psychiatric report. He observed that the psychiatrists considered that the Prison Service had the capacity to monitor and to treat the appellant's mental disorder. Since the offending had occurred many years before, the judge did not consider that any mental disorder affected her culpability for the offence. He had regard to the guideline in relation to sentencing offenders with mental disorders.

41. In respect of delay, the appellant had been interviewed in January 2019. She was only charged in October 2022. The judge referred to *Beattie-Milligan* [2019] EWCA Crim 2367 and the overarching guideline general principles in relation to delay. He said that the case was not simple or straightforward. The utmost scrutiny was required in order to reach a proper charging decision. Equally, the length of the delay was excessive. To a significant extent it was unjustified. The judge found that the delay inevitably placed a detrimental strain on the appellant and her family. Such delay required some downward adjustment of the eventual sentence.

42. On behalf of the appellant it had been submitted that the sentence of imprisonment could be of a length capable of suspension. The judge rejected that submission as unrealistic. From the starting point of 9 years 6 months' imprisonment, he reduced the sentence by 2 years to reflect the appellant's mitigation and by a further 6 months to

allow for the detrimental effect of delay. By that route the judge reached the sentence which he imposed, namely 7 years' imprisonment.

The grounds of appeal

43. Although there are seven grounds of appeal as set out in writing, it became apparent in the course of the hearing that they could be distilled into four arguments. First, the judge erred when he found as a fact that the appellant was aware in 2006 that Jade was to undergo Type 1 FGM and that she assisted and encouraged that procedure. Second, the judge used the wrong offence specific guidelines as analogous to the offence committed by the appellant. Insofar as it might have been appropriate to use those guidelines, the judge miscategorised the appellant's behaviour. Third, the judge failed sufficiently to reflect the powerful mitigation available to the appellant. Fourth, the reduction applied by the judge for delay did not properly reflect the adverse effect thereof on the appellant and her family.

44. As to the first submission, it is acknowledged on behalf of the appellant that the judge had presided over the trial. He was entitled to make factual findings based on the evidence he heard. However, the argument is that the judge's findings as to the knowledge of the appellant in 2006 and her participation in the FGM procedure were not founded on the evidence. From the point at which Jade had reported to a teacher what had happened to her, the appellant had been co-operative with the authorities. She had taken Jade to the hospital. The witnesses at the hospital had observed her shock and distress when she learnt of what had been done to Jade. All of this was inconsistent with the conclusion reached by the judge. When he said that the appellant's evidence "defied belief", he did not pay any or any sufficient heed to the position of the appellant as she was in 2006. What the appellant said about seeing cotton wool was as consistent with Jade having been pricked as opposed to having had her clitoris removed.

45. The second argument is that the judge ought not to have referred to guidelines other than the guideline specific to the offence contrary to section 3A of the 2003 Act. What the appellant did was not to be compared to causing really serious harm with intent. The parallel drawn with causing grievous bodily harm was inapt. That is an offence committed with the intention of causing pain and suffering. FGM is an unacceptable cultural practice. . Similar considerations applied to the offence of causing or allowing a child to suffer serious harm. Even if a parallel could be drawn with the offence of causing grievous bodily harm, harm was not in Category 1. The injury was not particularly grave. There was no evidence of any lasting effect so far as Jade was concerned. At worst, it was equivalent to a Category 3A offence with a starting point of 5 years' imprisonment. Even by reference to the guideline relating to section 3A, there was no serious harm. Although it had been conceded at the sentencing hearing that the appellant had committed the equivalent of a Category 1A offence under this guideline, that concession had been made in error. It was analogous to a Category 2A offence with a starting point of 3 years' imprisonment.

46. Third, the judge failed to give sufficient weight to the mitigating factors. The appellant at the time of the offence was a 22 year old woman who was in a vulnerable position. Since then she had lived a blameless life bringing up a large family. The offence had never been repeated. The effect of her incarceration on the family was bound to be dramatic. Nothing that the local authority, her husband and older children and/or her extended family could do would mitigate the dramatic effect of the appellant's absence.

Particular reliance is placed on the sections of the Equal Treatment Bench Book which were recited in *Carla Foster*. Taking those matters into account, the judge ought to have considered alternatives to immediate custody. The judge had regard to the purposes of sentencing. They are not restricted to punishment and deterrence which were the factors on which he concentrated. The appellant's personal mitigation also was not given sufficient weight. She was in poor health. She was bound to find prison exceptionally difficult.

47. Finally, it is submitted that the excessive delay ought to have been recognised by a significantly greater reduction in sentence than 6 months. In *Beattie-Milligan* the delay was less than a year. A sentence of 2 years' imprisonment was reduced to 18 months to allow for the effects of delay. That was a 25% reduction. The reduction in the appellant's case was barely 5%.

Discussion

48. The overall view of the judge was that any offence contrary to section 3 of the 2003 Act constitutes very serious offending. In our judgment the judge was justified in reaching that view. The offence involves deliberate assistance given to and/or encouragement of a person who carries out FGM on a girl. Type 1 FGM is the partial or total removal of the clitoris i.e. the removal of an important sexual organ from the body. The seriousness of that act is magnified when the victim is as young as Jade was in 2006. Implicit in the offence is that the girl, a UK national or resident, will be in a foreign country when the FGM is carried out. In this instance, Jade was a 3 year old far from home when she was mutilated.

49. The seriousness of offending relating to FGM is confirmed by the approach taken by Parliament since 2003. With the introduction of the 2003 Act the maximum penalty for mutilating female genitalia, whether as a principal or as a secondary party, was increased from 5 to 14 years. Even for the lesser offence of failing to protect a girl from the risk of genital mutilation introduced in 2015 the maximum sentence is 7 years. The Sentencing Council guideline for this offence provides for a category range up to 6 years for the most serious type of offending. It is unusual for a Council guideline to have a sentencing range which approaches the maximum sentence for the offence at the upper end of the range. This demonstrates the view taken by the Council of the gravity of FGM. As with any guideline, the sentencing range was determined after full public consultation and anxious scrutiny of the nature of the offending.

50. Where an offence is of particular gravity and/or where it is an offence in respect of which deterrence is an important feature, mitigating factors do not fade into insignificance. However, they will tend to be of less weight in the overall sentencing exercise.

51. With those general observations in mind, we turn to the submissions made on behalf of the appellant. The first issue is whether the judge was wrong to find that the appellant had been aware at the time of the nature of the procedure to which Jade was subjected and that her assistance had involved her being present when the procedure was carried out. Both in writing and orally Ms Akudolu argued forcefully that the judge failed to understand the cultural context in which the appellant went with Jade to the so-called clinic. Had he appreciated that context, he would have accepted that the appellant would have had every reason not to go into the house with Jade. The judge further did

not take into account the psychiatric evidence as to the effect on the appellant of the trauma she had suffered in her life. Ms Akudolu also relied heavily on the fact that the appellant co-operated fully with the authorities once Jade had spoken to her teacher. Her reaction of shock and distress at the hospital can only have been because she had discovered for the first time what had happened to Jade.

52. These are arguments which the judge had clearly in mind. However, having heard the evidence tested at trial, he rejected them. On the important issue of whether the appellant had gone into the house, the judge relied on the fact that the appellant had told the social worker that she had done so. Her evidence at the trial was inconsistent with that account. The judge was justified in using that inconsistency to find that the appellant had gone into the house. That fact formed a proper stepping stone to the conclusion that the appellant had gone into the room where Jade had undergone FGM. Jade was a three year old child. The appellant was looking after her. It was not to ignore the cultural context that the judge inferred that the appellant would have stayed with Jade. From that conclusion the judge was entitled to go on to find that the appellant saw what procedure was undertaken. That reasoning alone was sufficient to establish that the appellant was aware of what was to happen to Jade and that she assisted in a Type 1 FGM. The judge explained why he discounted the shock and distress witnessed at the hospital on which Ms Akudolu set great store.

53. Ms Akudolu disagrees with the findings of fact. She can rely on some matters which tend to run contrary to the judge's findings. That is not sufficient for us to overturn the findings of fact made by the judge who heard the trial, who saw and heard the appellant give evidence and who was wholly conversant with all of the relevant material. There is nothing which demonstrates that his findings were irrational or unreasonable. He explained those findings carefully. His reasoning cannot be impugned. This ground of appeal must fail.

54. The second broad issue relates to the use of analogous guidelines by the judge. The judge was required to take into account guidelines for analogous offences. The opening paragraph of the General guideline: overarching principles reads as follows:

> "Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):
>
> - the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
> - sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
> - definitive sentencing guidelines for analogous offences.
>
> ….When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise."

On the face of it the offences of causing grievous bodily harm with intent and causing or allowing a child to suffer serious harm were analogous offences.

55. Ms Akudolu's distinction between the deliberate infliction of harm and something done in a cultural context as the basis for not using the sentencing guidelines for the offences to which the judge referred is not a valid one. Whatever the background to the removal of Jade's clitoris, it was done deliberately. It is not arguable that removal of the clitoris from a child can be anything other than really serious harm. Thus, the FGM to which Jade was subjected amounted to causing grievous bodily harm with intent. On the judge's findings of fact the appellant was a secondary party to that act and intent. The same considerations apply to the offence of causing or allowing a child to suffer serious harm. The judge was entitled to consider the guidelines for those offences.

56. In relation to any application of the guideline for causing grievous bodily harm with intent, the judge took into account the difference in the maximum sentences i.e. life for causing grievous bodily harm and 14 years for the offence contrary to section 3 of the 2003 Act. He made the adjustment required by the General guideline. However, we consider that he did fall into error when he concluded that, as an offence of causing grievous bodily harm with intent, the FGM fell into Category 1A. He said that Category 1 harm was established because Jade had suffered a particularly grave injury. That was what was submitted for the prosecution and was the approach taken by Whipple J in *R v N* in 2019. However the guideline for the offence was revised with effect from 1 July 2021. The most significant revision was to the definition of harm in each category. Rather than two categories of harm defined in relatively general terms, the revised guideline provides three categories of harm. Category 1 reads:

> "Particularly grave or life-threatening injury caused;
>
> Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment;
>
> Offence results in a permanent, irreversible injury or psychological condition which has a substantial and long term effect on the victim's ability to carry out their normal day to day activities or on their ability to work."
>
> These are alternatives.
>
> Category 2 is "Grave injury or Offence results in a permanent, irreversible injury or condition not falling within category 1"

57. Not for a moment do we seek to underestimate the significance of the total removal of a girl's clitoris. It is plainly very serious. However, the guideline for causing grievous bodily harm with intent has to reflect all shades of really serious harm. Moreover, the existence of really serious harm is the starting point for all such offences. In our judgment the judge was wrong to equate Jade's injury with a Category 1 harm in this guideline. Rather, he should have found that it was equivalent to Category 2 harm. An offence in Category 2A has a starting point of 7 years' imprisonment and a range of 6 to 10 years.

58. We do not consider that the judge made an error in his analysis of where the appellant's offending fell within the guideline for causing or allowing a child to suffer serious harm. He was entitled to say that it would have been a Category 2A offence with a starting point of 9 years and a range of 7 to 12 years. Placing culpability into Category A was justified by the combination of Category B factors. In our view this offence was the most closely analogous offence to the offence of which the appellant was convicted. The offence is not on all fours with the offence contrary to section 3 of the 2003 Act. *ATT* [2024] EWCA Crim 460 explains the element of the offence which was not present in the appellant's case. Nonetheless, the definition of the offence includes the concept of allowing serious physical harm to be caused. That was precisely what occurred in this case. For the purposes of using an analogous guideline, we consider that it most closely equated to the acts of the appellant.

59. The judge did not consider that reference to the guideline for cruelty to a child was of any further assistance. We agree with him. In any event, the starting point and category range mirror the sentences indicated in the guideline of causing or allowing a child to suffer serious physical harm. The judge did not consider that the guideline for failing to protect a girl from the risk of genital mutilation provided any particular assistance. The appellant argued before him that it did; and indeed that it was the only relevant or appropriate guideline. That argument is repeated before us. We do not consider that it is tenable.

60. The offence contrary to section 3A is committed by any person responsible for the girl under 16 when the girl has a genital mutilation offence committed against her. This blanket responsibility can be avoided if the defendant did not think that there was a significant risk of a genital mutilation offence being committed or the defendant took reasonable steps to protect against such an offence being committed. It is an offence of omission rather than commission. It is very different from the case of a person who actively assists in or encourages the act of mutilation. The only relevance of the offence so far as the appellant is concerned is to show how seriously FGM is to be treated.

61. With all of those matters in mind we conclude that the appropriate starting point by reference to analogous guidelines was 9 years' imprisonment rather than 9 years 6 months' imprisonment identified by the judge. We should say that we do not find assistance in the sentencing analysis of Whipple J in *N.* We do not apprehend that the judge did either. As he said, the facts in *N* were somewhat different. Moreover, Whipple J had regard to the guideline for causing grievous bodily harm with intent in its previous iteration which justified a higher starting point than the current guideline. This is not to say that the sentence in *N* was other than appropriate. Rather, it concerned a very different set of facts.

62. As noted above at paragraph 37, the judge's "starting point" was not a pure starting point in that it took into account the aggravating factors: breach of trust; vulnerability of the victim. We consider that this was a proper course to take. To commit an offence of causing or allowing a child to suffer serious physical harm a person must be a member of the same household as the child. That imports a relationship of trust. Any child in that context will be vulnerable due to their position vis-à-vis the offender. Therefore, the starting point which we judge to have been appropriate must also include any aggravating factors. There is no further aggravation to consider.

63. Third, we must consider whether the allowance made by the judge for mitigating factors was insufficient. In that exercise it is necessary to remember that assessment of mitigating factors is not an arithmetical exercise. In many respects an individualistic approach is required. Such an approach is best conducted by the judge with the closest knowledge of the case and the offender. It is not for this court to substitute its view for the view of the trial judge unless it can be said that the judge fell into clear error. The judge took into account all of the relevant mitigating factors:

    i) The age of the appellant when she committed the offence.

    ii) The fact that she was herself a victim of FGM.

    iii) The cultural and family pressure to which the appellant was subject in 2006.

    iv) The appellant's good character and lack of previous convictions over the whole of her life which included raising a family of (now) 7 children.

    v) The impact of any prison sentence on the appellant's family.

    vi) What was said by the appellant's adult children albeit ignoring their views as to the proper sentence to be imposed.

    vii) The appellant's ill-health including her mental disorders.

    viii) The difficulty the appellant would experience in prison due to her limited command of English.

64. For those matters the judge reduced the sentence by 2 years. In oral submissions Ms Akudolu placed particular emphasis on the effect of the appellant's incarceration on the family. She argued that, whilst it was true that the appellant's husband and the older children would be able "just about to cope" with the care of the younger children, the family had been devastated both by the fact of the appellant's prison sentence and by its length. These were matters that were or ought to have been apparent to the judge. He failed to take account of them to any appreciable extent in the reduction he applied to the starting point he identified. Ms Akudolu argued that the arrangements put in place with the assistance of the local authority could not fill the void left by the absence of the appellant. She submitted that proper application of what was said in *Petherick* should have led to a much greater reduction purely in relation to the interference with family life and the damage to the appellant's dependent children.

65. The important passages in *Petherick* are as follows:

> "…the right approach in all article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within article 8.2? C. Is the interference proportionate given the balance between the various factors?" at [18].
>
> "….the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver…" at [23].

> "….in a case where custody cannot proportionately be avoided, the effect on children or other family members might (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges…." At [24].

In the appellant's case the judge asked himself the right questions. For the reasons we have already given, he was entitled to conclude that the appellant had committed a grave offence. We are satisfied that custody could not have been avoided here. Thus, it was a matter for the judgment of the judge to make the adjustment he considered to be appropriate. As was said in *Petherick*, there is no conventional reduction. It is of no assistance to compare the reduction afforded to the appellant in that case with the reduction made by the judge in this instance.

66. In the course of the hearing we investigated with counsel how the cultural element of the offending was to be reflected. FGM almost by definition is an offence committed within particular cultures. We are clear that the fact that FGM is considered appropriate within such cultures can be of no relevance to the seriousness of the offence. The practice is criminalised by UK law. The appellant is a UK citizen, as is Jade. The only relevance of the cultural context is the extent to which the appellant was in a position to deal with the familial and societal pressure when she was in Kenya. The judge took account of those matters. He found that the appellant was an adult with a husband and children who knew that FGM was wrong. He said that the appellant could and should have stood up to pressure since she was soon to return to the UK. Her own evidence was that she would not have allowed Jade to be subjected to Type 1 FGM had she known that this was what was intended. The judge had the benefit of hearing the appellant give evidence. He had regard to the evidence of Professor O'Reilly. It is apparent that, notwithstanding that evidence, he did not give any significant weight to the cultural context in assessing the seriousness of the offence itself. We do not consider that he erred in that respect. The offence can only be committed outside the UK. So long as the offender is also outside the UK, which is highly likely to be the case, there will be cultural pressure. That is the context in which Parliament set the maximum sentence at 14 years' imprisonment. It was envisaged that substantial sentences would be imposed notwithstanding the cultural context. The overriding concern was the damage caused by the practice of FGM.

67. The judge took account of the difficulties that the appellant would suffer in prison whether due to her lack of English or because of her physical and mental ill-health. We have the benefit of a prison report prepared after the appellant had been in prison for about two months. It paints a much more optimistic picture than might have been expected. When she arrived at HMP Bronzefield, the appellant was placed on an ACCT procedure which is the process adopted by HMPPS where there is said to be some risk of self-harm. The appellant developed a good relationship with staff with whom she was able to speak about her feelings. The procedure was closed after a month. By the time of the report the appellant was using her time constructively. She was attending classes to improve her English together with an arts and craft workshop and gym sessions. The chaplaincy team reported that the appellant attended Friday prayers and

Islamic studies. She was said by them always to show a happy disposition though she would seek pastoral care when she was struggling. She showed appreciation for all the support she received. This is not to say that the judge was wrong to pay regard to what might have been expected to have been the position. Rather, it shows that the appellant is doing unexpectedly well in custody.

68. Standing back we have to ask whether the judge made sufficient reduction to the sentence to take account of the mitigating factors. We anticipate that some judges faced with the various matters relied on by this appellant might have made a larger reduction. But that is not the issue. Can it be said that the judge's reduction was clearly insufficient? This was bound to be a substantial custodial sentence. It carried with it an element of deterrence given the nature of the offence. Assisting a non-UK person to mutilate overseas a child's genitals is not an offence which occurs on the spur of the moment. It is an offence which is bound to involve deliberation. In those circumstances, deterrence was a highly relevant feature. In our view the reduction the judge made from the starting point did reflect the matters to which the judge referred to a sufficient extent.

69. The judge considered the issue of delay quite separately though it is properly described as a mitigating factor. The issue of delay is dealt with in the General guideline to which we already have referred. It is identified as a mitigating factor and further defined as follows:

70. "Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender**,** the court may take this into account by reducing the sentence **if this has had a detrimental effect on the offender.**"

71. The highlighted words are as they appear in the guideline. The delay must be unreasonable. What is reasonable will vary from case to case. Cases of sophisticated fraud may take years to investigate even after the apprehension of the offender. Only where the delay is excessive will it amount to a mitigating factor. Here the judge found that the case was not straightforward. Not only were there evidential issues but the prosecution had to consider the public interest issues which arose. But he also found that there was some unjustified delay prior to charge which will have placed detrimental strain on the appellant and her family. He reduced the sentence by a further six months to take account of the delay.

72. The reduction was very much less in percentage terms than that afforded to the appellant in *Beattie-Milligan*. That decision does not purport to be a guidance case. It was reached on its particular facts. We note that in *Whiston-Dew* [2019] EWCA Crim 2131, a case of serious fraud where the delay between apprehension and the start of the trial was 10 years, the trial judge reduced the sentence by 20% to take account of all mitigation including the delay. This court approved the approach taken by the trial judge. We refer to that case not because it provides guidance any more than *Beattie-Milligan*. Rather, it demonstrates that reduction for delay is a fact specific exercise which will vary case by case. For this court to interfere a clear error must be demonstrated. Looking at the reduction for mitigation as a whole, it amounted to approximately 25%. We consider that this level of reduction for all mitigating factors reflected the effect of those factors sufficiently.

Conclusion

73. We consider that the judge conducted this complex sentencing exercise in exemplary fashion. His findings of fact were justified on the evidence. With one exception his assessment of culpability and harm by reference to analogous guidelines was appropriate. He considered all relevant mitigating factors.

74. The only error made by the judge was in his consideration of the relevant category of harm in the guideline for causing grievous bodily harm with intent. We consider this relatively insignificant error – which we should say was one replicated by the prosecution in their sentencing note – did lead him to identify a "starting point" slightly in excess of that which was justified by reference to analogous guidelines.

75. Our function is determine whether the sentence imposed was manifestly excessive. Applying the same percentage reduction for mitigating factors as the judge did to a "starting point" of 9 years' imprisonment, the outcome is a sentence of 6 years 9 months' imprisonment. That does not mean that the judge's sentence was manifestly excessive. It simply means that it was marginally longer than it would have been had the appropriate sentence before reduction for mitigating factors been applied.

76. In those circumstances, we do not interfere with the sentence imposed by the judge. He made no error of principle. The eventual sentence was not manifestly excessive. The appeal is dismissed.