



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 97

F70/20

OPINION OF LADY WISE

In the cause

MR H

Pursuer

against

MRS W

Defender

**Pursuer: McAlpine; Turcan Connell  
Defender: G Dewar; Thorley Stephenson**

1 October 2021

**Introduction**

[1] This case involves the proposed return of two of the three children of the parties' marriage from Scotland to Dubai, UAE. The children have refugee status in this country and have been living in the west of Scotland since mid-August 2017. The parties to the action are husband and wife and so I will refer to them as Mr H and Mrs W respectively. They married in Sudan in December 2001. They have three daughters. I will refer to the oldest child as YW, the middle daughter as SW and the youngest child as OW. The oldest child is 18 and not the subject of these proceedings. The younger two children have, at the time of completing this opinion, just attained the ages of 15 and 11 respectively. All three of

the parties' daughters were born in UAE where the family lived until July 2017 when they came to the UK for a holiday in London.

[2] While the parties were in London in the summer of 2017 the defender claimed asylum for herself and the three children. The circumstances in which she did so are contentious as between the parties and were the subject of evidence at proof. Mr H returned to Dubai at the end of July 2017 and has continued to be resident there. The oldest daughter YW returned to Dubai of her own volition in January 2020. She has lived there with her father since that time. The significant issues between the parties include the pursuer's claim that the defender's application for asylum in 2017 was a false one. His position is that she wanted to secure, ultimately, UK citizenship for herself and the three girls. He contends that he and his wife were still very much operating as a couple and as a family until early 2020. The defender's position is that the asylum claim she made was genuine and that the two younger girls should be permitted to remain in this country, consistent with their refugee status and in their best interests. The defender also contends that, even if the pursuer established that it was in the interests of the two younger children to live with him in Dubai, any order for their return would be unenforceable in law and could not serve any practical purpose. I heard evidence in submissions over a four day period in relation to these contentious issues.

### **Undisputed facts**

[3] The defender was granted asylum in the UK for a period of 5 years on 13 December 2017. SW and OW are dependents on the asylum claim made by the defender and were also granted leave to remain in the UK on 13 December 2017. In May 2018 the pursuer Mr H made an application to the UK authorities for a family reunion visa. Mrs W sponsored her

husband's application. Mr H's initial application was refused and matters progressed first to the First-tier Tribunal and then the Upper Tribunal. The decision of the First-tier Tribunal judge (number 6/8 of process) was to the effect that there was no reason why the defender and the children could not return to UAE in order to continue family life there. In April 2019 the parties and their children spent a holiday together in Georgia. In December 2019-January 2020 the parties and their children visited Georgia for a second time. On that occasion the defender and the children travelled to Dubai and from there the parties and the children travelled together to Georgia.

[4] The parties eldest daughter YW suffered mental health difficulties while in Scotland and was absent from education for a period. The local social work department was involved and she was accommodated. There is no current relationship between YW and her mother. She enjoys a close relationship with her father. The pursuer and his younger daughters maintained contact through FaceTime and other electronic means until October 2020 when these proceedings were raised. Contact resumed thereafter following an interlocutor of this court on 10 December 2020. The current level of FaceTime contact was increased by interlocutor on 20 May 2021 and now takes place for a period of up to one hour each day.

[5] Prior to the summer of 2017 all three children attended an international school in Dubai where they performed well. The two younger girls SW and OW currently attend local schools in Glasgow where they are also achieving relatively high standards of educational attainment. During the course of these proceedings both children met with Miss Donachie, a child welfare reporter appointed by this court to elicit their views on the orders sought in these proceedings. Miss Donachie's report comprises number 15 of process. SW told Miss Donachie that she was sad that she could not live with her older sister and her father. She said that even if her mother was to return to Dubai she would

want to live with her mother if the family could not all live together. She then said that it would be good if she lived with her dad but she would be sad about leaving her mum. She also said that she preferred living in Dubai over Scotland. She said the weather was better in Dubai. The reporter records that SW appeared hesitant throughout their meeting. As the meeting progressed and she was asking SW to think about her mum living in Scotland and her dad in Dubai SW became visibly upset. She told the reporter that she wanted her family to be reunited and all live together again. Miss Donachie concluded that SW preferred living in Dubai to living in Scotland but there was less clarity about the views that she was expressing in relation to residence and direct contact with her dad as at times her views appeared to be a bit muddled. It was clear that she felt uncomfortable speaking with the reporter and she was obviously upset by the division of her family.

[6] OW was quite clear in the views she expressed to Miss Donachie. She said that she would like to go and visit her dad when she is older but she does not like to travel and likes to stay at home. She said that even if her dad did not live in Dubai she would still want to live with her mum although she qualified that with "I don't think so." She said that if her mum moved away from Scotland she would want to go with her and that she does not want to leave her mum. She said that she did not know how she would feel if the judge decided that she was to spend time with her dad or live with her dad but that she would probably feel sad. She does not want any of the current arrangements to change. The reporter records that OW was very quiet and it was difficult to engage her in a conversation.

### **Evidence led at proof**

[7] The pursuer Mr H gave evidence and adopted his affidavit number 23 of process as part of his evidence. His position was that the parties enjoyed a comfortable and enjoyable

lifestyle in Dubai until July 2017 when they came to London for a holiday. They had return flight tickets to Dubai and there had been no question of a plan to remain in the UK when they arrived. He said that it was his wife's idea to try to stay in this country by claiming asylum. He did not approve of the plan but he agreed to help her. Friends recommended an individual named Ali Arbab who could prepare a false asylum story on the defender's behalf. Mr H attended the first meeting with Ali Arbab and his wife at a Costa Coffee shop in Shepherd's Bush in London. He accompanied his wife because he was concerned about her meeting a strange man alone in London. Thereafter, Mrs W asked her husband to double check whether Ali Arbab was the best person to prepare such a claim. The couple went to some Sudanese shops in Shepherd's Bush market and Mr H asked around about Ali Arbab and was assured that he was the best person to secure false asylum for Sudanese citizens. According to the pursuer, prior to the trip to the UK he and his wife had never discussed any possibility of making a false asylum claim. Mr Arbab charged around £1500 to prepare the false claim for the defender and the pursuer spoke to WhatsApp messages between himself and his wife (number 6/44 of process) during the period 27 July to 29 November 2017. He confirmed that a message of 27 July was sent to him by his wife in which she stated that she had paid Ali £720. That had been a part instalment for the work he had done in preparing the claim. The balance was payable before the defender's interview with the Home Office. Mr H's position was that he was concerned about Ali Arbab and tried to persuade his wife not to go ahead with the application but she was determined to do so. The pursuer said that although he was not willing to make a false asylum claim with his wife, she had said that he could join her and the children at a later date by applying for a family reunion visa.

[8] Mr H described a diagram that he said was drawn by Ali Arbab at their first meeting explaining the full process of claiming asylum and what was likely to follow. He then wrote the false asylum story on behalf of the defender, in Arabic. The pursuer confirmed that number 6/43 of process was the story that Mr Arbab had handwritten in the couple's presence. The defender had given the pursuer a copy of the story in July 2017. The defender was told to memorise the story and impart its contents to the Home Office at interview. The pursuer said that after he returned to Dubai at the end of July he was in regular contact with his wife and was aware of the initial screening interview she attended after she sought asylum. He understood from her that Ali Arbab had attended but sat in a café nearby the office. Mr Arbab had taken hold of the defender and children's valuable possessions such as mobile phones and tablets so that it would look as if the defender had no money. The defender and the children were immediately moved to Scotland and the defender's main interview with the Home Office took place there in November 2017. After the defender and children were given leave to remain in the UK until 12 December 2022 the pursuer realised that they were not going to return but he and his wife continued their frequent contact through WhatsApp messages and Skype as illustrated in the documents numbers 6/44 and 6/50 of process.

[9] The two central elements of the defender's asylum claim had been first that she had been arrested by the Sudanese security service in 2015 and so was fearful of prosecution if she returned there and secondly that her daughters were at risk of being subjected to female genital mutilation (FGM). The pursuer's position was that both allegations were fabricated to justify why the defender should be given refugee status. He said that his wife had never been arrested for anything at any time in her life. The family had visited Sudan in July 2015 to see relatives. He thought that that date had been mentioned because if the defender's

entry visas and so on were checked the Home Office would be able to see that she had in fact been in Sudan in 2015. The pursuer said his wife never had any involvement in political work in support of the armed Darfuri movements anywhere. He disputed that the defender belonged to a Darfuri tribe called Tunjur. The whole story fabricated by Mr Arbab was untrue and he personally had witnessed it being handwritten by Mr Arbab.

[10] In relation to Mr H's own application, he had sent his passport to the embassy in May 2018 for this but it took 10 months to be processed and it was not until March 2019 that he asked for entry clearance to the UK as a visitor to have contact with his children. That was refused and he identified that point as the one where he tried to persuade his wife to return to Dubai. The defender said that he should appeal the decision but that was unsuccessful and permission to appeal to the Upper Tribunal was also refused. By March 2020 the pursuer felt that he had exhausted all avenues to re-join his family. During the family holidays to Georgia in 2019 he had tried to persuade the defender to return to UAE but she was insistent on staying in the UK until British passports were secured. When it became apparent that the defender would not return to Dubai the pursuer notified the Home Office of the false nature of his wife's claim (the correspondence was lodged as numbers 6/39-41 of process). On FGM, Mr H's position was that he is strongly against its practice and it is not something carried out on any female within his wider family other than his elderly mother who had been subjected to FGM as a young girl. However, his mother had become an educated and cultured woman and had never put pressure on him or even suggested to him that FGM be carried out on any of his three daughters. The practice of FGM is now illegal in Sudan. The pursuer was obviously aware that the defender had been subjected to FGM when she was very young and they had discussed it when they were first married. The defender had said that her own mother had carried out the procedure. Mr H

described his mother-in-law as an uneducated woman, and he understood that all the women in his wife's family had been subjected to FGM. The false story that was created by Ali Arbab was that the defender had become alarmed because the pursuer came under immense pressure while in London in July 2017 from his family who kept phoning and insisting that the girls be returned to Sudan to undergo FGM. The pursuer said this was entirely untrue and unfounded and he thought it nonsensical to suggest his family would begin to exert such pressure on him when the family was in London rather than in Dubai where they had been for 15 years. He had not been in contact with his mother while in London.

[11] The pursuer produced various family photographs of himself, his wife and their three daughters on the two family trips to Georgia – numbers 6/13 and 6/14 of process. The family had holidayed there as soon as Mr H's passport was again available to him from the Home Office. After the second Georgia trip the five of them flew back from Tbilisi to Dubai and the defender and the children then had an onward flight to Glasgow. However the first flight was delayed by 5 or 6 hours and so the connection to Glasgow was missed. Then, due to torrential rain and storms in the Middle East the new flight to Scotland was cancelled and the defender and children were in a hotel for two nights, 13-15 January 2020, while waiting to return to Glasgow. The parties were in contact until the defender returned to Glasgow after which she stopped communicating with him without providing any reason. By that time their eldest daughter YW had become extremely unhappy and was not attending school. She was desperate to return to Dubai but the defender was concerned that the Home Office might find out. Eventually the defender had agreed that YW could return and said to her that she and the two younger children would go back after UK passports were issued. YW flew to Dubai airport where she was met by Mr W and the two of them travelled to an

airport in Ethiopia and then flew on together to Sudan. This was necessary because YW could not enter Dubai without her passport. The pursuer obtained Sudanese travel documents for her from the consulate in Dubai. The pursuer could only stay there for three days but YW stayed a little longer in Sudan which she wanted to do as she had some friends there who had studied with her in Dubai. The pursuer pointed out that the defender had agreed to YW returning to Dubai against the background of the unfounded allegations she had made. Had she been genuinely concerned that her daughter might be subjected to FGM she would not have done so. YW was much happier since returning to Dubai and her mental health had improved greatly.

[12] Mr H explained that he has lucrative work as a pension specialist in Dubai and receives various allowances, including for accommodation and transport, in addition to his salary. After the children were not returned to Dubai he had moved to a smaller two-bedroomed apartment which was comfortable and spacious. If the younger two girls returned to Dubai they would all move again to a larger apartment so that the children could have their own bedrooms. He was aware that his wife could not work in the UK and was dependent on state benefits. He had transferred around £600-£700 per month to his wife until January 2020 when the parties stopped speaking and the defender stopped spending the money he was sending. The pursuer described a very happy and fulfilling life in Dubai where all three of his children had thrived. They had undertaken numerous activities together, played sports, visited funfairs, the beach and gone out for meals. He had produced a number of photographs of the family in Dubai (number 6/11 of process). He was concerned that the life they were leading in Glasgow was much more isolated and that they had very limited extra-curricular or social activities. Prior to their departure from Dubai he had been involved in supporting them with homework and was very keen to help

them pursue their education. The children had previously attended the international school and they could return there, the pursuer having paid a deposit to register them for the school year 2021-22. He described himself as having a very strong relationship with his two younger daughters. He had required to re-institute contact through court order. He had complied with the court's direction not to discuss any matters relating to these proceedings with the girls. Contact had continued to be difficult however. The defender had strictly time-limited the calls and she was often in the room listening and guiding the children in the conversation with their father and their older sister. There had been some difficulties after Miss Donachie's report was made available and it had become apparent that the defender had discussed matters with SW who he felt was under pressure from her mother.

[13] The pursuer's position was that he could provide the children with security and safety in future if they were returned to Dubai. He understood that his wife may wish to stay in the UK but he thought it in the children's interest to have contact with both parents. He would assist a return to Dubai in any way possible. He thought that both SW and OW wanted to return to Dubai. He was concerned that if they could not do so he may be unable to obtain a visa to visit the UK to see them.

[14] Under cross-examination, the pursuer said that he thought his wife had been influenced by her brother who had also fabricated an asylum claim, albeit in France. Mr H was aware that many people come to this country and regard securing a UK passport as a major privilege. When a chance arose for his wife to do the same as her brother she had taken it. When they first arrived in London he had not realised that his wife's plan was to stay here. He was concerned that the fabricated allegations might make him look like an abuser when in fact he had never intended to try to subject his daughters to FGM. Mr Arbab had reassured him at the time that nothing said would affect him or any future application

he might make to join the family here. Mr H maintained that he had tried to persuade his wife to give up on the application and continue with life in Dubai. He had gone along to the first meeting with Mr Arbab at Costa Coffee only because his wife insisted that she was going ahead and he did not want her going around London alone. It was after the meeting in the coffee shop that he had gone to Shepherd's Bush market to enquire about Mr Arbab's reputation. The places he had gone were a handbag shop and a restaurant that he and his wife had visited during the same trip. It was normal to start chatting to any Sudanese person they came across. Mr H said he was aware that Sudanese people coming to the UK tend to use either links with a particular ethnic group in Sudan or the risk of FGM as possible grounds for asylum, with men tending to use the former and women the latter. The Sudanese business people in Shepherd's Bush had confirmed that Ali Arbab was the best person to use.

[15] On being shown the translation of the WhatsApp messages between him and his wife (Number 6/44 of process) the pursuer confirmed that the reference to the £720 was the payment to Mr Arbab and the reference to "Ali" was to that gentleman. He agreed that the messages did not state in terms that his wife was making a false asylum claim. He agreed that as he was not present at the Home Office interview he could not state exactly what his wife had said to officials but she had told him afterwards and she had sent him a copy of her asylum registration form, which ultimately he had lodged as number 6/42 of process. He disputed that his wife was telling the truth about being detained in Sudan in 2015 for supporting the Movement of Justice and Equality and that his daughters would have to undergo FGM. He disagreed also that there was a distinction between the contents of the defender's application form and the content of 6/43 of process, the document written by Mr Arbab. He agreed that Mr Arbab's document had not been submitted to the Home

Office. His wife had given him all of the documents relating to her asylum claim and that is how he had been able to lodge them in these proceedings. He agreed that he had not managed to prevent his wife making the asylum claim although he had tried to convince her but she had repeatedly said that he should wait until the UK passports were issued and then they could be together again. He had accompanied her to meet Mr Arbab and into the Sudanese shops to make enquiries because in their culture she should not be going alone to such places. As to why he had organised translation of Mr Arbab's document three years after the event, Mr H confirmed that it was not until after his own claim for family reunion failed and he had given his wife time to rethink her position that he started to wonder what was going to happen. As he had retained the Arabic version of the document he had it translated when he was considering raising these proceedings. The political activities aspect of the defender's asylum claim had been inserted because Mr Arbab said that there required to be justification for leaving both Sudan and Dubai. That part was made up to justify fear of persecution in Sudan and the FGM to justify that if the pursuer was likely to put pressure on the defender to make the girls undergo FGM that pressure could take place in Dubai. When asked which members of his wider family he was referring to when he said that FGM was not carried out in his wider family Mr H said that he was talking about his sisters and he had explained in his affidavit that his mother had been subjected to FGM. Further, neither his children nor his cousins had been subjected to that practice. On whether the defender had denied being in any political organisation (see paragraph 5.4 of number 6/42 of process), Mr H explained that it was the Darfurian movement that was asking for equality in Sudan. This was something that he recalled the defender had memorised and been able to talk about at her interview.

[16] In relation to the cessation of contact with the two younger girls between October and December 2020, Mr H confirmed that after the defender received the court papers he began noticing that his youngest daughter did not reply to his calls or messages and SW said that OW had not been given her phone. Contact had only resumed once the court ordered that. The defender continued to try to limit the pursuer's contact with the children by encouraging them to end the calls saying it was time for their shower or to eat. He disputed that he was using contact to try to persuade the girls to return to Dubai. He thought it normal that he would ask the girls about how they were getting on at school and the weather in Scotland and in return they would ask him about things in Dubai. He would engage them in conversation when they asked him about whether he had been buying pastries from the shop near their home in Dubai and recollect other things they used to do there. The pursuer agreed that in January 2020 he had sent messages to YW who had been telling her mother that she wanted to return to Dubai and the pursuer was trying to help her convince the defender to agree. This was before any court proceedings had commenced and he was simply responding to his daughter's desire to have her choice. He told YW that her mother did not listen to him or accept any of his opinions anymore and that he would support her fulfilment of her wish. The pursuer disputed that he had not been represented in the appeal against refusal of his own entry clearance for family reunion purposes. The solicitor from the Ethnic Minorities Centre had said he could represent both husband and wife as they were not in conflict. Under reference to paragraph [6] of the First-tier Tribunal judgment (Number 6/8 of process) where it is stated that the pursuer's position in 2019 to that tribunal was that he had not been in favour of FGM but that he "nervously blamed" his wife for standing up to his own mother on the issue, the pursuer said that this had been a careful wording because the defender had said he could not acknowledge that her claims

had been totally false. She had been worried about the Home Office taking her visa away. As a couple they had gone back to Mr Arbab and he had suggested what they could say about the FGM issue to allow the pursuer to apply for family reunion. The whole idea of the defender standing up to the pursuer's mother was a fabrication. It was simply to think of something that would allow the pursuer to succeed in his application for a reunion visa without risking the defender's visa being revoked. On Mr Arbab's advice they had made this story to fit with the family reunion application, for which the defender was the pursuer's sponsor.

[17] The pursuer was asked about the various photographs he had lodged in relation to the trips to Georgia and the defender's claims in her affidavit that there had been an altercation at Dubai airport after the second trip and that the pursuer had threatened that the children were not going back to the UK and tried to book a flight to Khartoum. The pursuer disputed the defender's account (which differed from that given on record). He disagreed that the defender had resisted the idea of YW's return to Dubai and said that she had only ever been concerned about her refugee status. He explained that YW had been able to go to Sudan notwithstanding that she had refugee status from the UK because she is a Sudanese citizen and he was able to have a passport issued there for her as a matter of urgency. In fact it had been his wife who requested that they visit her family in Sudan and the defender's mother had visited the pursuer's mother's house there during the time that YW was present. The defender had made contact with YW when she was in Sudan. When asked why he had stated that the defender could not work in the UK, Mr H confirmed that he thought this was because she had two children under the age of 16 and was studying; he was not suggesting that his wife was prohibited in law from working. His understanding that the younger children were isolated in Glasgow referred to the pre Covid-19 period and

he accepted that social activities will have been restricted for some time because of the pandemic. His conversations with SW suggest to him that she is not happy to be in Glasgow and in Scotland. Mr H acknowledged that both girls had written letters asking him to come and live with them in Glasgow (numbers 6/47 and 6/49 of process) but these had been prepared for the purposes of his application for family reunion. The legal advice received had been that the children's letters might put pressure on the Home Office.

[18] The pursuer denied criticising the defender to the children in his video calls, but accepted that he would often show them where he was while speaking to them whether in the street, the marketplace or the swimming pool. The children had memories of these places. He did not think that SW and OW would struggle if returned to Dubai. It was their place of birth and had been their home for many years. They would have access to all social activities and education. They had no particular emotional tie or connection with Glasgow despite the length of time they have been there. Their life there was very limited in comparison with what would be available to them in Dubai. Mr H considered that he could take the same route as he had with YW should the younger girls be returned in that he could take them to Sudan for the issue of passports. However, in re-examination he confirmed that there were other routes. There was a Sudanese embassy in London that could issue a passport which the girls could use to fly direct to Dubai.

[19] The parties' oldest daughter, YW, gave evidence in the pursuer's case and adopted her affidavit number 22 of process as part of her evidence. She attends a private school in Dubai after which she hopes to attend a university there. She lives in an apartment with her father the pursuer and described a good relationship with him. Although some of her mother's relatives are also in Dubai she is now estranged from them. Her father's brother visits from time to time. In her affidavit evidence YW explained the circumstances in which

she stopped living in Scotland. She did not like living with her mother and she was also experiencing problems with her mental health. It was clearly a very unhappy time for her. YW has been much happier since returning to Dubai to live with her father in January 2020. She thought that her mother did not care that she was leaving and had asked for the opinion of her brothers (YW's uncles) whether she should let her daughter return. YW was firmly of the view that if her sisters were returned to Dubai things would be much better both for them and for her. Her understanding is that her sisters have no social interaction outside the house. In Dubai they could go out with their father to the cinema or for dinner or to a hair salon. She thought her sisters would easily make new friends in Dubai. YW stated that she missed her sisters "so much" and was annoyed about the time she is able to speak to them being limited. She would be very happy if her sisters returned to Dubai.

[20] Under cross examination the witness was taken to the defender's affidavit number 27 of process and it was put to her, under reference to paragraphs 35 and 36 of that affidavit that her mother wanted to maintain communication with her after she returned to Dubai but that YW had stopped contact. YW disputed that it was she who had stopped talking to her mother. She explained that the defender had blocked her number on WhatsApp and blocked her phone number to avoid receiving calls from her daughter. On the allegation in the defender's affidavit at paragraph 37 that YW had called the police on one occasion after she returned to UAE because she said her father had hit her, YW said that there had been an incident, but that it was not serious and that she did not tell her mother that her father had hit her. Her recollection was that he had taken her phone and that had caused an argument.

[21] When challenged about paragraph 8 of her own affidavit in which YW referred to there being mention of "things that might happen to me and my sisters if we were to go to the Sudan" YW confirmed that she was referring there to FGM. She confirmed that she was

confident that her father's family would never subject them to FGM but that her mother's side of the family might do so. She recalled one time asking her mother about it and the defender had told her that the maternal side of the family could do this. Her father's family were completely different and her father had assured her that his family would not do such a thing. YW was asked about the fact that her father had taken her to the Sudan as part of her return to Dubai notwithstanding that she was a refugee holding a travel document from the UK that would not permit her to go there. She confirmed that they had gone there to obtain a document that she required to return to Dubai. There was no difficulty with her getting inside Sudan. She had stayed there for about a week and had visited relatives there including her grandmother, her aunt and a friend.

[22] The pursuer also called a Mr NN, a 50 year old Sudanese gentleman who has lived in the United Arab Emirates since 1973. Mr NN is blind and gave evidence over WebEx with his wife assisting the operation of that facility. He had sworn an affidavit number 24 of process which he adopted as his evidence. It had been prepared using the services of an interpreter and a software programme that allowed it to be read out to him. The affidavit had then been translated into English. In essence Mr NN's evidence was that he was a close friend of the pursuer to whom he speaks almost daily. They share cultural interests and concerns related to the situation in the Sudan and have a common interest in the affairs of the Sudanese community in Dubai. Mr NN had assisted the pursuer with the organisation of certain cultural activities while the pursuer held a position at the Sudanese Cultural Club in Dubai. Mr NN knows the pursuer's three daughters to the extent that he has met them a few times at the Cultural Club in Dubai and once at a book fair. He had also visited the pursuer's home on some occasions and now follows news of the younger two girls through the pursuer.

[23] Mr NN's view was that from the outside the pursuer's family had seemed happy and stable. The parties seemed very keen on the education of their daughters and the family enjoyed an excellent standard of living. In particular, the pursuer's high level of employment resulted in his daughters' tuition fees being met by his employer. The schools the three girls attended in Dubai were of excellent quality. Mr NN clearly holds the pursuer in very high regard and described their ideas as coinciding both on the political and cultural levels. He thought that the pursuer now treats YW more as a friend than a daughter in that he facilitated her fulfilling her desires. The pursuer had spoken to Mr NN about missing his two young daughters. They had never had a debate about female circumcision. However, Mr NN was aware through their general discussions that the pursuer was against the idea of that practice. Mr NN had met the defender once or twice when she was in Dubai but did not really know her.

[24] Under cross examination Mr NN agreed that insofar as he had impressions of the pursuer's family and his relationship with his daughters it was based primarily on what the pursuer had told him. He described his relationship with his friend as a very open one based on trust. He could not speak to the advantages and disadvantages of UAE as compared with Scotland other than from what the pursuer had told him. In relation to the nature of the pursuer's relationship with YW, Mr NN explained that the common picture of the father/daughter relationship in Sudanese society was where the father gives orders to his children. The pursuer's relationship with YW was not like that. He respects YW's will and desires and he has an open dialogue with her about issues in general. In relation to FGM, Mr NN said that he knew from his discussions with the pursuer over a period of time that this is not something he would consider. He and the pursuer have not required to discuss the topic specifically because they are both promoters of women's rights and freedoms and

it is out of the question that they would even have to discuss FGM. Mr NN had some knowledge of Sudanese people who seek asylum in the UK. He thought that most of those who did so wished to secure travel documents and citizenship. Sudan had suffered economic hardship and dictatorship over the last twenty years and so many of its people want safety and security outside Sudan. Though UAE does not grant citizenship to any expats and so to remain there residency constantly has to be renewed. It was for that reason that many Sudanese people living in Dubai came to the west to get the security and stability of citizenship that is not available in UAE. Some go to Australia and others to the UK. As residency in UAE tends to be linked to employment, many have suffered the threat of residency not being renewed if they had lost their job. Mr NN accepted that of course from time to time there would be genuine asylum seekers in the UK as the dictatorship in the Sudan had caused oppression to some, at least prior to 2019, because of their political views.

[25] Mrs SS, the pursuer's mother gave evidence from the Sudan using video conference facilities and simultaneous interpretation. She had sworn in affidavit number 25 of process which she adopted other than to confirm she was born in 1939 and not 1945 as stated there. She had been a school teacher and described her relationship with the pursuer, her eldest son, as a strong one. She speaks with her three granddaughters from time to time and considered the pursuer and his family to have been leading a very happy life in Dubai where she had visited them many times. She regarded the defender as "not a perfect mother" but thought that the three granddaughters loved both parents very much. She was clearly very unhappy with the defender's decision to seek asylum for herself and her daughters in the UK and thought that her son had suffered dramatically from being away from his daughters. Her affidavit evidence stated that she had never spoken to the pursuer

about circumcising his daughters. She did not accept the idea of FGM and girls in her family were not subjected to it.

[26] Under cross examination the witness confirmed that she had a daughter as well as her son the pursuer and there was some confusion about whether or not she had more than one daughter because the pursuer had referred to sisters in the plural until the witness explained that there were two sisters. It was put to Mrs SS that female circumcision has been commonplace in the Sudan for many years to which Mrs SS replied that she was not sure although she was aware it had been practiced a long time ago in that country. She said that the practice is not taken on board nowadays and they do not subject their children to it. People who had become educated and enlightened had stopped carrying out the practice of FGM, her own daughters and the pursuer's daughters had not been circumcised. When it was put to the witness that an immigration judge in this country had recorded the pursuer as having said that Mrs W had required to stand up to her (SS) on the issue of FGM, the witness was clear that this incident had not happened at all. The defender had not spoken with her on that issue and she was not aware of any such conversation taking place. She stated emphatically "I swear by god this conversation has never taken place at all" when asked again about whether she had ever spoken about FGM with the defender in relation to the defender's children.

[27] The defender gave evidence and almost immediately asked to proceed with simultaneous translation notwithstanding that her affidavit number 27 of process had been prepared and sworn in English. She stated that she can read in English and had been able to read a draft of the affidavit and make any necessary changes. She adopted the terms of the affidavit as part of her evidence. She confirmed that she is currently a student living in Glasgow and is 44 years of age. The defender's affidavit evidence sets out in detail her case

that although initially the parties had a good life in the Sudan they had come under pressure from their families about subjecting their daughters to FGM. The trip to London in July 2017 had been intended as a 3 week holiday, but during their time in the UK the pursuer completely changed his mind about FGM and said he would do it to the children. The defender's position is that the pursuer received a phone call from his mother during the holiday and Mrs SS was putting pressure on them both to subject their daughters to FGM.

[28] In her affidavit the defender makes no reference to Mr Ali Arbab. In oral evidence her counsel asked her when she had last spoken with Mr Ali Arbab and she stated that it was around 2018. The defender's affidavit goes into some detail about the family trips to Georgia in April and December 2019, particularly the second trip where she stated there were aggressive incidents. In relation to YW's return to Dubai in January 2020 the defender confirmed her oldest daughter's unhappiness in Scotland and her desire to return to Dubai. When asked in oral evidence whether she knew that YW would be going to Dubai with Mr H via Sudan the defender disputed this and said that her daughter told her only that they had visited Addis Ababa. She stated that she never knew that they had been in the Sudan. The defender's affidavit evidence confirmed her own experience of FGM when she was 6 years old which she describes as indescribably painful.

[29] Under cross examination the defender stated that she could not say "100%" that the pursuer was a loving and caring father to the three girls. Then she agreed that until 2017 the three children had a loving relationship with him because he was their father. She accepted that they had a normal family life in Dubai and that the children went to good schools with many friends. She disputed that they enjoyed extra-curricular activities there. The parties and the children had family in the UAE that they visited from time to time. She agreed that her children would have expected to go home to Dubai after the holiday to the UK in

July 2017 as it was their country of birth and residence. They had left the majority of their possessions at home in Dubai. The girls had not said goodbye to their friends or teachers as they understood they were simply going on holiday.

[30] The defender agreed that she and her husband had met Mr Ali Arbab but she denied that it was because their friends had said that Mr Arbab could prepare a false asylum story. She said that it was her husband who spoke with Mr Arbab and that she spoke only to his wife and in any event only in general terms. She claimed that her husband had a personal relationship with Mr Arbab and that she did not sit with him in the coffee shop in Shepherd's Bush. She denied also going to shops run by Sudanese people in Shepherd's Bush where her husband asked about asylum claims although he did tell her that he had gone there. Mrs W disputed that Mr Arbab had given a price of £1500 for his services. When the texts at 6/44 of process were put to her with reference to sums of money and Mr Arbab the defender disputed that this was a conversation between her and her husband at all. When asked whether she had wanted her husband to come to the UK and join her at a later date when she realised that he would not be part of the initial asylum claim the defender seemed unable to answer. Then she stated again that Mr Arbab did not do anything for her, she said he did not prepare anything for her and that most of what her husband said had not happened. After she and the children were settled in the UK she did want to apply for her husband to join them there. This was in 2018. She stated that she believed that the father's role was very important in the children's life in general terms and that was why she supported the family reunion. On being shown the Arabic version of what her husband had said was the document given to her by Mr Arbab (number 6/43 of process) the defender stated at first that this document belonged to her and was not linked to Mr Arbab. Then she said that Mr Arbab had not given her any documents ever. She

agreed however that she sent a copy of the document in question to her husband but stated that she never told him it was from Mr Arbab.

[31] The defender disputed all of the details about the asylum claim that the pursuer had given in his account. She said that she had taken a taxi with the girls to the Home Office building at which her interview was to be conducted and that she had no conversations with Mr Arbab. She agreed that her husband had always told her he was against FGM but maintained that then he encouraged it. In 2013 she had visited the Sudan on her own and with the girls in 2015. She accepted that YW who was 12 years old in 2015 had not been subjected to FGM when she was in the Sudan but she stated that she was pressurised by her husband's family to carry it out. When pressed on the issue of whether her husband was opposed to FGM the defender stated that although he stated he was against it he had not taken steps to protect the girls and that his actions were therefore inconsistent with what he said. She insisted that the pursuer did speak with his mother on the phone while they were in London and that she and the pursuer were lying when they denied that. The defender maintained also that she had been arrested in the Sudan in 2015 although she had not been politically active. She was not a member of any movement or organisation but liked the goals and views of the Movement for Justice and Equality. She said the circumstances of her arrest were that she was accused of supporting that movement. Her father had been from a tribe which originated from Darfur and she disputed that her surname was in circulation only in northern Sudan. Returning to the document number 6/43 of process the defender then said that the handwriting on that document was hers and not Mr Arbab's.

[32] The defender was pressed on how she could have continued her relationship with her husband if what she told the immigration authorities about him planning to force the girls through FGM was true. Her position was that she and her husband had reconciled or

at least started speaking to each other after she settled in the UK. She felt safer here in the UK and she always wanted her children to have their father. Then she said that she might have made a mistake recommencing her relationship with her husband but said her main concern was the safety of her girls. She disputed that she and her husband had never in fact separated saying that they lost contact with each other in late 2017. She agreed that she and the girls had gone on holiday to Georgia with her husband as soon as his passport was released by the embassy in April 2019. The first trip in April 2019 to Georgia had been enjoyable and the photographs of that trip (number 6/13 of process) showed a happy family unit. The second trip was the one where the defender stated that when they returned from Tbilisi to Dubai in order to transfer to Glasgow she discovered that her husband had booked a flight to Khartoum. It was an official at the check-in counter that told her that. The defender told the official to look at the travel documents illustrating that she and the girls could go anywhere in the world except Sudan. The defender then stated that the pursuer told the official that this was his family and he could take them with him wherever he went. An argument ensued and the defender said she asked for the police to be called. The pursuer told the police that he was going to Dubai but that he had booked for the defender and the girls to go to Khartoum to see the defender's family. Mrs W agreed however that there had been torrential rain at the time of the proposed return trip and that flights had been cancelled and about two days were spent at the airport. She agreed that her husband had paid for her expenses at the hotel where she and the girls stayed. She stated that the incident about the flight booked for Khartoum was a prior flight to the one that was cancelled due to weather issues. She insisted that there had been police involvement at the airport.

[33] Initially the defender stated that only the first trip to Georgia had been a happy time and said that no photographs had been taken on the second trip, which neither she nor the children had enjoyed. When shown photographs in number 6/14 of process of the family in Georgia with a Christmas tree in the background, Mrs W said as they went there in December it would be normal to have a Christmas tree. Then she stated that the photograph had been taken during the first trip and that the presence of a Christmas tree was not proof that it had been Christmas. The defender disputed that YW's possible return to Dubai had been discussed and agreed in Georgia as being in her eldest child's best interests. YW wanted to go to Dubai with her father but the defender insisted that she return to Glasgow, which she did. Subsequently the defender sought advice from YW's school and from the social work department and was told that as she was 16 years old there was nothing that could be done, so the defender respected her view and let her go. The defender assisted with the arrangements. She disputed that YW is doing well at school in Dubai, but agreed she had no contact with her or with the school she attends. The witness accepted having blocked YW as a contact on her phone.

[34] Mrs W agreed that YW had been close to her sisters and that she would like them to live together again, but did not see that happening as YW would not return to Glasgow. She considered that her two younger daughters would be at risk (of being subjected to FGM) if they visited their sister in Dubai. When it was suggested that the children would be better provided for in material terms in Dubai she insisted that they were safe and financially content in Glasgow. Mrs W denied that her husband had sent funds for her and the children until she stopped speaking to him in January 2020 and questioned the value of the perfume and laptop (MacBook) he had sent the girls saying that they needed food and clothing instead. She denied that he sent food parcels, later stating "sending a box of crisps every

couple of months, that's not food". The defender agreed that the girls had visited fun-fairs and the beach at weekends in Dubai with their parents and that her husband had been an involved father "like any other father" but "nothing exceptional". She disputed that the children's lives in Glasgow were isolated in comparison to their time in Dubai. On the proposal that the girls return to the American International School in Dubai the defender said "...they have school here. I don't see the logic for them to go back there".

[35] On the cessation of video and telephone contact between October and December 2020, the defender said she had taken action because her husband had been telling the children things and being disrespectful of her to them. He had accused her of stealing a phone belonging to one of the girls, which had been lost. It had not been because he had raised these proceedings. The subsequent court order had helped because now he calls at specific times and not just when it suits him. Mrs W said she had no difficulty with such contact but felt the pursuer had used it to "brainwash" the children, telling them how much better life in Dubai was than in Glasgow. It was unacceptable for him to be showing the girls photographs of him swimming in pools and going to nice areas during lockdown when she and the girls could not leave the house. She had understood that the initial court order limited contact to 30 minutes including any time with YW and said that her oldest daughter had also shown photographs to her sisters of her enjoying nice places in Dubai. Mrs W denied being present when the girls are speaking with their father, she just checks at the beginning that her husband is not talking about the case and then she leaves the room.

[36] When asked whether she had seen Ms Donachie's report recording the children's views, the defender said that she had asked SW to translate it for her as her daughter's English was very good. She confirmed that SW reads emails and letters to her that she does not understand and said that when she had been told not to show the report to anyone she

did not think that included her daughters. On being challenged about how she could have provided an Affidavit in English if she required emails to be translated, the defender stated that simple language had been used by the solicitor. When she had read her husband's affidavit she had looked up any words or phrases she did not understand on Google. She said that Ms Donachie's report "was something very important to me, that's why I needed help." Mrs W was adamant that she did not want to return to Dubai or see her husband again. When pressed on what she would do if the court ordered the children's return she said that it was impossible for her to think about being without her children but that she would have an issue obtaining a residency visa now for UAE. She found it difficult to answer in advance of the court's decision. She did not accept her husband's evidence that he would pay for her residence visa in UAE even if they were separated. On the issue of direct contact with their father if the younger girls remain in Scotland, the defender stated "I don't mind him seeing the children, but I will not be there so I would like them to have high protection. I need to be sure he is not going to take them for FGM procedure or talk badly of me."

### **The applicable law**

[37] Both parties to this action hold full parental responsibilities and parental rights in respect of SW and OW. The relevant parental responsibilities are outlined in section 1 of the Children (Scotland) Act 1995 ("the 1995 Act") and the corresponding parental rights are listed in section 2 of that legislation. Section 6 of the 1995 Act provides that both the child (if mature enough to express a view) and the other parent must be consulted about any major decision one parent with parental responsibilities and rights intends to take about the child. A change of the country of residence would clearly fall within this category. Section 11(1) of

the 1995 Act provides that the court, in circumstances such as those that arise in this case, may make orders relating to those parental responsibilities and rights. The orders sought by the pursuer in this case are in terms of section 11(2)(c) and (e) which provide as follows:

- “... (c) an order regulating the arrangements as to –
- (i) with whom or
  - (ii) if with different persons alternately or periodically, with whom and during what periods,
- a child under the age of 16 years is to live (any such order being known as a “residence order”);
- ...
- (e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as a “specific issue order”);”

For her part, the defender also seeks a Residence Order in terms of section 11(2)(c) of the 1995 Act.

[38] The test to be applied by the court where any order under section 11 is sought can be found in section 11(7) which provides:

- “...in considering whether or not to make an order under subsection (1) above and what order to make, the court –
- (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all;
  - (b) taking account of the child’s age and maturity, shall so far as practicable –
    - (i) give him an opportunity to indicate whether he wishes to express his views;
    - (ii) if he does so wish, give him an opportunity to express them; and
    - (iii) have regard to such views as he may express.”

The parties were agreed that all aspects of the test are relevant in this case and that the views of the children as reported to the Child Welfare Reporter should be considered. In applying the test in section 11(7)(a) the court must have regard to certain listed matters. These include;

“(7B)

- (a) The need to protect the child from –
- (i) any abuse; or
  - (ii) the risk of any abuse,
- which affects, or might affect, the child;
- (b) the effect of such abuse, or the risk of such abuse, might have on the child ;
- (c) the ability of a person –
- (i) who has carried out abuse which affects or might affect the child; or
  - (ii) who might carry out such abuse,
- to care for, or otherwise meet the needs of, the child; and
- (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

(7C) In subsection (7B) above—  
‘abuse’ includes—

- (a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
- (b) abuse of a person other than the child; and
- (c) domestic abuse;

‘conduct’ includes—

- (a) speech; and
- (b) presence in a specified place or area.

(7D) Where—

- (a) the court is considering making an order under subsection (1) above; and
- (b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,

the court shall consider whether it would be appropriate to make the order.”

[39] This case is characterised as a relocation case because, regardless of the circumstances in which the children became resident here, they have resided in Scotland for four years and the pursuer seeks to alter that *status quo* and relocate them back to Dubai. There was no dispute between counsel in this case as to the applicable law or the way in

which the courts in this jurisdiction have settled the approach to relocation cases. In *M v M* 2012 SLT 428 at paragraph 9, Lord Emslie, giving the decision of the Inner House confirmed that in relocation cases “the welfare and best interests of the child or children concerned are paramount, and fall to be judged without any preconceived leaning in favour of the rights and interests of others”. The correct approach to applications of this sort was also summarised by Lady Smith in the case of *Donaldson v Donaldson* 2014 Fam LR 126 at paragraph 27 as follows:

“Since the decision of this court in the case of *M v M*, it has been clear that, on an issue of relocation, it is no part of our law that a judge requires to regard any particular factor as having greater weight than any other. It would, for instance, be wrong to proceed on the basis that there is a rule that the most crucial assessment required is as to the effect that a refusal of the relocation application will have on the applicant. This is often conveniently described as a “presumption free” approach; it accords with the court’s duty to regard the welfare of the child as the paramount consideration. That is not to say that, in an individual case, there may not be features which are of particular importance when considering the welfare of the individual child concerned. The availability in each jurisdiction of some particular medical treatment or educational provision that the child requires would be an example. Much will depend on the facts of each case.”

Much will depend on the particular circumstances of the case and the advantages and disadvantages for the child of the proposed move with the wishes and interests of each parent receiving no greater weight than they deserve in the circumstances.

[40] There is an evidential burden of proof in a relocation matter on the parent seeking to relocate with the child, or as in the present case, have the child or children returned to him to live in another jurisdiction. That party must furnish the court with material potentially capable of justifying the making of the orders sought (*S v S* 2012 Fam LR 32 at paragraph 10) and show (1) that relocation would in fact be in the best interest of the child concerned; and (2) that from the child’s perspective it would be better to allow relocation than to make no order – *M v M* cited above. It is neither instructive nor appropriate to try to formulate any

list of applicable factors as relocation cases are fact sensitive and scrutiny of the particular circumstances of the dispute and the child is what matters – *Donaldson v Donaldson* cited above and *GL v JL* 2017 Fam LR 54. Finally, it is important in any case involving children that the decision maker must not be distracted from the primary focus of the effect of any order upon the welfare of the child concerned; a nexus between the central issue and the findings of fact made by the court is to be demonstrated – *NJDB v G* [2012] UKSC 21 at paragraph 31.

[41] In Immigration cases, asylum claims by those seeking protection from a risk of being subjected to FGM are well recognised. The applicable country guidance for Sudan – *FM (FGM) Sudan CG* [2007] UKAIT 00060 summarises the position as follows (at paragraphs 136-137);

“Risk of FGM in Sudan

136. The large-scale statistical evidence regarding FGM in Sudan, cited by UNICEF and others, whilst not particularly up-to-date, remains generally valid. From this and many of the other materials to which we have referred, it is plain that FGM in Sudan as a whole, and the north in particular, is widely practised. That includes both type I (infibulation) and type III (or ‘Sunna’ form), both of which plainly constitute serious harm and persecution. That is the backdrop against which any particular claim to international protection must be analysed. Most girls and young women in Sudan are, today, still likely to undergo one or other of these forms of FGM.

137. Nevertheless, it is also apparent from the evidence as a whole that not every uncircumcised girl or young woman of what (in Sudanese terms) might be described as marriageable age will as such be at real risk of FGM on return to Sudan.”

The guidance also notes (at paragraph 121) that legislation prohibiting FGM has been a factor in the practice becoming less prevalent.

[42] There is also an argument in the present case about the relationship, if any, between the issues for determination and the Secretary of State’s decision to grant the defender’s asylum claim for her and the children. In *G v G* [2021] 2 W.L.R. 705, where the conflict was

between the operation of the Hague Convention on International Child Abduction and an ongoing asylum claim, Lord Stephens expressed the view that it would ordinarily be sufficient if the Secretary of State be requested to intervene so that decisions in the Hague Convention case did not trespass on her responsibilities in the asylum process. In that case the asylum claim was live and the issue was whether it should take precedence over summary proceedings for return of a child under the 1980 Hague Convention. The present case is rather different because the claim has been determined by the Secretary of State to the extent of granting leave to remain for five years to December 2022 and is in that sense not an ongoing claim. To address any perceived conflict, however, intimation was duly ordered to be served on the Advocated General for Scotland in advance of proof lest he would wish to participate and his office confirmed that he did not intend to do so, but would like sight of the court's final interlocutor.

[43] The children are persons to whom the Geneva Convention 1951 Relating to the Status of Refugees ("the 1951 Convention") applies. The determination that a person is a refugee is declaratory in nature – *ST (Eritrea) v SSHD* [2012] 2 A.C.135 at 140. It is well established that the court cannot substitute its own view upon the substantive merits of a decision that is within the exclusive province of the Secretary of State for the Home Department in the performance of her constitutional function – *SAA (Iraq) v SSHD* [2017] CSOH 59 at para 15; *ABC (Afghanistan) v SSHD* 2013 [CSOH] 32; *RA (Pakistan) v SSHD* 2011 S.L.T.970. An issue arises as to whether the decision of the Secretary of State would be undermined by a decision of this court.

[44] The question of whether an order for return to UAE could be implemented in this case remains contentious as between the parties. In *F v M* [2017] EWHC 949 (Fam) [2018] Fam 1, Hayden J was asked by the Court of Appeal to consider the competency of ordering

the return to Pakistan of a child with refugee status here in the UK, Pakistan being the country from which refuge had been sought. Hayden J, having summarised the relevant law, including the 1951 Convention, answered that question in the following way ( at para 44):-

“Accordingly, it seems clear that the grant of refugee status to a child by the Secretary of State is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction. Ms Fottrell QC, on behalf of F, has been reluctant to yield to this unambivalent statement of principle, at least expressed in such stark terms. She contends that the options for the child within the family court are not neutralised by the supremacy of the Secretary of State's authority. By this she means that there are a range of alternatives which might encourage or indeed require the Secretary of State to reconsider her decision in the light of findings made in the Family Court on the basis of evidence to which she has not had access. This however, whilst a valid point, is not the same one. Determination of refugee status itself and therefore its consequences is the Secretary of State's sole responsibility.”

It is not clear whether Hayden J intended to express the view that the child could not be ordered to go to a third country, as opposed to that from which refuge was sought, although a reasonable interpretation is that the grant of refugee status confers complete protection against forced removal from the UK. The definition of refugee in Article 1A of the Convention includes those with a well-founded fear of persecution who are outside the country of their nationality or who do not have a nationality and are outside the country of their habitual residence. The right not to be “refouled”, enunciated in Article 33 of the Convention, protects a refugee in a signatory country from being returned to a territory where a relevant threat is present. I discuss below whether that has implications for my decision in this case.

## Discussion

[45] I turn first to address the credibility and reliability of the parties to the action. So far as the pursuer is concerned, on the matters about which he gave evidence to this court, including the events of 2017 when the parties were in London, I found him to be generally credible and reliable. His affidavit and oral evidence was clear and consistent and he came across as anxious to assist the court. However, as detailed below, I have found that he was prepared to support his wife's asylum claim in 2017 knowing it to be based on false statements and that he colluded with her subsequently in concocting a story that they both thought would persuade the authorities to allow him to join her here in the UK. He was prepared to give a false account in support of his own subsequent claim. Accordingly, I take into account that he has lied to state authorities himself in the past, but accept that he has in these proceedings given a broadly truthful account.

[46] As between Mr H and his wife, where their accounts differed I have accepted his account. The defender was an unimpressive witness on the issue of the circumstances of her coming to live in the UK. I had much less difficulty accepting her evidence in relation to matters of child welfare. A number of issues have resulted in my rejecting the more contentious parts of her evidence. First, as she had instructed her solicitors and had her Affidavit prepared and sworn exclusively in English, notwithstanding that it is her second language, her legal team proceeded on the basis that she was competent in English. Her insistence on simultaneous translation through the interpreter for the majority of her oral evidence appeared to me to be a convenient way of extending the time she had to answer questions and I have concluded that she used the alleged language barrier to achieve that. This was best illustrated when, shortly after 12 noon on day 3 of the evidence, she was being pressed on her allegation that her husband had booked her and the children on a flight to

Sudan without her knowledge after the second Georgia trip. She gave a long and quite fluent narrative in English of what she said had occurred at the airport before reverting again to insisting on simultaneous interpretation. Secondly, she contradicted herself or otherwise gave answers clearly unanticipated by her own advisers on several matters during her evidence. Some examples include her evidence about (i) having met Mr Arbab in 2017 and spoken with him in 2018, coupled with her denial of his involvement in her asylum claim without explanation as to the purpose of their meeting, (ii) the bundle of WhatsApp messages (number 6/44 of process) which she denied were between her and her husband when he had spoken to them in evidence without contradiction as to their provenance, (iii) the document number 6/43 of process that she accepted sending to her husband but denied had been written by Mr Arbab when her husband had stated without challenge that it was the document drafted by Mr Arbab with the false asylum claim story and (iv) whether there were photographs of the second Georgia trip when those showing a Christmas tree in the background were put to her. The defender's counsel admitted candidly in submissions that his client's evidence that she was the author of no 6/43 of process "came from nowhere".

[47] I considered Mr NN to be a credible and reliable witness. His evidence was limited in scope and he made clear that much of what he understood had been gleaned from conversations with the pursuer. YW was also credible and reliable and gave some useful evidence about the family dynamics and the allegations about FGM. There were some difficulties with the evidence of the pursuer's mother, Mrs SS. She is 82 years old and gave her oral evidence from Sudan and through an interpreter. At times she appeared not to understand the question but I had the impression that she could not hear the questions very well and that speaking to a camera was quite alien to her. There were connectivity issues

that delayed her evidence. As a precaution and because counsel for the defender raised the matter, the witness's son in law was asked to leave the room in which Mrs SS was giving evidence lest he be tempted to assist her with the answers. However, the witness's evidence was if anything more fluent after that departure and I was not concerned that there had been any attempt to coach the witness or otherwise manipulate the procedure. On the single issue about which she gave important evidence and was cross examined (whether she had spoken with the defender in the Summer of 2017 about subjecting the parties' children to FGM) she gave convincing evidence which I accept as credible and reliable.

[48] The undisputed facts of this case alone are revealing on the disputed issue of why the children no longer live with their father. The family lived a relatively affluent lifestyle in Dubai, where all three girls had been born. The children were being privately educated and pursued many enjoyable activities at the weekends. Even on her own account, the defender acknowledged that her husband had been quite an involved father. When they all travelled to the UK in the summer of 2017 it was for a planned family holiday. After the defender's successful asylum claim she remained in very regular contact with her husband and then supported his claim to join her and the children in the UK. After that was unsuccessful, she holidayed with her husband as soon as his passport was returned to him, first in the Spring of 2019 and subsequently in December 2019. For reasons that were not explained, both trips were to Georgia, but the defender and the children were able to travel anywhere other than to Sudan. YW's voluntary return to Dubai is also instructive. There was no extraneous evidence supporting any complaint by the defender in January 2020 that her 16 year old daughter was at risk on such a return. There was ample evidence that YW had been extremely troubled while in Scotland and that she is settled and content in Dubai. There was also evidence of YW regarding it as unremarkable that she spent a week in Sudan

visiting relatives while securing the paperwork for her return to Dubai. I conclude that the undisputed facts are more consistent with the pursuer's account of a functioning marriage in the context of which attempts were made to acquire UK residence and citizenship than the defender's account of events taking place in July 2017 that led to her being fearful for herself and her girls.

[49] Turning to the disputed aspects of the claim for asylum itself, it is noteworthy that the defender did not suggest in her evidence that she was fearful that her daughters would be subjected to FGM at any time prior to the London trip. She claimed (paragraphs 12-13 of her affidavit) that it was towards the end of that holiday that her husband changed his view on the practice, having been against it previously. She stated that a phone call from his mother put pressure on him to do so. However, what was put to Mrs SS in cross-examination was not that she exerted pressure on her son in 2017 but the finding in 2018 of the Immigration Judge that the pursuer had said that his wife had had to "stand up to his mother" on the issue of FGM at that time. Mrs SS disputed that she had any conversation with her daughter in law about that issue in 2017. The pursuer said that the whole issue of "standing up to" his mother had been concocted in 2018 as part of the family reunion claim because the parties understood the glaring inconsistency between the primary basis for the defender's initial asylum claim and her sponsorship of her husband's claim to come to the UK and reunite with his family. Further, the aspect of the defender's claim that related to her personally appeared to have no substance in her evidence to this court. She stated that she was not politically active but that inexplicably she had been arrested in Sudan for supporting a political movement and had then breached bail conditions. It was all quite vague and not spoken about in evidence in the kind of detail one would expect if an entirely innocent politically inactive woman had suddenly been arrested in her home country and

was asked to give an account of it. Whatever her evidence was to the immigration authorities, the defender was not clear about this aspect in these proceedings. In any event, it was not clear how such events would affect her life in Dubai if they had occurred.

[50] I have concluded that, having now heard the conflicting accounts of what took place, only the pursuer's account of the asylum claim issue is consistent and makes sense. He was able to give a detailed account of Mr Arbab's involvement and the story that was created about the defender's alleged arrest in Sudan in 2015 and her fears of FGM being visited upon her daughters. I was not impressed by the defender's denials that documents consistent with her husband's account were not in fact what they purported to be, when such a claim had not been made or even suggested at any stage prior to her evidence. The numerous messages between the parties at the time events were occurring, lodged by the pursuer and spoken to in his evidence, support his account. For these reasons, I have accepted the version of events given by the pursuer as broadly accurate. The defender wanted to secure UK citizenship for herself and her children and so claimed asylum. She was assisted in achieving that ambition by the pursuer, who subsequently sought to take advantage of his wife's successful claim and join her here in the UK. It is significant that in rejecting the pursuer's application for a Family Reunion Visa in 2019, the First-tier Tribunal judge, in giving reasons said of the defender and the children;

"They have been in this country since 6<sup>th</sup> July 2017.... They have spent most of their life in the UAE. I cannot see why the Sponsor and the children cannot return to the UAE and if there is an opportunity for them to continue family life together in that country and where there is no apparent risk to their safety and well being, then it has to be in the children's best interests to do so. They would be reunited with their father which is what they want." (number 6/8, page 6, of process at para 17).

It is clear from the documents lodged about the Family Reunion Visa application that the defender retracted her claim that the girls were in danger from the change in attitude by the

pursuer towards FGM that she had earlier alleged as soon as there was an opportunity for him to join her in the UK. The defender was unable to explain satisfactorily why her earlier fear had dissipated.

[51] It was clear from the pursuer's account that he would never have disclosed how the claims came to be made in 2017 but for the breakdown of the parties' relationship after the second Georgia trip. While I reject as implausible the defender's evidence that her husband had booked her on a flight to Sudan, I accept that by December 2019/January 2020 there were tensions between the parties because of the defender's refusal to contemplate a return to Dubai as an alternative to her husband joining her in the UK. The relationship broke down completely following YW's return to Dubai and to her father. I formed the impression that the defender considers YW as having made a choice that may have threatened her own position here in the UK and was anxious to avoid her younger daughters making the same decision.

[52] As indicated above, as a matter of law this court cannot substitute its decision for that of the Secretary of State. What can be done in a private law dispute, however, is to hear evidence relevant to an aspect of the case that may differ from the evidence heard by the Secretary of State when reaching her decision. This court is required to treat the welfare of the children concerned as the paramount consideration. Evidence was led without objection about the circumstances in which the children came to live here and the basis of the defender's claim for asylum in 2017. That is relevant evidence upon which I have required to make findings. The Secretary of State's decision in 2017 was made on the basis of material and evidence submitted at that time and I acknowledge the validity of the decision in that context. The challenge is not to the decision itself, which clearly remains extant.

[53] The conclusion I have reached about the circumstances in which the defender made an asylum claim for her and the parties' children is based on the undisputed facts, coupled with my assessment of the credibility and reliability of those who appeared before me and having considered the relevant productions spoken to in evidence. My assessment is necessarily different from that conducted by the Home Office in 2017. Quite apart from having the parties' contradictory accounts, I have considered subsequent events as the time at which any perceived risk to the children must be ascertained for these proceedings is the current date. In my opinion, neither SW nor OW is at risk of being subjected to FGM by spending time with or living with their father. FGM is a brutal practice and there was some evidence that the defender's family are, in contrast with the pursuer's relatives, not quite so against it. That said, YW is now 18 years old, has spent time with her mother's extended family and has never been exposed to such a risk. Neither SW nor OW was at risk of being subjected to FGM when they lived in Dubai and visited Sudan. However, significant as it is, my conclusion on the alleged risk of FGM is only one aspect of the evidence that is relevant to a determination of what is now in the children's best interests. It does not follow that, because I have reached the view that the defender, with some assistance from the pursuer, was not honest with the authorities when making an asylum claim, the children should be returned to Dubai. I require to consider the evidence on their current circumstances, their attachment to each parent and the views they have expressed, together with the consequences of a change in their care arrangements before making a decision based on the totality of the evidence. Apportioning blame, as between the parties, for the circumstances in which the defender and the children came to reside in this country does not amount to the necessary child focused analysis. It is a relevant factor that I have concluded on the evidence before me that the defender and the children never required to seek refuge in the

UK, but that fact cannot determine what is best for them in 2021, four years after those events.

[54] I am entirely satisfied that prior to July 2017 SW and OW enjoyed a close family life with their parents and elder sister, that they performed well at school and that they had no inkling when they came to the UK on holiday that their lives were about to change dramatically. However, over four years have elapsed since then and their mother has cared for them effectively singlehandedly throughout. They live in reduced financial circumstances and they attend a local school. The written material from the schools they attend (numbers 7/2 and 7/3 of process) confirms, however, that they perform well and are settled in their current environment. The guidance teacher at SW's school confirms she is a polite, well-behaved pupil. She is well presented and has a close friendship group. SW has completed the third year of secondary school and is entering the fourth senior year. OW's class teacher describes her as "...an absolute pleasure to teach" and she scores in the "excellent" category for behaviour, attitude and attendance. They are being educated in English but retain their first language, Arabic, which is spoken at home. There was no evidence to justify a conclusion that the education they receive here will deprive them of any opportunities in future or that it is of lesser quality than that available in Dubai. Of course, there is evidence that the girls could return to the International school in Dubai. I can accept that the education provision there is also of a high standard and reports from that school (numbers 6/18 and 6/19 of process) confirm the progress each child was making. I conclude that there is suitable educational provision for the girls both in Scotland and in Dubai. The defender's evidence was that their current accommodation is suitable and they have sufficient in terms of material provision. I accept both that living a more modest lifestyle is of itself not adverse to the interest of these children and that their current accommodation

arrangements are satisfactory. OW described her home to Ms Donnachie as “warm and comfy”. Should the two younger girls return to Dubai the pursuer and YW would require to move to larger accommodation as their current apartment is a two bedroomed one, albeit spacious and well furnished. I accept that it would be reasonably easy for the pursuer to organise and fund that through his remuneration package.

[55] Turning to the central relationships in the girls’ lives, their mother has effectively never worked outside the home and has been their primary care giver. I accept that she is a loving mother to the two girls, who seem close to her as the views expressed to Ms Donachie indicate. Since coming to Scotland, the girls have spent time with their father physically only on the Georgia trips. However, they have always maintained contact with him through electronic means, other than when the defender stopped that contact between October and December 2020. While I accept that she may have perceived that the pursuer was using contact to try to persuade the girls of the advantages of life in Dubai, the time during which the defender refused to allow video contact was when she felt threatened by the raising of these proceedings. She now accepts that the girls should have ongoing contact with their father; despite her complaints about him she did not seriously suggest he should not be involved in their lives. That is unsurprising given that her explanation in evidence for supporting his claim to be reunited with his family in the UK was that she felt the girls should have their father living with them. The pursuer emphasised his perception that the girls live an isolated life and have few social contacts. Covid 19 restrictions aside, that perception was not really supported by such extraneous evidence as there was and I have noted the reference by SW’s teacher to her having a group of close friends at school. Should the girls be returned to Dubai there would inevitably be a period during which they had to make new friends or reconnect with those they have not seen for over four years in order to

resume their social life. OW in particular would have no concrete links there initially. I am not satisfied that there would be immediate social benefits of a return to Dubai. There was little or no independent evidence to support a contrary view. Mr NN is reliant on what the pursuer tells him about this and YW is hardly independent, having ceased any relationship with her mother.

[56] So far as the girls' views are concerned, these are summarised at paragraphs [5] and [6] above. There was no suggestion by either side that either SW or OW was too young or immature to express a view and I take account of the views they have expressed. It is clear from Ms Donachie's report that, while SW remembers and misses life in Dubai, OW has no real recollection of life there and likes living in Scotland. She was clear that whatever happens she does not want to leave her mum and would not want any change to the current arrangements. She is not so close to YW given the age gap. SW misses her dad, her sister and living in Dubai. She would like to visit them frequently and was sad she could not live with them. However, SW had nothing negative to say about living with her mother, stating that she liked living with her mum and thought it good that her mum was "doing it on her own". She would prefer if the whole family could live together and it makes her sad that she can only see her father on video calls. Her reasons for preferring Dubai to Scotland were that the weather was better there and there were more things to do. Ms Donachie conveys that SW was quite distressed at having to discuss these matters. The impression I have is that SW feels conflicted and would prefer not to choose as between which parent she will live with, although being separated from her father and sister causes her to be upset. She has just attained the age of 15 years and within a year will be able to make the decision herself about where and with whom she wants to live. It was unfair of the defender to involve SW in reading Ms Donachie's report to her and this will have added to the pressure

on SW to please both parents. So far as OW is concerned, I conclude that she would be upset and anxious if separated from her mother for long periods of time. The defender was uncomfortable when asked whether she would return to Dubai if there was an order returning the children. They are clearly her priority but she may now have difficulties securing residency in UAE if separated from her husband. There was no evidence independent of the parties supporting the position of the pursuer that he could secure residence for her. In any event, this court cannot tell the defender where to live and she is unwilling to return to Dubai at this stage.

[57] SW and OW have two parents who love them and it is patently in their best interests that both parents should be involved in their daughters' upbringing. The challenge is how that can be achieved standing the defender's current refusal to return to UAE. I am not satisfied that it would be better for either SW or OW to be returned to live in Dubai with their father than for both to remain in Scotland at this stage. It would be disruptive to move either of them during an academic year and SW is at an important stage in her secondary school education. Her fond memory of the weather in Dubai is not a material factor, unlike her emotional tie to her father and YW, which has weighed more heavily in my determination of the issues. OW has seen one sister depart already and she is close to the one who remains with her. It is apparent that OW derives her sense of emotional security from living with her mother and sister. It would not be in her interests to be separated from her mother, so if the defender remains resident here, so too should OW. Further, it would not be in OW's interests to be separated from SW at this time. The girls' current living arrangements have subsisted for four years. I consider that, on balance, it would be better for SW and OW for those living arrangements to continue meantime and I intend to grant a Residence Order to reflect that. The events of 2017 and the findings I have made about their

mother's behaviour and motivation at that time have less bearing on the issue of what is currently best for the girls than the evidence of their settled existence in this jurisdiction. I am not prepared to order a disruption of the current arrangements.

[58] I have concluded that what would be best for SW is for her to be given the opportunity in due course to exercise a choice about where and with whom to live after she has spent some time with her father again. I consider that both girls should be given the opportunity to spend time with the pursuer. This should be for a short holiday in the first instance, in a country as close as reasonably practicable to the UK if it is not possible for the pursuer to enter the UK. It would be beneficial if YW could spend time with her sisters in person too. Again, subject to her educational commitments, she may be able to travel with her father. It is to be hoped that two or three such trips over the course of the next year might be possible. Physical re-engagement with their father of this sort will allow SW to make an informed choice about whether she would like to stay in the UK or return to Dubai at age 16 as her sister did. So far as OW is concerned, reconnecting more meaningfully with her father than the current video calls permit should allay any anxieties she has about being apart from her mother. It will be for others to decide whether the defender and the girls will be permitted to remain in the UK in the longer term should they wish to do so.

[59] As indicated above, I consider that there is force in the submission for the defender that a grant of refugee status in the UK carries with it protection against a forced removal, which would include an order of the court in a family dispute. While an order for return to Dubai would not amount to refoulement as such, it would appear on the face of it to contradict the Secretary of State's earlier decision, unlike a voluntary return, which is always possible. In light of the decision I have reached about the children's best interests, I do not require to express a firm view on that matter. However, had I decided that it would be

better for SW and OW to be the subject of an order to return to Dubai, I would have invited the advocate general to make submissions on the matter before deciding whether I could make a formal order. For the avoidance of doubt, the prohibition on the girls entering Sudan remains in force and could not be the subject of interference by this court. I will fix a By Order hearing at which I will hear parties on the issue of the orders to be made to reflect the decision I have reached. In particular I expect there to be liaison on arrangements for the in person contact I have decided should take place. I will also reserve all questions of expenses meantime so that they can be addressed at the hearing. Finally, I wish to express my gratitude to counsel for their forbearance and perseverance during the technical and connectivity issues encountered during the virtual proof.