OUTER HOUSE, COURT OF SESSION

[2025] CSOH 78

P76/25

OPINION OF LORD BRAID

In the Petition by

"A" COUNCIL

Petitioner

for

Interdict

Petitioner: Ennis KC; Ledingham Chalmers LLP
First Respondent: Conroy, sol adv; CSG Legal Limited
Second Respondent: Perriam; Smail & Ewart

14 August 2025

Introduction

[1] In January 2025, the petitioner, a local authority[1], presented a petition to this court seeking protective orders in relation to the child of the respondents, a daughter born on 8 December 2024 ("XY"). It no longer seeks those orders, and the only live issue before the court is whether the petitioner should be found liable in expenses.

[2] The petitioner's case was that it had a reasonable apprehension, for the reasons averred in the petition and discussed more fully below, that XY was imminently to be taken by the respondents to Malaysia for the purposes of Female Genital Mutilation (FGM). The

[1] The petitioner has been anonymised as 'A' throughout, the better to protect the anonymity of the respondents and the child. No significance attaches to the choice of the letter 'A', other than that it is the first letter of the alphabet.

orders sought against the respondents included interdict for a period of 1 year against XY being removed from Scotland, and surrender of her passport to the court for a period of 1 year.

[3] The case called before Lady Carmichael, who appointed a curator *ad litem* to XY. Following receipt of the curator's report, and a lengthy opposed interim hearing on 30 January 2025, Lady Carmichael granted interim interdict preventing the respondents from taking XY to Malaysia. That necessitated the respondents requiring to postpone a trip to Malaysia which was due to begin on 3 February 2025. In a fully-reasoned note, Lady Carmichael, while acknowledging that the impression of the curator was that the respondents did not intend to subject XY to FGM while on holiday in Malaysia, concluded nonetheless that the petitioner had averred a *prima facie* case and that there were various factors which justified it holding the concerns that it did. Further, while there were factors pointing either way, the balance of convenience favoured the petitioner due to the irreversible nature of the harm to XY if the petitioner's apprehension were well founded. The paramount consideration was XY's welfare. An expedited proof was subsequently fixed for 18 February 2025.

[4] Two features of the interim hearing are worth mentioning at this stage. First, the respondents' position was clearly stated as being that they did not intend to subject XY to FGM in Malaysia, but were attending for Eid and a family holiday (the first respondent's family residing there). Moreover, they offered to have XY medically examined before leaving Scotland and on return. However, the petitioner expressed doubt at the hearing as to whether type IV FGM (one of the types practised in Malaysia) could necessarily be detected upon medical examination. Second, the petitioner undertook that if interim interdict was obtained which prohibited XY from travelling to Malaysia on 3 February 2025

and final orders were refused by the court, they would reimburse the cost of the flights for each family member up to a maximum of £5,000.

[5] Shortly before the proof was due to take place, it was discharged, and the interim interdict recalled, on the basis of undertakings given by the respondents that they would not allow XY to be subjected to any form of FGM; and that they would consent to XY being medically examined within 2 weeks of return to Scotland from Malaysia.

[6] A re-arranged trip to Malaysia duly took place. XY was examined on return and it was confirmed that she had not undergone FGM.

[7] The respondents now seek refusal of the petition, which is not opposed. They also seek an award of expenses against the petitioner on an agent-client basis arguing that the petitioner's conduct in bringing these proceedings was unreasonable; and an additional charge under heads (a), (b), (c), (d) and (e) of Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. The petitioner opposes the motion for expenses, although concedes that if expenses are awarded, an additional charge is to some extent appropriate.

Expenses – the principles

[8] The starting point is that the awarding of expenses is a matter of judicial discretion. Generally, expenses follow success but in cases involving children, in particular where proceedings have been brought by a local authority in the exercise of its statutory obligation to protect and promote the welfare of children, the general practice is that expenses are not awarded, irrespective of who has "won" or "lost" the case, unless the local authority has acted reprehensibly or unreasonably. The leading authorities to that effect are *In Re T (Children)(Care Proceedings: Costs* [2012] 1 WLR 2281 and *In Re S (A Child) (Access to Justice Foundation intervening)* [2015] UKSC 20. The justification for that approach, and the relevant

considerations, are set out by Baroness Hale of Richmond in the latter case at paras [21] - [24] and [29]. In particular, it is assumed that in children cases, all parties are motivated by either love for their children (in the case of parents) or (in the case of local authorities) the need to comply with its statutory obligations. Although that is an English case, it has been followed in Scotland: *Perth & Kinross Council, Petitioners* 2018 SLT 275, in which Lord Brailsford declined to award expenses against the petitioner, despite its petitions for permanence orders in respect of sibling children having been refused; and, more recently, *A* v *North Lanarkshire Council* [2025] CSOH 66, in which I found that the local authority in that case had acted unreasonably in *failing* to comply with a statutory duty and opposing a petition to ordain it to do so, and I did make an award of expenses against it.

[9] As regards the scale on which expenses should be awarded, the law was summarised by Lord Hodge in *McKie* v *Scottish Ministers* 2006 SC 528, para [3]. The general rule is that expenses are awarded on the party party scale, unless the paying party has conducted the litigation incompetently or unreasonably thereby causing the other party unnecessary expense; in which event the conduct may be sanctioned by an award of agent-client expenses and in considering reasonableness, the court can take into account behaviour before the action was raised and the strength of a party's position on the substantive merits of the action.

Factual background

[10] The first respondent, who is XY's mother, was born in Malaysia and has lived in the UK since she was 17. She underwent type 1 FGM, although was unaware of that until 2019, when she found out during her first pregnancy. The second respondent was born in the UK and converted to Islam before marrying the first respondent.

[11] It is not in dispute that FGM is practised in Malaysia. The Fatwa committee of the National Council for Islamic Religious Affairs Malaysia issued an opinion that the practice was part of Islamic teachings and should be observed by Muslims. That opinion is described as non-binding but has a significant impact in Malaysia and world-wide.

[12] A Child and Family Assessment carried out by an English county council in 2019, during the first respondent's first pregnancy, noted that she did not feel that FGM had significantly impacted her and was not against it for her child. That assessment also records that she did not plan to have FGM conducted on her child should it be a girl, which she understood was a criminal offence; and that the second respondent also understood that FGM was illegal in the UK and would not want to circumcise any of his children.

[13] Shortly after XY's birth, the petitioner received notification of a child protection concern, following an assessment carried out by midwives. It consisted of two checklists of indicators, one headed "Consider Risk", and the other headed "Significant or immediate risk". The two items checked on the first list were: (a) woman comes from a community known to practice FGM; and (b) woman has undergone FGM herself. One item was checked on the second list, namely "Woman says that FGM is integral to cultural or religious identity", alongside a handwritten note "Historically".

[14] The petitioner completed an initial child protection report, recording that the first respondent disclosed her FGM during her booking-in pregnancy appointment, and also recording a concern that the respondents intended to travel to Malaysia, for a visit lasting 2½ months. Social workers expressed a concern that both parents appeared to lack insight regarding the implications of FGM and that they had, to an extent, minimized concerns regarding that. They were worried that the length of the planned trip was to allow a period of recovery so that FGM would be undetected on XY's return to the United Kingdom.

The child protection orders

[15] Acting on its concerns, the petitioner sought, and obtained, a child protection order on 31 December 2024, preventing the removal of XY from her family home, and ordering that she must not be removed from Scotland and that her passport be surrendered. The application referred to research which suggested that key factors which indicated a child may be at risk of FGM included that the family's country of origin has FGM practising communities; that the mother or other female relative has had FGM; and an upcoming trip to the country of origin; all of which applied to XY. The application was supported by a police officer (*quantum valeat*).

[16] That child protection order was recalled by the children's hearing at the second day hearing on 3 January 2025, by majority decision. The minute of that hearing records the hearing's reasoning as follows:

> "This was on a majority decision. We had a long discussion about the circumstances of the CPO, however we heard from the mother that she was not aware it had been carried out on her as a baby, and only discovered when she became pregnant. The couple have been very honest and brought the issue to the attention of the social workers and medical staff on the consequential pregnancy. They had organised a passport for the child, for a previously booked holiday. This triggered the application of (*sic*) a CPO, however we felt that the assurances provided by the family that this was not there (*sic*) intention to take the child abroad to carry out FGM. The majority was accepting of this assurances. There were no other concerns about the family whatsoever."

[17] The petitioner's social workers were not happy with this decision. A further CPO application was made on 7 January 2025, referring to the first order and its subsequent termination by the hearing. The application narrated that the hearing's view was not shared by its Children and Families Social Work Department due to "the concerns raised in the previous and current application and supplementary information provided to the court".

The application then largely repeated the information which had been before the sheriff on 31 December 2024. It called before the same sheriff who had granted the first order. The first respondent attended the hearing. The petitioner's social worker told the sheriff that the petitioner felt that the children's hearing had not adequately interrogated the family's position at the children's hearing. The sheriff said that he could not make a decision about whether an order was appropriate until he had more information about the intentions of the children's reporter, who (it was reported) was seeking further reports before deciding whether to pursue matters. That resulted in the application being withdrawn by the petitioner.

Child protection planning meeting

[18] A child protection planning meeting then took place on 10 January 2025. It was attended by various agencies including social work and Police Scotland, as well as by the respondents. Social work, as they had done in the CPO applications, relied heavily on research by the Orchid Project, accepted nationally by government, that there was a high prevalence, up to 93%, of FGM in Malaysia, usually carried out around 40 days after birth. Even if that dropped to 48% regionally, as the respondents contended, that was still very high. The respondents said that although they identify as Muslim, they were mostly non-practising. Both respondents asserted, as they have done throughout, that they did not want FGM for their child. The social workers present at the meeting made clear that they did not believe that position and that the petitioner's intention was to raise the present petition. Further, some emphasis was placed on the fact that in 2024 the respondents had requested their GP that their older male children be circumcised, allegedly for religious and cultural reasons. That request was refused by the surgical paediatric team of the local Health Board.

There was some concern that the respondents had later tried to downplay that request by subsequently claiming that the proposed circumcision had been for medical reasons.

[19] The decision of the meeting was to place XY on the child protection register as being at risk of physical abuse. The two older children were also placed on the register as being at risk of emotional abuse. Thereafter, the petition was presented, bringing before this court essentially the same material and arguments as had been before the sheriff, the children's hearing and the child protection meeting.

The curator *ad litem's* report

[20] The curator *ad litem* reported on her meeting with the respondents. Her overall conclusion was that she had the impression that the respondents did not intend to subject XY to FGM while in Malaysia; and that there was only a relatively small risk (but a risk nonetheless) of an irreversible and hugely harmful procedure being carried out on XY, and that the level of risk had to be balanced against the nature of the harm in order to reach a decision. As noted above, Lady Carmichael carried out precisely that balancing exercise in deciding to grant interim interdict.

Submissions

Respondents

[21] Neither respondent contends that the petitioner's conduct was reprehensible. However, the solicitor advocate for the first respondent, and counsel for the second respondent, submitted that the petitioner acted unreasonably in the following respects. First, the petitioner had been forum shopping. The petition was presented only after a child protection order made by the local sheriff had been recalled by the 2-day children's hearing;

and after a subsequent attempt to obtain a second child protection order had been unsuccessful. Second, the undertaking which led to the petition being discontinued had been offered by the respondents both before, and during, the interim hearing on 30 January 2025. The petition had been entirely unnecessary. Third, the petitioner had misled the court by relying heavily on the suggestion that type IV FGM would not be detectable on standard medical examination. There was no evidence in support of that position, which was not insisted in following the taking by the petitioner of expert advice. That expert advice, and the petitioner's whole assessment of the case, should have been sought, and carried out, sooner. That, say the respondents, was so unreasonable that not only should expenses be awarded, but that those expenses should be on the agent-client scale. Finally, an additional charge should be awarded under heads (a), (b), (c), (d) and (e) of the 2019 Act of Sederunt. The proceedings were complex and novel, and required special knowledge of family, criminal and child law issues. The productions included children's hearing documents, journals and opinions in respect of FGM, and affidavits had to be prepared from witnesses outwith the jurisdiction in a short period of time. Numerous telephone consultations and video conferences had to take place. The proceedings were of the utmost importance to the respondents.

Petitioner

[22] Senior counsel for the petitioner submitted that it had acted responsibly. From the outset, it had sought to identify and instruct an appropriate expert witness on FGM to inform and assist the court in its understanding of the types, risks and impacts of FGM, but there were few experts in the field. An expert report was instructed and her initial draft report obtained on 18 February 2025 and circulated to the respondents, although by that

time the undertaking had been agreed. (The report is in process. I note that the conclusion of the author was that the overall risk assessment was "medium-high"). It had been very difficult to achieve gynaecological opinion on the question of "detectability". While the proceedings were instigated in the absence of both expert witnesses, the assessment of risk was undertaken by the petitioner in good faith and having regard to Scottish Government Guidance. This was an unprecedented action in an area of law which was novel in Scotland and where there was no pre-existing expertise and established pathway to guide all parties. It was appropriate that undertakings be given in the context of court proceedings, so that there were clear and obvious consequences should they be breached. The first respondent had also voluntarily offered to engage with the petitioner's social work department in respect of work to be provided in relation to FGM with specialist input. In those circumstances no award should be made, but if an award were made, it should be restricted to the amount of the respondents' respective legal aid contributions.

[23] Further, although there was some overlap, the tests for making an award of expenses, and awarding expenses on the agent-client scale were different. The petitioner should not be penalised twice over. If the court found that it had acted unreasonably, an award of party party expenses would be sufficient sanction.

[24] Finally, if expenses were awarded, an additional charge under heads (a) (complexity etc of the proceedings) and (e) (importance to the client) would be appropriate. However, the other heads were not engaged. The skill, time and labour required of the solicitor was not unique. The number and importance of the documents perused was not unusual. There was nothing particularly unusual about the circumstances in which the case was conducted.

Decision

[25] It is not hard to see why the respondents feel aggrieved. They have all along maintained that they did not intend to have XY subjected to FGM. Although that position was accepted by the children's hearing, the petitioner's social workers refused to believe them and, terrier-like, pursued one legal remedy after another until they eventually obtained an interim interdict, only then to change their position shortly before proof was due to take place, eventually accepting an undertaking from the respondents which was duly complied with in full. As a result, the trip to Malaysia was delayed and abortive expenditure incurred (although I was informed that the petitioner intends to honour its undertaking to meet the cancellation costs, which the respondents have vouched). Further, the enjoyment of their family holiday was spoiled. On their return from Malaysia, their position was vindicated.

[26] Nonetheless, it seems to me that it is important not to conflate the loss sustained by the respondents (which might or might be confined to the cost of re-booking flights) on the one hand, with the expenses of the petition on the other. An award of expenses should not be made simply because the respondents' holiday was delayed and spoiled. Simply because interim interdict was obtained which was not ultimately insisted in does not mean that the petitioner acted unreasonably in bringing the petition in the first place. At least part of the respondents' sense of grievance relates to the timing of the petition and the loss sustained by them rather than to the fact that expense was incurred in opposing the petition, and is not strictly relevant in considering whether an award of expenses should be made. To say that the petition ought to have been raised sooner than it was, in light of the knowledge about the Malaysian holiday in February 2024, does not provide a reason for awarding the

expenses of the petition to the respondents: the expenses would have been incurred whenever the petition was raised.

[27] That said, it is also important to draw a distinction between the issue of whether the petitioner's social workers reasonably entertained concerns at the outset about the risk of FGM, and the separate question of whether, by the time the petition was presented, that was still a reasonable course of action for the petitioner to take standing the history with regard to the CPO first being obtained and then recalled.

[28] There can be no doubt that the petitioner's social workers were initially entitled to hold the concerns they did. A number of risk factors were identified, not the least of which were the prevalence of FGM in Malaysia, the fact that the first respondent had herself undergone FGM and the imminence of the proposed trip to Malaysia. The concerns were genuinely held and were formed having regard to government advice. The question then becomes whether the social workers were entitled to pursue those concerns to the lengths they did standing the absence of expert reports, the effective failure of the first two attempts to obtain a CPO and the respondents' repeated assertions that they did not intend to subject XY to FGM.

[29] I do have some misgivings about the petitioner's refusal to accept the decision of the children's hearing and their pursuit of a second child protection order after the first had been recalled, before finally resorting to this court, which is, in general, not a practice to be encouraged. Children's hearings, not social workers, are tasked by Parliament with making decisions in the best interests of children and their decisions should be respected. Nonetheless, in the particular circumstances of this case, and after careful consideration, I am unable to hold that the petitioner's decision to seek an interim interdict in this court lay outwith the band of reasonable courses of action available to it at that time. In the first

place, although two members of the children's hearing believed the respondents, the third clearly was not persuaded that it was appropriate to recall the child protection order, lending some succour to the social workers' position. Second, since the outcome sought was always the prevention of the trip to Malaysia, it is at least arguable that resort to the Court of Session for an interdict should have been the first port of call, rather than an application for a child protection order, which usually has the effect (although thankfully not here) of removing a child from at least one of her parents. If it would not have been unreasonable to have sought an interdict without first having applied for child protection orders, it cannot have become unreasonable simply because of the history in relation to child protection orders. Third, and this may be the second point expressed in a different way, the tests for granting a child protection order, and interim interdict, are different. Having unsuccessfully pursued one remedy on one legal ground does not make it unreasonable to pursue another remedy on a different legal ground, even if the facts underlying both applications are the same. And fourth, illustrating the third point, the proof of the pudding is that Lady Carmichael was in fact persuaded that the petitioner had a *prima facie* case, and granted interim interdict, taking into account the severity, and irreversible nature of FGM, should it occur, reflecting the concern also expressed by the curator.

[30] As regards the absence of expert reports at the stage the petition was presented, this was not a situation where an expert report was required before counsel could responsibly make averments, or *ex parte* submissions, in support of interim interdict. The report eventually obtained might have bolstered the petitioner's case insofar as the expert's conclusion was that there was a medium-high risk, but the factors which gave rise to that risk were all known to the petitioner from the outset. The detectability of FGM is perhaps a different matter but the risk of being detected, should FGM be carried out, is merely a

protective factor to be weighed in the balance along with all the other risk, and protective, factors and, of itself, provides no guarantee that FGM will not be carried out.

[31] The final matter bearing upon reasonableness is the petitioner's supposed *volte face* regarding what is said to be the belated acceptance of an undertaking when the respondents had all along made an offer in similar terms. However, as the petitioner points out, a voluntary agreement to have XY medically examined before and after the trip to Malaysia would have involved no sanction had it been breached; whereas an undertaking recorded in the minute of proceedings carries the effect of an interdict, and to achieve that, it was necessary for the petitioner to present the petition. At best for the respondents, the offer of an undertaking during the currency of the litigation which was rejected would entitle them to the expenses from the date of the offer, or perhaps (analogous to a tender) the date when it ought to have been accepted. As I have observed, the respondents did repeat their offer at the hearing on 30 January 2025 that XY be medically examined, although it is not clear that a formal undertaking was offered then. Even if it was, I consider that the petitioner was entitled to have further time to investigate the detectability issue, and that it did not act unreasonably in not settling the petition on the basis of an undertaking at that stage.

[32] For all these reasons, I cannot find that the petitioner acted unreasonably in presenting and proceeding with the petition such that it should be found liable in expenses. It was reasonably acting in pursuance of its duty to safeguard the welfare of XY. It is therefore unnecessary to express any concluded view on the other matters argued before me, viz, the scale of any award and additional charge. For what it is worth, although there is an overlap in the tests to be applied, it does not follow that whenever a local authority is found liable in expenses, its behaviour must be held to have been so unreasonable that those expenses must necessarily be on the agent-client scale. Whether they should be or not will

depend on how heinous the behaviour which led to the award in the first place. Here, if I had made an award, that would have been on a party-party basis. As regards additional charge, I would have preferred the petitioner's submissions and awarded a charge under reference to heads (a) and (e) only, applying the usual rule of thumb of 10% to 15% per head, observing that it is not so much the law which was novel, as the application of established legal principles to a novel, and complex, factual situation.

Disposal

[33] I have refused the petition, finding no expenses due to or by any party.