Neutral Citation Number: [2020] EWCA Civ 1185

Case No: B4/2020/0854

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
THE HON MRS JUSTICE LIEVEN
[2020] EWHC 1886 (Fam)

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND THE IMMIGRATION ACTS
AND IN THE MATTER OF G (A CHILD) (CHILD ABDUCTION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/20

Before :

LORD JUSTICE HICKINBOTTOM

LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

- -

Between :

G

Appellant

- and -

G

Respondent

- and -

(1) THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT
(2) REUNITE INTERNATIONAL CHILD
ABDUCTION CENTRE
(3) THE INTERNATIONAL CENTRE FOR FAMILY LAW,
POLICY AND PRACTICE
(4) SOUTHALL BLACK SISTERS

Interveners

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Edward Devereux QC, Zane Malik and **William Tyzack** (instructed by **Dawson Cornwell**) for the **Appellant Father**
Henry Setright QC, Michael Hosford-Tanner and **Michael Gration** (instructed by **A&N Care Solicitors**) for the **Respondent Mother**
Alan Payne QC and **John Goss** (instructed by **Government Legal Department**) for the **First Intervener**
Richard Harrison QC, Jennifer Perrins and **Mark Smith** (instructed by **Brethertons LLP Solicitors**) for the **Second Intervener** (written submissions only)
James Turner QC, Mehvish Chaudhry and **Paige Campbell** (instructed by **Bindmans LLP**) for the **Third Intervener**
Samantha King QC, S Chelvan and **Charlotte Baker** (instructed by **Goodman Ray Solicitors**) for the **Fourth Intervener** (written submissions only)

Hearing dates: 10-11 August 2020
Further written submissions: 17 August-14 September 2020
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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This is the judgment of the court to which all of its members have contributed.

2. This appeal gives rise to issues of some importance in relation to the interplay between obligations of the state, on the one hand, under the Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980 ("the 1980 Hague Convention") as incorporated by the Child Abduction and Custody Act 1985 ("the 1985 Act") and, on the other hand, under immigration law including the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 and 16 December 1976 ("the 1951 Geneva Convention") and relevant European Directives; and, notably, the apparent tension between the objective of the former expeditiously to return a wrongfully removed or retained child to his home jurisdiction and the principle of the latter that refugees should not be refouled (i.e. expelled or returned to a country where they may be persecuted). It also raises issues as to the rights of children in the context of such situations.

3. The issues arise in the context of an appeal from the Order of Lieven J dated 5 June 2020 under which the application of the Appellant father ("the father") under the 1980 Hague Convention for the immediate return to South Africa of his daughter (to whom we shall give the initial "G" for the purposes of anonymisation) who had been removed to the United Kingdom by the Respondent mother ("the mother") was stayed pending the determination by the Secretary of State for the Home Department ("the Secretary of State") of asylum claims made by the mother and, as the judge understood it, by G.

4. Before us, Edward Devereux QC, Zane Malik and William Tyzack appeared for the father, and Henry Setright QC, Michael Hosford-Tanner and Michael Gration for the mother. Alan Payne QC and John Goss appeared for the First Intervener, the Secretary of State. There are three other Interveners, each a non-governmental organisation involved in relevant fields.

    i) The International Centre for Family Law, Policy and Practice is an organisation associated with the University of Westminster, involved in the area of family and child law with a particular focus on international aspects including child abduction. James Turner QC, Mehvish Chaudhry and Paige Campbell appeared on its behalf.

    ii) Reunite International Child Abduction Centre ("Reunite") undertakes and publishes research, and provides advice and assistance (including a mediation service) to individuals and government, statutory and voluntary bodies, in the field of international child abduction. Richard Harrison QC, Jennifer Perrins and Mark Smith appeared on its behalf by way of written submissions only.

    iii) Southall Black Sisters ("SBS") is an organisation which provides advice, resources and advocacy in respect of gender-related violence and discrimination against black and other ethnic minority (mainly migrant)

women. Samantha King QC, S Chelvan and Charlotte Baker appeared on its behalf, again by way of written submissions only.

At the outset, we thank all Counsel and their supporting teams for their considerable assistance.

The Facts

5. The father is a national of a European Union Member State ("EUMS") who, for over 20 years, has lived and worked in South Africa, where he has permanent residence. In 2006, he met the mother, a South African citizen who describes herself as coming from "a very traditional African family". They married in 2010; and their only child, G, was born in 2012. She has dual EUMS/South African nationality, but has always been habitually resident in South Africa.

6. The mother describes a difficult marriage, in which she says the father was controlling, being sexually and racially abusive towards her, suggestions which he denies. The mother had some mental health issues which she blames on this alleged behaviour.

7. In 2014, the mother and the father separated, and the father moved to another house, a few kilometres away from the mother's home. Relations between them remained difficult. The mother says that the father continued to be aggressive and abusive towards her. The mother was found to be HIV positive, the source of which was a matter of dispute between them. G continued to reside with her mother, but the father had regular contact. Following a divorce in 2018 and a report by a family counsellor, the South African equivalent of a child arrangements order was made. The father and the mother shared full parental rights and responsibilities in relation to G, who continued to live with the mother but had extensive contact with the father on alternate weekends and for half the school holidays, and he regularly picked up G from school. The father paid the mother maintenance, and also for items such as school fees.

8. For a child to leave the jurisdiction, South African law requires the written consent of all those with full parental responsibility. In December 2019, with the mother's consent, the father took G to the EUMS to spend time with his extended family. During that period, the mother visited the UK, from where she messaged the father to say that she had made contacts and found employment in England, and intended to remain here. She suggested she could collect G from the EUMS, and take her directly from there to live in England. The father objected, pointing out that he had parental rights, he did not think that being schooled in England was in G's best interests, and the South African courts should make any decisions in relation to G.

9. In the event, the father and G returned to South Africa in January 2020, as planned. The mother appeared to accept that the father did not want G to relocate to the UK. She too returned to South Africa, and continued to be G's primary carer.

10. In February 2020, the mother told the father that she was going to take G for a long weekend to Sun City near Johannesburg. The father expected to see G next when he picked her up from school on 2 March. However, when he got to the school that day, G was not there: in an exchange of texts, the mother said she was running late, and G

would be at school the following day. However, she was not there at the end of that school day either. In further messaging, the mother indicated that she had in fact taken G to England where she had enrolled her in a new school. The father was blocked from speaking with either the mother or G.

11. On 11 March 2010, the father made an application to the South African Central Authority for the return of G under the 1980 Hague Convention. That request was transmitted to the English Central Authority, and an application was duly issued in the Family Division of the High Court on 14 April 2020. At the first hearing, before Newton J on 29 April 2020, various disclosure orders were made together with a location order. The mother was served, and the location order executed, the following day. A return date was fixed for 15 May 2020.

12. Under the disclosure orders, on 12 May 2020, the Secretary of State confirmed an address for the mother; and also confirmed that an application for asylum had been made "by or on behalf of" the mother and "by or on behalf of" G on entry into the UK on 2 March 2020. As explained below (paragraph 23), the latter was subsequently found to be incorrect as no separate application had been made on behalf of G.

13. In a statement dated 2 June 2020 served in response to the 1980 Hague Convention application, the mother explained that she had always had feelings for women, but had been brought up to believe that homosexuality was a sin. However, following her separation from the father, she had told her friends that she was lesbian. As a result, she had been threatened by members of her family and, in May 2019, subjected to a very painful and frightening "cleansing ceremony" at her family's home. After that episode, she continued to receive threats from her family including death threats; but the police, to whom she reported them, did not take the threats seriously and said they could do nothing about them. While she was in England in December 2019, her car in South Africa was vandalised; and, on her return to South Africa in February 2020, someone she believed to have been her brother tried to force her off the road whilst she was driving, writing off her car in the process. She believed that this victimisation by her own family was as a consequence of her sexual orientation.

14. As a result, the mother decided to sell the car for scrap, and used the money to buy tickets for herself and G to fly to the UK, which they did on 2 March 2020. The mother says that she did not tell the father because she did not think that he would help, but would rather take G away from her. On arrival in the UK, she applied for asylum on the basis of the fear of persecution from her family as a result of her sexual orientation, from which the South African authorities were unwilling or unable to protect her.

15. The return date of the 1980 Hague Convention application was adjourned by MacDonald J to 22 May and then by Gwynneth Knowles J to 5 June 2020, to allow the mother to obtain legal advice and serve an Answer to the application. The Order of Gwynneth Knowles J indicated that the purpose of the 5 June hearing was to consider disclosure of the asylum application documents into the 1980 Hague Convention application and *vice versa*.

16. In her statement (to which we have already referred) and Answer, the mother relied upon two grounds in opposing the father's application, namely articles 13(b) (grave risk to the child) and 13(2) (child's own objections) of the 1980 Hague Convention.

The 5 June 2020 Order of Lieven J

17. The 5 June 2020 hearing came before Lieven J. At that stage, the Secretary of State having confirmed this to be the case in the letter of 12 May 2020, the parties and court proceeded on the basis that the mother and G had each made an application for asylum which was outstanding; and in those circumstances, as recorded in [10] of Lieven J's judgment, it was uncontroversial that G could not be returned to South Africa until her asylum application had been determined. Further, even if the asylum application were rejected, the judge doubted whether G could be returned whilst any appeal was pending (again, [10]).

18. No application to stay had been made by either party; but the judge considered the determination of the 1980 Hague Convention application should be stayed until the Secretary of State had determined G's asylum application, for three reasons:

> "11. … Firstly, if the asylum application is allowed, then the legal position is that the child cannot be returned in any event. Secondly, in my view, the Secretary of State is in a better position to consider the factual issues than the court in exercising a Hague summary jurisdiction. Under that jurisdiction the court does not generally hear oral evidence, whereas the Secretary of State will undertake through her officers a detailed interview and that is undertaken by officers experienced in dealing with asylum issues and, further, the mother would then have, if there was a refusal, a right of appeal to a First-tier Tribunal [("FtT")] where oral evidence is heard and subject to cross-examination. It is of course correct that the immigration and the [1980] Hague Convention processes and considerations are not the same, and the court will not be bound by any findings made in the immigration system. However, given that the child cannot be sent back to South Africa at the present time, and given there is a detailed investigation of the same factual nexus being undertaken by the [Secretary of State], it is sensible for her to complete at least the first stage of that process before the Family Division devotes its time to determining what might be an academic Hague application.
>
> 12. Thirdly, it is, in my view, quite inappropriate for this court to try and carry out some kind of preliminary consideration of the merits of the asylum application…. The appropriate course is to let the asylum application take its course and then once it has reached determination by the Secretary of State stage for the Family Division to consider what to do next."

19. In the circumstances, Lieven J found there would be no benefit to disclosure of the asylum documents into the 1980 Hague Convention proceedings, to which the mother objected: the judge referred to the risks of material being passed to members of her family, and found the balance "plainly" in favour of non-disclosure at this stage (see [15]). However, she allowed the father's application for disclosure of the documents in the 1980 Hague Convention proceedings to the Secretary of State, on the basis that,

in determining the asylum application, she (the Secretary of State) might be assisted by those documents (see [16]-[19]).

20. Lieven J's Order of 5 June 2020 encouraged the Secretary of State to determine the outstanding asylum claim "with maximum speed". However, we were told that it had not been possible to hold asylum interviews as a result of the Covid 19 restrictions, although they were due to recommence in the week of the hearing before us. Mr Payne informed us that it was hoped that the mother would be interviewed within two weeks, but no date for the determination of the application could be given. No decision has yet been made.

The Grounds of Appeal

21. The father appeals the 5 June 2020 Order on four grounds, as follows.

Ground 1: The judge erred in considering any form of refugee status to be an absolute bar to a return under the 1980 Hague Convention. Alternatively, insofar as there is a bar, it is to the *implementation* of a return order, not to the *determination* of the application.

Ground 2: In respect of the application for disclosure of the documents within the asylum file into the 1980 Hague Convention application, the judge erred in relation to their relevance and weight by failing to follow the procedure set out in R v G and H (Secretary of State for the Home Department intervening) [2019] EWHC 3147 (Fam) ("R v G and H").

Ground 3: By staying the 1980 Hague Convention application in the way she did, the judge erred because such a stay was in breach of article 11 of the Convention which requires the judicial or administrative authorities of Contracting States to "act expeditiously in proceedings for the return of the child". Any derogation from that obligation can only be made after a careful appraisal of any justification, in this case consideration of the *bona fides* and merits of any asylum claim as it applies to the mother and (vitally) to G, an exercise which the judge did not perform.

Ground 4: The judge erred in failing to consider G's own status within the asylum claim (i.e. whether she had made an application for asylum in her own right, or merely as a dependant of the mother), because different considerations apply to each of those circumstances.

22. On 1 July 2020, Moylan LJ granted permission to appeal on Grounds 1, 3 and 4, and adjourned the application for permission to appeal on Ground 2 into open court to be considered with the substantive appeal on the other grounds. It is that appeal and application which are now before us.

23. However, the scope of the appeal was effectively widened by the confirmation by the Secretary of State in paragraph 9(2) of her skeleton argument dated 4 August 2020 that, contrary to the indication in the letter of 12 May 2020, no application for asylum has ever been made by G, but only by the mother with G as her dependant. That entirely changed the factual basis upon which the parties and Lieven J proceeded below.

24. In the event, the following primary issues were addressed before us.

Issue 1: In the context of an application for a return order under the 1980 Hague Convention and 1985 Act, does the fact that the child and/or the taking parent have refugee status or a pending asylum claim or appeal act as any form of bar to the determination of the application or the making or implementation of any return order?

Issue 2: If so, does it act as a bar (i) to the determination of the application or (ii) to the making of a return order or (iii) only to the implementation of any return order?

Issue 3: If there is no bar to the determination of the application, how should the court go about its task of deciding whether to determine or to stay the application?

Issue 4: What part, if any, should the child play in the application?

Issue 5: What steps should the court take to apprise the Secretary of State of the application under the 1980 Hague Convention and any material used in that application?

We also heard some limited submissions on the issue of disclosure from the asylum claim to the court.

25. Before we deal with those issues, however, it would be helpful to consider the legal framework in which 1980 Hague Convention applications and applications for asylum are respectively determined, and the previous authorities which have considered the interface between the two.

The 1980 Hague Convention

26. All of the articles of the 1980 Hague Convention relevant to this appeal, save for article 20, are expressly incorporated and given the force of law in England and Wales by section 1(2) of and Schedule 1 to the Child Abduction and Custody Act 1985. Article 20 is, in effect, incorporated (see paragraph 39 below).

27. The Convention was drafted by the Hague Conference on Private International Law against the backdrop of an increase in international relationships and ease of international travel, which had resulted in an increase of instances of the wrongful removal or retention of a child by one parent (the taking parent) to or in a country other than that of the child's habitual residence and of the difficulties then encountered by the left-behind parent in procuring the child's return. An abducted child is, of course, taken away from his or her habitual environment in which rights of custody were being exercised by, typically, the child's other parent.

28. In the 1980 Hague Convention, "wrongful removal or retention" is thus defined in terms of the removal or retention of a child in breach of rights of custody under the laws of the state in which the child was habitually resident immediately before the removal or retention (article 3). The appeal before us concerns, and this judgment will focus upon, the removal of a child; but the same principles apply when a child is wrongfully retained.

29. The Convention provides a means by which the left-behind parent can secure the swift return of children wrongfully removed from their home country, so that they can

return to the place which is properly their "home", and any welfare dispute can be decided in the courts of that country, according to the laws of that country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed (Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619 ("Re D") at [48] per Baroness Hale of Richmond). Delay in return can result in the new factual situation becoming a new *status quo*, embedded to the extent that it may become in the child's best interests not to return him or her and the forum for consideration of welfare issues may move to the courts of the other country. In whatever circumstances they have arisen, and leaving aside the manner in which the 1980 Hague Convention operates to the benefit of children (which we address next), article 3(1) of the United Nations Convention on the Rights of the Child 1989 ("the UNCRC") requires that, in all actions concerning children, their best interests shall be a primary consideration.

30. The way in which the 1980 Hague Convention operates to the benefit of children generally, as well as to the benefit of the individual child, was explained by Baroness Hale and Lord Wilson JJSC when giving the judgment of the court in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27; [2012] 1 AC 144 ("Re E"):

> "[14] … [T]he fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The Preamble to the Convention declares that the signatory states are 'Firmly convinced that the interests of children are of paramount importance in matters relating to their custody' and 'Desiring to protect children internationally from the harmful effects of their wrongful removal or retention…'. This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see [the 1980 Hague Convention Explanatory Report by Professor Elisa Pérez-Vera, the rapporteur to the 1980 sessions of the Hague Conference which produced the Convention ('the Pérez-Vera Report')], at paragraph 25."

> "[52] … [T]he whole of the [1980] Hague Convention is designed for the benefit of children, not of adults. The best interests, not only of children generally, but also of any individual child involved are a primary concern in the Hague Convention process. We agree with the Strasbourg court that in this connection their best interests have two aspects: to be reunited with their parents as soon as possible, so that one does not gain an unfair advantage over the other through the passage of time; and to be brought up in a 'sound environment', in which they are not at risk of harm. The Hague Convention is designed to strike a fair balance between those two interests. If

> it is correctly applied it is most unlikely that there will be any breach of article 8 or other [European Convention on Human Rights ("ECHR")] rights unless other factors supervene. [Neulinger and Shuruk v Switzerland (ECtHR Application No 41615/07) [2011] 1 FLR 122] does not require a departure from the normal summary process, provided that the decision is not arbitrary or mechanical. The exceptions to the obligation to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to the children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be."

See also paragraphs 20-25 of the Pérez-Vera Report.

31. The 1980 Hague Convention is, therefore, based on the presumption that the *prompt* return of an abducted child promotes the interests of children generally as well as the interests of the individual child.

32. The requirement for expedition and the obligation imposed on states to act expeditiously are emphasised throughout its provisions, starting with the Preamble which refers to the establishment of "procedures to ensure [a child's] prompt return to the State of their habitual residence". Article 1 proceeds to set out the objects of the Convention as:

> "a) to secure the *prompt* return of children wrongfully removed or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." (emphasis added)

33. Article 2 requires Contracting States to take appropriate measures to implement the objectives of the Convention; and, for this purpose, "they shall use the most expeditious procedures available". Article 11 also imposes procedural obligations on Contracting States, by expressly requiring that the judicial and administrative authorities of Contracting States "act expeditiously in proceedings for the return of children"; and that, if a decision is not reached within six weeks of the commencement of an application, then reasons for the delay can be requested. That obligation incorporates a duty to ensure that applications for the return of a child are, so far as possible, "granted priority treatment" (see paragraph 104 of the Pérez-Vera Report).

34. The requirement to act expeditiously is reinforced by the following:

    i) Part 12 Chapter VI (Proceedings under the 1980 Hague Convention and other international instruments) of the Family Procedure Rules 2010 generally

requires expedition at each stage of an application under the 1980 Hague Convention (see, e.g., FPR rules 12.48, 12.49 and 12.51). The Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings issued by the President of the Family Division on 13 March 2018 has the same objective.

ii) The requirements of article 8 of the ECHR which include positive procedural obligations on Contracting States to provide a fair, efficient and effective mechanism for determining the issue of return which reflects "a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action" (Ignaccolo-Zenide v Romania (ECtHR Application No 31679/96) (2001) 31 EHRR 7 at [94]). Given that the passage of time can have "irremediable consequences for relations between a child and the [left-behind] parent", these generally import an element of urgency into proceedings for the return of an abducted child (Maumousseau and Washington v France (ECtHR Application No 39388/05) (2007) 51 EHRR 35 at [83]).

35. The primary substantive obligation on Contracting States is set out in article 12 of the 1980 Hague Convention, which provides as follows (so far as relevant to this appeal):

> "Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

Article 12 is drafted in mandatory terms: the obligation on the Contracting State is "to order the return of the child forthwith". This is subject only to the settlement provision in article 12 (when the application has been initiated more than one year since the wrongful removal or retention) and/or to one of the exceptions in article 13 and/or to the provisions of article 20. The onus of establishing these grounds is on the taking parent.

36. Article 13 provides:

> "Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

37. The focus of article 13(b) is on the risk to the child: if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, then the source of the risk and how it arises are irrelevant (Re E at [34]; and Re S (A Child) (Abduction: Rights of Custody) [2012] UKHL 51; [2012] 2 AC 257 ("Re S (2012)") at [34] per Lord Wilson, giving the judgment of the court).

38. Although the focus is on the child, it is well-established that the child's situation may be directly or indirectly affected by the taking parent's situation with the result that the latter can be highly relevant to whether the grave risk referred in article 13(b) has been established. Thus, Hale LJ said in TB v JB (Abduction: Grave Risk of Harm) [2000] EWCA Civ 337; [2001] 2 FLR 515 at [44]:

> "It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left-behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it."

A similar point was made by Wall LJ in Re W (Abduction: Domestic Violence) [2005] 1 FLR 727 at [49]; and in Re S (2012), Lord Wilson said (at [34]):

> "In the light of these passages we must make clear the effect of what this court said in [Re E]. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned."

A recent example of this was B (A Child : Abduction: Article 13(b)) [2020] EWCA Civ 1057. We would also refer to the Guide to Good Practice on Article 13(1)(b) published by the Permanent Bureau of the Hague Conference in March 2020 which, at paragraph 33, notes that this "exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child".

39. Article 20 provides:

> "The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Although this article is not expressly incorporated by the 1985 Act, it has been given domestic effect by section 6 of the Human Rights Act 1998 which makes it unlawful for any public authority to act in a way that is incompatible with the ECHR, so that a court (as a public authority) is bound to give effect to ECHR rights wherever they appear, including the rights in article 20 (Re D at [65]).

40. Article 20 appears very rarely to have been relied upon by a court as a ground for refusing the return of a child. The statistical analysis of applications made under the 1980 Convention in 2015, undertaken by Professor Nigel Lowe and Victoria Stephens for the 2017 Seventh Special Commission on the 1980 Hague Convention (and the 1996 Child Protection Convention), identified only two cases in which a return had been refused under article 20.

41. Mr Setright, drawing on an article by Professor Merle Weiner ("Strengthening Article 20" (2004) 38 University of San Francisco Law Review 701), submitted that, properly construed and applied, article 20 should be more broadly interpreted so as to provide greater focus on the position of the taking parent, in particular a parent who has been the victim of domestic abuse. This is not an issue which we need to address in this judgment; but, given the manner in which article 13(b) is applied, as set out above, we see no reason to extend the scope of article 20 for the reason suggested by Mr Setright. The issue he raised is amply reflected in the operation of article 13(b). We shall return to his additional submission as to the relevance of the taking parent having made an asylum application, with the child as a dependant, to the determination of an application under the 1980 Hague Convention (paragraph 161(v) below).

42. Another important aspect of the 1980 Hague Convention, which reflects the interests of the child being "at the forefront of the whole exercise" (Re E at [14], quoted at paragraph 30 above), is the voice of the child. The importance of the voice of the child is recognised world-wide by article 12 of the UNCRC which provides:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

At a European level, its specific importance in the determination of proceedings under the 1980 Hague Convention is recognised by article 11(2) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and

enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa"), which provides:

> "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

The importance of hearing children in proceedings under the 1980 Hague Convention was also emphasised by Baroness Hale in Re D, at [59], when she referred to article 11(2) of Brussels IIa as enunciating a principle of "universal application" and to this being "consistent with our international obligations under article 12" of the UNCRC.

43. By section 3(1)(a) of the 1985 Act, for England and Wales, the Lord Chancellor is the Central Authority for the purposes of the 1980 Hague Convention, which function he exercises through the International Child Abduction and Contact Unit. In England and Wales, applications under the Convention must be made in the High Court and issued in the Principal Registry of the Family Division, and heard by a High Court Judge (section 3(a) of the 1985 Act and FPR rule 12.45). The High Court thus has the exclusive statutory power to determine such applications.

Immigration Law

Introduction

44. In England and Wales, the control of immigration (including the grant of asylum) is exercised under a statutory framework rooted in the Immigration Act 1971 and subsequent legislation, including Immigration Rules made by the Secretary of State and laid before Parliament under section 3(2) of that Act. Immigration Rules are an integral part of the statutory scheme (R (Munir) v Secretary of State for the Home Department [2012] UKSC 32; [2012] 1 WLR 2192 at [26]-[27] per Lord Dyson JSC). However, asylum law in this jurisdiction is ultimately derived from a variety of international treaties and European measures, as well as domestic legislation, regulations and rules, each driven by the same underlying principles.

45. The most relevant international treaty is of course the 1951 Geneva Convention. The Convention has not been incorporated into our domestic law. However:

    i) Generally, it has been said that: "It is plain… that the British regime for handling applications for asylum has been closely assimilated to the Convention model" (R v Asfaw [2008] UKHL 31; [2008] 1 AC 1061 at [29] per Lord Bingham of Cornhill).

    ii) Section 2 of the Asylum and Immigration Appeals Act 1993, headed "Primacy of Convention", provides that nothing in the Immigration Rules (where much of the transposition of the 1951 Geneva Convention into domestic law is made) shall lay down any practice which would be contrary to the Convention.

    iii) The United Kingdom is currently bound to act in accordance with the rights protected by the Charter of Fundamental Rights of the European Union ("the

Charter") (article 6(1) of the Treaty of the European Union). Article 18 of the Charter provides that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Geneva Convention; and article 19 effectively guarantees, in appropriate cases, that those with the right to "subsidiary protection" (see paragraph 62 below) cannot be removed to a state in which the relevant risk arises.

iv) Where rights granted by the 1951 Geneva Convention are effectively incorporated into the relevant European Directives, they are enforceable in the UK either as a result of transposing domestic provisions or because of vertical direct effect (see paragraph 48 below).

v) As noted above (paragraph 39), section 6 of the Human Rights Act 1998 makes it unlawful for any public authority to act in a way that is incompatible with the ECHR, so that a court (as a public authority) is bound to give effect to ECHR rights whenever they are engaged.

46. The primary European measures are (i) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") (the UK having opted out of the 2011 Recast Directive), and (ii) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive") (the UK likewise having opted out of the 2013 Recast Directive).

47. These Directives are not directly applicable; but the United Kingdom, as a Member State, was required to transpose them by 10 October 2006 and (generally) 1 December 2007 respectively. However, because existing domestic legislation was considered by the Government already to be largely consistent with these Directives, there was no single implementing measure: the existing domestic provisions were simply supplemented by regulations such as the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006 No 2525) ("the Qualification Regulations"), the Asylum (Procedures) Regulations (SI 2007 No 3187) and amendments to the Immigration Rules.

48. No one before us suggested that the Directives were other than fully transposed by this patchwork of domestic provisions; but, as we shall see, there is at least considerable doubt as to whether that transposition has been made in every respect material to this appeal. However, insofar as they have not been transposed, by article 4(3) of the Treaty on European Union, Member States have an obligation to take all measures "to ensure fulfilment of the obligations arising out of the [European] Treaties and resulting from the acts of the institutions of the Union". Consequently, our courts in any event have to interpret national law, so far as possible, to achieve the purposes of the Directives and effectively ascribe to those seeking asylum the rights against the state given to them by the Directives, i.e. they would have to acknowledge the vertical direct effect of the Directives (see Marleasing SA v La Comercial Internacionale de Alimentación SA (ECJ Case C-016/89) [1993] BCC 421 ("Marleasing") at [8]; and the helpful discussion of the issue in the context of the Qualification Directive by Patterson J in AD v Home Office [2015] EWHC 663 (QB) ("AD") at [52] and following). So far as domestic law is concerned, such

"enforceable EU rights" are recognised by section 2(1) of the European Communities Act 1972. We also record that, by reference to Marleasing and AD, the Secretary of State expressly accepted in her submissions in this appeal that the Qualification Directive (i) "confers the right on an individual to be granted refugee status under article 13 or subsidiary protection under article 18 if the criteria are met", and (ii) "[obliges] Member States under article 21… to respect the principle of non-refoulement". We consider these specific provisions of the Directive below (paragraphs 58 and following).

49. Whilst, by virtue of section 2 and 4(1) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020, European law (including the Charter) will generally cease to be applicable in England and Wales after the Brexit "IP [implementation period] completion day" (i.e. 31 December 2020: see section 39 of the 2020 Act), "EU-derived domestic legislation" will continue to apply (see sections 1A, 1B and 2(1) of the 2018 Act). "EU-derived domestic legislation" includes not only transposing statutory provisions but also regulations or rules made under such provisions (section 2(2)). However, by virtue of section 4, also saved are "rights, powers, liabilities, obligations, restrictions, remedies and procedures" which, immediately prior to IP completion day, "are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972" and "are enforced, allowed and followed accordingly". As a result of section 4(2)(b), this expressly does not apply to rights which "arise under an EU directive… and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case)". Sections 2, 3 and 4 of the 2018 Act are subject to the exceptions set out in section 5 to and Schedule 1; but none is relevant to this appeal.

50. In short, rights conferred by a Directive will be retained if they have been either transposed or in any event recognised (either as part of the *ratio* of the case or *obiter*) by the domestic courts prior to the IP completion date. In her submissions to us, the Secretary of State thus accepted that, after that date, the rights and obligations referred to in paragraphs 48-49 above, flowing from the Qualifications Directive and recognised in such cases as AD, will continue to apply after 31 December 2020.

51. With regard to the Immigration Rules, Part 11 of the Rules provides the mechanism for the UK to give effect to the obligations imposed on the state by the Qualification and Procedures Directives, including a detailed procedure for determining claims for asylum and subsidiary protection, and for determining whether refugee/subsidiary status, once granted, should be revoked.

The 1951 Geneva Convention: Definition of Refugee and Rights Conferred

52. Rather than applying to specified groups as had its predecessors, article 1A of the 1951 Geneva Convention provides a single definition for "refugee" in the following terms (so far as relevant to this appeal):

> "… [T]he term 'refugee' shall apply to any person who… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

> avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The definition has been effectively adopted by both European measures (see article 2(c) of the Qualification Directive and article 2(f) of the Procedures Directive) and domestically (see regulation 2 of the Qualification Regulations).

53. As "refugee" is defined in terms of a well-founded risk, an individual having once fallen within that definition may cease to do so if the nature or level of risk changes. Article 1C(5) of the 1951 Geneva Convention thus provides that the Convention shall cease to apply to any person otherwise falling within article 1A if:

> "He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality…".

54. The 1951 Geneva Convention lays down minimum rights for refugees, including the right to access to the courts (article 16), elementary education (article 22) and work (Chapter III), and the right to non-discrimination (article 3), non-penalisation (article 31) and (most importantly for the purposes of this appeal) non-expulsion and non-refoulement (articles 32 and 33).

55. Article 32 prohibits a Contracting State from expelling a refugee "lawfully in its territory", i.e. a refugee recognised as such as a matter of national law (Secretary of State for the Home Department v ST (Eritrea) [2010] EWCA Civ 643 at [39] per Stanley Burnton LJ with whom Sir Antony May PQBD and Longmore LJ agreed).

56. Article 33 provides, under the heading "Prohibition of Expulsion or Return ('Refoulement')":

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

It is to be noted that the scope of the prohibition in article 33 is narrow: it prohibits the act of refoulement. Because article 1A defines "refugee" in terms of well-founded fear of persecution in the country of nationality, the question generally posed by article 33 is whether removal of an individual from a state will return (or risk the return of) that person to the country of nationality where he or she will risk

persecution. If the person faces no such risk in his or her country of nationality, removal to that country is not prohibited. The exceptions to the principle of non-refoulement set out in article 33(2) are consistently found throughout European and domestic asylum measures, but are not relevant to this appeal.

57. Under the 1951 Geneva Convention, save for article 32 (which applies only to a refugee recognised as such by the relevant domestic law), these rights apply to a person from when, and for so long as, he or she satisfies the article 1A criteria for a refugee, whether or not refugee status has been recognised. The importance of the recognition of refugee status by the state was made clear in Saad, Diriye and Osirion v Secretary of State for the Home Department [2001] EWCA Civ 2008 ("Saad") at [12] per Lord Phillips of Worth Matravers MR giving the judgment of the court because, without it, a refugee's access to Convention rights is inevitably impeded; but the Convention itself does not deal with such recognition, no doubt because whether an individual is lawfully in a state as a refugee is a matter for domestic law. Nor does it impose any positive obligation on a Contracting State to permit a refugee to reside in its territories (as opposed to the negative obligation not to expel or refoule). However, so far as the European Union is concerned, those are matters dealt with in the Qualification Directive.

The EU Directives and Immigration Rules: Rights Conferred

58. The Qualification Directive effectively incorporates article 33 of the 1951 Geneva Convention, article 21 providing that:

> "Member States shall respect the principle of non-refoulement in accordance with their international obligations."

Like the 1951 Geneva Convention, it also acknowledges that recognition of refugee status is merely a declaratory act (recital (14)), "refugee status" meaning simply "the recognition by a Member State of a third country national or a stateless person as a refugee" (article 2(d)).

59. However, it generally links the rights it gives to refugees to the grant of refugee status by the relevant Member State: the rights are derived and flow from the recognised status. Thus, in articles 24-34, it requires Members States to provide a certain level of benefits to those it recognises as having refugee status including (in article 24(1)) a residence permit for at least three years renewable.

60. Although the article 21 obligation in respect of non-refoulement is not expressly limited to those with refugee status, it is in effect so restricted, because the non-refoulement of those who merely have a pending application for asylum is covered, in a somewhat different way, by article 7 of the Procedures Directive which, as we shall see (paragraph 76 below), imposes a positive duty on Member States in which the application is made to allow such applicants to remain its territory until the application is determined. In "respect[ing] the principle of non-refoulement", the Directives do not require Member States to take any steps, or refrain from taking any steps (such as refoulement), in respect of persons who have neither been granted nor applied for refugee status.

61. This scheme – linking refugee rights to the state's recognition of status, in a way that the 1951 Geneva Convention generally does not – satisfies the Convention obligations because article 13 of the Qualification Directive imposes an obligation on a Member State to grant refugee status to anyone who qualifies as a refugee in accordance with Chapters II and III of the Directive. The right of an individual to be granted refugee status where he or she satisfies the relevant European criteria was specifically recognised in AD (cited at paragraph 48 above).

62. The Qualification Directive also provides for parallel status and rights to "persons eligible for subsidiary protection", i.e. for those who do not qualify as refugees, but who would, on return, face a real risk of suffering "serious harm" as defined in article 15 (namely the death penalty or execution, treatment contrary to article 3 of the ECHR, or serious and individual threat by reason of indiscriminate violence in situations of armed conflict) (articles 2, 18 and 24(2)). In this way, the Directive covers not only compliance by Member States with their obligations under the 1951 Geneva Convention, but also under articles 2 and 3 of the ECHR. This judgment focuses on the provisions relevant to asylum; but this parallel scheme may have a part to play in the mother's claim for international protection because she claims that, even if on return to South Africa she would not be subject to relevant persecution, she would be at risk of suffering treatment contrary to articles 2 and/or 3 of the ECHR; and thus, even if not a refugee, she is eligible for subsidiary protection.

63. Reflecting article 1C of the 1951 Geneva Convention, the Qualification Directive also provides for cessation of refugee status. Article 11(1) sets out circumstances in which a person shall cease to be a refugee, including (at (e)), "if he or she… can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality". In considering this, by virtue of article 11(2), Member States are required to have regard to whether the change in circumstances "is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded". By article 14, Member States are required to revoke refugee status where, amongst other things, the relevant individual "has ceased to be a refugee in accordance with article 11". Again, under the Directive, the cessation of refugee rights is linked to the issue of recognition of refugee status by the Member State. There are parallel provisions for the cessation and revocation of the subsidiary protection status (articles 16 and 19).

64. The Qualification Directive also makes provision for "family members", defined in article 2(h) to include the spouse, partner and unmarried minor children of the beneficiary of refugee or subsidiary protection status. Where family members do not themselves qualify for refugee or subsidiary protection status, article 23(2) requires Member States to ensure that they are entitled to the benefits provided by articles 24-34. This clearly has nothing to do with refoulement – indeed, a dependant is given the right to reside by article 24, but not the benefit of non-refoulement under article 21. Rather, reflecting rights under article 8 of the ECHR, it is to ensure that family unity is maintained.

65. Unlike the 1980 Hague Convention, the 1951 Geneva Convention and the Qualification Directive and Procedure Directives are not primarily concerned with the benefit of children. However:

i) Recital (12) of the Qualification Directive records that the best interests of the child should be a primary consideration of Member States when implementing the Directive.

ii) So far as the domestic position is concerned, section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), which reflects the general obligation towards children imposed on states by the UNCRC, in any event requires the Secretary of State to discharge any immigration or asylum functions "having regard to the need to safeguard and promote the welfare of children…".

66. Refugee status thus affords a relevant individual considerable rights, notably the right of residence in (and the right not to be expelled from) the Member State acknowledging the status as such. It is therefore unsurprising that European law recognises the importance of adequate and effective procedures for the granting and revocation of refugee status.

67. The Procedures Directive, as its long-title suggests, establishes minimum standards of procedures for granting and withdrawing refugee status (article 1). Under it, Member States are thus required to ensure that asylum applications are appropriately examined, up-to-date information is obtained as to the circumstances prevailing in the applicant's country of origin, and the applicant given an opportunity to obtain appropriate legal advice and for a personal interview on the application (articles 8 and 12-16). Equally, there are provisions ensuring a proper examination prior to any reconsideration of the validity of current refugee status, including an opportunity for a personal interview (articles 37-38). Article 39(1) requires Member States to ensure that applicants for asylum have an effective remedy before a court or tribunal against (amongst other things) a decision taken on his or her application for asylum (article 39(1)(a)(i)) and a decision to withdraw refugee status (article 39(1)(e)). Article 39(3) provides that Member States shall, where appropriate, provide rules for dealing with the question of whether the right in article 39(1) shall have the effect of allowing applicants to remain in that country pending its outcome.

68. Several provisions of the Procedures Directive are particularly relevant to this appeal, which we consider below, in turn, as follows:

i) article 4 ("Responsible authorities") (paragraphs 69-75);

ii) article 7 ("Right to remain in the Member State pending examination") (paragraphs 76-82);

iii) article 6 ("Access to the procedure") (paragraphs 83-94); and

iv) article 22 ("Collection of information in individual cases) and article 41 ("Confidentiality") (paragraph 95).

69. First, article 4 requires a Member State to designate a determining authority "for all procedures" which will be responsible for the examination of applications for asylum (article 4(1)). It is clear from the Immigration Rules that for the UK, subject to available rights to appeal or judicial review (see paragraphs 75-76 below), the determining authority is the Secretary of State who is made solely responsible for

investigating and determining claims for asylum or subsidiary protection, and also for decisions to revoke such status once granted.

70. Thus, paragraph 328 of the Immigration Rules provides that all asylum applications will be determined *by the Secretary of State* in accordance with the 1951 Geneva Convention; and paragraph 333A requires *the Secretary of State* to ensure that a decision is taken on an application for asylum "as soon as possible, without prejudice to an adequate and complete examination", and that, if a decision is not taken within six months, then *the Secretary of State* has to inform the applicant of the delay and give a time estimate for determination. *The Secretary of State* is equally responsible for the revocation of refugee status (see paragraph 73 below).

71. Paragraph 334 provides that "an asylum applicant will be granted asylum in the United Kingdom" if the Secretary of State is satisfied that the applicant meets a number of criteria, including (i) that "they are in the United Kingdom or have arrived at a port of entry in the United Kingdom", and (ii) that "they are a refugee, as defined in regulation 2 of the [Qualification Regulations]", i.e. the definition found in article 1A of the 1951 Geneva Convention (see paragraph 52 above). Paragraph 336 provides that, if the criteria are not satisfied, the application for asylum "will be refused", i.e. refusal is mandatory.

72. A refugee is initially given five years' leave to remain (paragraph 339Q(i)). As a matter of practice, the Secretary of State will not seek to terminate that leave or remove any person she has recognised to be a refugee without going through the procedure, set out in the Immigration Rules, for revoking that person's refugee status. That is of course in line with the obligation in article 32 of the 1951 Geneva Convention not to expel anyone with recognised refugee status, as well as the obligation in article 33 of the Convention and article 21 of the Qualification Directive not to refoule.

73. Under paragraphs 338A and 339A, refugee status shall be revoked if the Secretary of State is satisfied that one or more criteria are met, including (at paragraph 339A(v)) that the circumstances in which they have been recognised as a refugee have ceased to exist.

74. Asylum decisions of the Secretary of State are only challengeable by way of appeal granted by the statutory provisions or by judicial review on conventional public law grounds. Section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as substituted by the Immigration Act 2014 gives a right of appeal in respect of any decision by the Secretary of State to refuse "a protection claim" (i.e. a claim for asylum or subsidiary protection) or to revoke "protection status" (i.e. refugee or subsidiary protection status); and section 84(1) sets out the available grounds of appeal including that removal of the appellant from the UK would breach the UK's obligations under the 1951 Geneva Convention or in relation to persons eligible for subsidiary protection.

75. An appeal thus involves a review of the merits of the asylum claim. However, the statutory scheme excludes the right to appeal – either any appeal or, in some cases, an in-country appeal – in a number of circumstances.

i) Where the Secretary of State decides that further representations to the effect that an individual is entitled to asylum do not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules, then no right to appeal arises (R (Robinson) v Secretary of State for the Home Department [2019] UKSC 11; [2019] 2 WLR 897).

ii) Section 96(1) of the 2002 Act provides that an appeal may not be brought by a person where the Secretary of State has certified that that person was notified of a right of appeal under that section in respect of an earlier decision (whether an appeal was in fact made or not), the ground of entitlement now relied upon could have been raised in any such appeal, and there was no satisfactory reason for that ground not having been raised in such an appeal.

iii) Section 120 of the 2002 Act requires that, where an irregular migrant has been served with a section 120 notice, he must promptly bring forward any claim of entitlement to leave that he then has, with a continuing duty to make a claim which arises in the future as a result of a change of circumstances. Section 96(2) provides that a person may not bring an appeal if the Secretary of State certifies that the person has received a section 120 notice, and he or she now relies upon a ground of entitlement (including a claim for asylum) that should have but has not been raised in a section 120 statement and there was no satisfactory reason for that ground not having been raised in such an statement.

iv) By section 92(2) of the 2002 Act and section 33 of and Part 1 of schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, an appeal must be brought from outside the UK if the asylum claim is certified by the Secretary of State as clearly unfounded under section 94(1). In other words, if an asylum claim is certified, the applicant can be removed to his or her country of nationality prior to any (necessarily out-of-country) appeal being lodged. In respect of an application for asylum from a national of a state presumed by the statute to be "safe" (in the sense that, in general, there is no serious risk of persecution of persons entitled to reside in it such that return of one of its own nationals will not breach either the 1951 Geneva Convention or the ECHR), the Secretary of State is required to certify the asylum claim as clearly unfounded unless satisfied that it is not, certification having the effect of removing any right to an in-country appeal. The list of designated safe states includes South Africa (section 94(4)(w)).

In respect of a material non-appealable decision (e.g. a decision that representations do not amount to a fresh claim, or certification under section 94 or 96 of the 2002 Act), any challenge is only by way of judicial review.

76. Second, by article 7, although an applicant for asylum has no right to a residence permit merely as a result of his application, he or she must:

> "… be allowed to remain in the Member State in which the application is made, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III of the Directive."

This ensures the non-refoulement of a refugee who is awaiting an asylum decision: but the obligation on the state is expressed in a different form, namely as a positive duty to allow such an applicant to remain rather than as a negative duty not to remove/refoule him or her.

77. In our domestic provisions, the position of asylum applicants is dealt with in section 77 of the 2002 Act, which provides (so far as relevant to this appeal):

> (1) While a person's claim for asylum is pending he may not be—
>
> (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
>
> (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.
>
> (2) In this section—
>
> (a) 'claim for asylum' means a claim by a person that it would be contrary to the United Kingdom's obligations under the [1951 Geneva] Convention to remove him from or require him to leave the United Kingdom, and
>
> (b) a person's claim is pending until he is given notice of the Secretary of State's decision on it.
>
> …
>
> (4) Nothing in this section shall prevent any of the following while a claim for asylum is pending—
>
> (a) the giving of a direction for the claimant's removal from the United Kingdom,
>
> (b) the making of a deportation order in respect of the claimant, or
>
> (c) the taking of any other interim or preparatory action."

78. Section 78 effectively extends that protection to asylum applicants whose applications are refused but who exercise an in-country right of appeal while the appeal is "pending", i.e. until the appeal is withdrawn, abandoned or "finally determined" (section 104(1)). An appeal is not "finally determined" whilst an application for permission to appeal to the Upper Tribunal or the Court of Appeal has been or could be made in time, or permission to appeal has been granted and the appeal awaits determination (section 104(2)). The provisions of sub-sections 78(1)(a) and (b) are in the same terms as sub-sections 77(1)(a) and (b).

79. It can readily be seen that these provisions do not replicate article 7 of the Procedures Directive. In particular:

i) Article 7 is in the form of a positive duty to allow asylum applicants to remain in the territory of the Member State until the determining authority has made a decision. Section 77 is in the form of a general negative provision that such an applicant cannot be removed from, or required to leave, the UK "in accordance with a provision of the Immigration Acts". That is a phrase to which we shall return (see paragraphs 98-99 below); but, on the face of it, it does not act as a prohibition on the removal of asylum applicants under any power outside the Immigration Acts (such as the power to return a child under the 1980 Hague Convention). The domestic provisions thus appear, in this respect, to be narrower than the European requirements (or, indeed, those of articles 32 and 33 of the 1951 Geneva Convention).

ii) The Directive makes no provision for asylum applicants who have had their application refused but appeal: article 7 only applies until the determining authority makes a decision. However, section 78 imposes a prohibition on the removal of appellants who have and exercise an in-country right of appeal, i.e. appellants whose asylum claim is not considered by the Secretary of State to be clearly without merit (see paragraphs 74-75 above). The domestic provisions are, in this respect, wider than the European requirements (and, indeed, those of the 1951 Geneva Convention).

iii) Sections 77 and 78 proscribe any requirement to leave and the act of removal of an asylum applicant: but, in sections 77(4) and 78(3), they expressly allow "interim or preparatory action" including the giving of a direction for that person's removal.

80. Sections 77 and 78 only apply to a person who has made a claim that it would be contrary to the UK's obligations under the 1951 Geneva Convention to require that person to leave, or to remove him or her from, the UK. However, paragraph 329 of the Immigration Rules provides, so far as relevant to this appeal:

> "Until an asylum application has been determined by the Secretary of State… no action will be taken to require the departure of the asylum applicant *or their dependants* from the United Kingdom" (emphasis added).

The first part of this paragraph effectively reinforces section 77, so far as asylum applicants are concerned. However, the latter extends the protection to dependants for whom no independent asylum application has been made whilst the principal applicant's application is pending. In the Rules, there is no provision for dependants during the pendency of an appeal by the principal applicant, equivalent to section 78.

81. Of course, nothing prevents the Secretary of State adopting a policy of taking no action to remove the dependants of an asylum applicant during the pendency of that application. Indeed, given the obligations under article 8 of the ECHR, the principle of family unity, and the obligation under article 23 of the Qualification Directive to give dependants of a successful asylum applicant the right to reside, such a policy is entirely understandable. However, we do not agree with Mr Payne's submission (supported by Mr Setright) that articles 6(3), 7(1) and 9(3) of the Procedures Directive require it. They do not. Article 6(3) simply gives Member States a power to accept asylum applications made by a principal applicant on behalf of his or her dependants.

Whilst article 7(1) requires Member States to allow "applicants" to remain in the state during the pendency of the application, "applicant" is restrictively defined in article 2(c) to mean only a person who has made an application for asylum. Article 9(3) merely allows a Member State, on an application for asylum, to take a single decision covering all dependants. There is nothing in any of these provisions that prohibits the removal of a dependant of an asylum applicant who has no independent asylum claim of his or her own. That prohibition stems solely from paragraph 329 of the Immigration Rules.

82. Furthermore, although, in line with her obligations under section 55 of the 2009 Act, it is the Secretary of State's policy to consider whether an identified child dependant of an asylum applicant for whom no independent asylum claim is made requires international protection (see paragraph 87 below), it is not suggested on her behalf that, by virtue of that alone, such children are from the outset "asylum applicants" or treated as such. They are not. Hence the need for the words "… and their dependants…" in paragraph 329 of the Immigration Rules. The extension of the protection to them by that paragraph can therefore only be on the basis of the family unity principle, and not the principle of non-refoulement.

83. Third, article 6 of the Procedures Directive deals with "Access to the Procedure". Member States must ensure that a capacitous adult has the right to make an asylum application on his or her own behalf (article 6(2)); and may determine "in national legislation" circumstances in which a minor can make an application for asylum on his or her own behalf (article 6(4)(a)) and circumstances in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor (article 6(4)(c)).

84. In domestic law, as we have described, paragraph 329 of the Immigration Rules proscribes the removal of the dependants of an asylum applicant during the pendency of the asylum application. Otherwise, family members and dependants of a primary asylum applicant are covered by paragraphs 339Q(iii) and 349 of the Rules and the Secretary of State's Asylum Policy Instruction: Dependants and former dependants (Version 2.0) (May 2014) ("the API").

85. Reflecting the requirements of article 23 of the Qualification Directive (see paragraph 65 above), paragraph 339Q(iii) provides:

> "The Secretary of State will issue a residence permit to a family member of a person granted refugee status or humanitarian protection where the family member does not qualify for such status. A residence permit may be granted for a period of five years…. 'Family member' for the purposes of this sub-paragraph refers only to those who are treated as dependants for the purposes of paragraph 349."

Paragraph 349 provides:

> "A spouse, civil partner, unmarried partner, or minor child accompanying a principal applicant may be included in the application for asylum as a dependant, provided, in the case of an adult dependant with legal capacity, the dependant consents

> to being treated as such at the time the application is lodged. A spouse, civil partner, unmarried partner or minor child may also claim asylum in their own right. If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in their own right will be also considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where they make a claim as a dependant or in their own right."

86. Neither paragraph requires (or, indeed, allows) a dependant to be granted refugee status merely on the basis of his or her dependency on the principal asylum application. Such a grant would be inconsistent with the mandatory requirement in paragraphs 334 and 336 of the Immigration Rules to refuse an application for asylum if the applicant is not a refugee as defined in article 1A of the 1951 Geneva Convention (see paragraph 71 above). Of course, it is not necessary to confer "refugee status" on dependants who do not fall within the definition of refugee to enable them to obtain rights such as the right to remain: as we have explained, these rights for mere dependants (which article 23(2) of the Qualification Directive guarantees: see paragraph 64 above) do not derive from asylum law, but from the respect for the right to family life and in accordance with the principle of family unity.

87. The API confirms that a dependant may be included in the application of a principal asylum applicant as a dependant and/or may make an independent asylum claim (paragraph 3.4). Where the principal applicant's claim is refused, then the claims of dependants will normally also be refused in line, except where, upon examination of the application, they have independent international protection needs. The policy makes clear that, where a principal applicant for asylum includes dependants without making any independent claim for protection on their behalf, the Secretary of State will in any event (and without a formal application for asylum having been made on their behalf) consider whether such dependants require protection as refugees or as persons entitled to subsidiary protection.

88. The Secretary of State is clearly entitled to do that. Recital (27) of the Qualification Directive acknowledges that family members, due to their relationship to a refugee, "will normally be vulnerable to acts of persecution in such a manner that could be the basis of refugee status". Further, it is self-evident that an independent asylum application for a dependent child may not be made at the outset only because the principal applicant is likely to make an asylum application at a time of substantial personal distress, without proper advice and/or full understanding of the criteria for protection. That policy is therefore understandable and unexceptionable. However, as we have explained, it does not make all dependants "asylum applicants"; nor does the Secretary of State suggest that it does.

89. The API also indicates that, even where the principal asylum application is refused, the Secretary of State will consider the child in the context of section 55 of the 2009 Act, which may lead to a grant of leave to enter or remain (paragraph 4.2). Again, that policy, which is entirely distinct from the policies which seek to protect

dependants who have an independent claim for international protection, is understandable; and probably an inevitable consequence of section 55.

90. However, the API does not stop there. As we have described, where the principal applicant's claim for asylum is successful, paragraphs 339Q(iii) and 349 of the Immigration Rules provide that dependants will be granted leave to enter or remain for the same duration. The API goes further. Paragraph 4.1 states:

> "Dependants of an asylum applicant who have been included in the initial asylum claim will, if the principal applicant is granted asylum… normally be granted leave of the same duration *and status* as the principal applicant." (emphasis added)."

91. In paragraph 6 of his written submissions of 17 August 2020, Mr Payne suggested that, as well as this paragraph of the API, paragraph 339Q of the Immigration Rules granted the same status (i.e. refugee status) to a dependant as to a successful principal asylum applicant; but he subsequently confirmed that the Secretary of State accepts that paragraph 339Q grants in line only leave and not status. In our view, that is clearly so. Neither in paragraph 339Q nor anywhere else in the Rules is the Secretary of State given the power to grant refugee status to an individual who does not personally satisfy the criteria for such status as set out in article 1A of the 1951 Geneva Convention. Indeed, as we have described (paragraph 71 above), paragraphs 334 and 336 of the Rules specifically prohibit the grant of refugee status in these circumstances.

92. The position of dependants who, under the API, have been granted "refugee status" whilst not satisfying the criteria for a "refugee" was recently considered by this court in JS (Uganda) v Secretary of State for the Home Department [2019] EWCA Civ 1670: [2020] 1 WLR 43 ("JS (Uganda)"). JS was a dependent child of an asylum applicant and had no independent claim to protection. The Secretary of State granted him "refugee status" under the (then) Family Reunion Policy within the API. However, the Secretary of State submitted that the grant by her of "refugee status" in these circumstances did not make an individual a "refugee" for the purposes of the 1951 Geneva Convention. Often, whether someone is a refugee or the dependant of a refugee does not much matter in practice, because the rights afforded to each are generally similar; but it mattered in this case, because JS had committed various crimes and the Secretary of State wished to remove him, but (JS contended) there had been no change in relevant circumstances since she afforded him "refugee status" and so she could not revoke that status and refoule him.

93. The core proposition put forward by the Secretary of State – that the grant by her of "refugee status" in these circumstances did not make an individual a "refugee" for the purposes of the 1951 Geneva Convention – entirely unsurprisingly, found favour in JS (Uganda). The court confirmed that, as article 1A of the 1951 Geneva Convention defines "refugee" exclusively in terms of a person who himself or herself had a well-founded fear of being persecuted, a person could not derive refugee status from the refugee status of another person. There is no such thing as a "derivative refugee". Consequently, a person admitted to the UK by the Secretary of State as a dependant of someone who is recognised as having refugee status does not, by dint of that dependency alone, acquire the status of a refugee under the Convention, even if, under

the API, he or she has been granted what is there called "refugee status". Such a person can, therefore, be refouled.

94. In our view, insofar as paragraph 4.1 of the API (which is mere policy) is inconsistent with paragraphs 334 and 336 of the Immigration Rules in this respect, it cannot stand. That appears to us to have been the simple answer to the claim in JS (Uganda): the Secretary of State could not have granted JS "refugee status" in its usual sense of status as a refugee. Insofar as the Secretary of State seeks to use "refugee status" in two different senses – one to reflect status as defined in article 1A of the Geneva Convention, the Qualification and Procedures Directives and the Qualifications Regulations, and the other somewhat wider – that is, at best, unhelpful and unnecessary, and can only lead to confusion. It led to the somewhat surreal arguments considered in JS (Uganda). It seems to us that it could only be helpful if the Secretary of State were to abandon the use of the phrase "refugee status" as meaning anything other than status as a refugee under the 1951 Geneva Convention. In the meantime, we touch upon the difficulties of the granting of "refugee status" to child dependants who are not refugees below (paragraph 126).

95. Fourth, there are two relevant provisions of the Procedures Directive relating to confidentiality. First, article 22(a) proscribes the disclosure of information regarding individual asylum applications (or the fact that such an application has been made) to the applicant's alleged persecutor(s). Second, in relation to information obtained in the course of their work, article 41 binds determining authorities by the confidentiality principle as enshrined in domestic law.

Authorities

96. We were referred to a number of authorities concerning the interface between applications under the 1980 Hague Convention and applications for asylum by the taking parent and/or the child. None of these cases authoritatively determines any of the issues with which we have to deal; but, as Counsel for each party prayed in aid various parts of these cases, it would be helpful to outline them before proceeding to deal with those issues.

97. In the first two cases in time, the essential facts were similar. A mother, who had removed the child or children from their home state, applied for asylum in the UK on the basis that she feared persecution from the father on any return. No claim for asylum was made on behalf of the abducted children, who were named as dependants in the respective mother's asylum applications. Habitual residence having been in a non-1980 Hague Convention country, the father applied for a return order under the inherent wardship jurisdiction.

98. In Re S (Child Abduction: Asylum Appeal) [2002] EWCA Civ 843; [2002] 1 WLR 2548 ("Re S (2002)"), a mother and two children came from India to the UK for a holiday; but, whilst here, she claimed asylum on the basis that she faced persecution from the father and she would be unable to survive in India as a single woman. She named her children as dependants. The claim for asylum was refused, although both mother and children were granted four years' exceptional leave to remain. The mother appealed against the refusal of the asylum claim: no appeal was made by or on behalf of the children. In the meantime, the father obtained an order for the return of the children forthwith on the ground that it was in their best interests, which the

mother also appealed submitting that section 15(1) of the Immigration and Asylum Act 1999 prohibited the removal of the children. That section, which was a predecessor of section 77 of the 2002 Act, provided as follows:

> "During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom".

99. Laws LJ, giving the judgment of the court and upholding the return order, held, at [21], that "remove" and "required to leave" as used in section 15 were "terms of art in the law of immigration", so that the prohibition in section 15 imposed a negative obligation only on the executive in the context of its administration of immigration law and practice. It did not circumscribe the duty and discretion of a judge exercising the wardship jurisdiction nor did it create an exception to the obligations arising under article 12 of the 1980 Hague Convention. The generality of article 33 of the 1951 Geneva Convention – which Laws LJ acknowledged – was not directly applicable in the UK, and could not justify a construction of section 15 which was wider than its terms or context would bear. Section 15 was thus narrower in scope than article 33.

100. Laws LJ recognised (at [27]) that section 15 did not in fact apply in that case, because no claim had been made for asylum by the children or on their behalves; and paragraph 329 did not apply because it only applied during the pendency of an asylum application and did not extend to a dependant where the principal application had been refused and the principal applicant had appealed. He referred to the practice of the Secretary of State not to remove dependants in these circumstances, and continued:

> "… and that practice, absent some wholly exceptional justification for a departure from it, would no doubt be protected by the courts either under article 8 of the [ECHR], or as a matter of legitimate expectation."

101. The appeal was consequently dismissed; and the children returned.

102. In Re H (Child Abduction: Mother's Asylum) [2003] EWHC 1820 (Fam); [2003] 2 FLR 1105 ("Re H (2003)"), the mother fled Pakistan and claimed asylum in the UK, alleging domestic violence by the father. The father brought their child to the UK, and the mother assumed care of the child contrary to the father's wishes. He then returned to Pakistan, and applied for a return order within wardship proceedings. The mother was granted asylum. It appears to have been common ground between the parties that the court could order the child's return despite the principle of non-refoulement.

103. In any event, drawing on Re S, Wilson J ordered the immediate return of the child, observing that, as this was an exercise of the wardship jurisdiction, by virtue of section 1(1) of the Children Act 1989, the child's best interests were a paramount consideration, and in normal circumstances the courts of the country of habitual residence could best determine the welfare of the child. He accepted that the grant of refugee status to the mother, the fact that the child had lived with the mother for 18 months in the UK and the alleged likely failure of the authorities in Pakistan to protect

the mother from the father were all matters which went in the balance against return; but, "after anxious thought", the judge concluded that the balance was in favour of return. Whilst the decision of the Secretary of State that the mother had a well-founded fear of persecution was significant, the father (who had played no part in the asylum claim) disputed the basis of that finding and the court here could not resolve that factual dispute. The return order did not compel the mother to return to Pakistan, and her refugee status did not prevent her returning if she chose to do so. Protective measures were put in place by way of undertakings which had been offered, e.g. to divorce the mother, to commence child proceedings in Pakistan, to provide the mother with support, to allow her to look after the child in Pakistan if she wished to return and not to assault or harass her.

104. The third authority is more recent. The factual and procedural background to F v M and another (Joint Council for the Welfare of Immigrants intervening) [2017] EWHC 949 (Fam); [2018] Fam 1 ("F v M (2017)") was not entirely straightforward. The family were nationals of Pakistan. In August 2014, the mother and eight-year-old child visited the UK with the consent of the father, but overstayed. The mother claimed asylum on the basis that she had suffered ill-treatment at the hands of the father and state protection was ineffective. The father applied for the summary return of the child to Pakistan within High Court wardship proceedings. The child then independently applied for asylum, on the basis that he too had suffered ill-treatment from his father. However, on the final return date of the father's application, the mother agreed to the child's return to Pakistan by a particular date, and undertook to withdraw her asylum application and that of the child. In the event, the asylum applications were not withdrawn, nor was the child returned. The mother applied to set aside the consent order with the undertakings in it, on the basis that she had not freely consented to it. The father applied to enforce the return order. In the meantime, the applications for asylum of both the mother and the child were granted. At a High Court hearing, the mother's application to set aside the consent order was dismissed, the father's application for enforcement of the return order was granted, and an order made for the return of the child forthwith.

105. The mother appealed to this court; and the child applied for permission to join the proceedings as a party and also for permission to appeal, which were both granted. At the substantive hearing, the appeals of the mother and the child were allowed, the consent order and later order directing the immediate return of the child were set aside, and the proceedings remitted to the High Court (Re H (A Child) (International Abduction: Asylum and Welfare) [2016] EWCA Civ 988; [2017] 2 FLR 527 ("Re H (2016)")).

106. Black LJ (as she then was), with whom Moore-Bick and Longmore LJJ agreed, observed that there was no authority on how the court should approach the situation where an abducted child who is the subject of an application for summary return himself or herself has refugee status (see [36]). She considered that neither Re S (2002) nor Re H (2003) (neither of which concerned a child who had made an independent claim for asylum) was authority for the proposition that there was no bar to the Family Division ordering the return of a child to the country from which he or she has been granted refuge (see [32]). She found that the judge who had ordered immediate return had erred by not considering the implications of the fact that the

Secretary of State had accepted that the child would be at risk of persecutory treatment if returned to Pakistan (at [37]):

> "At the very least, it was a factor that required to be weighed carefully in the balance in determining whether it was in [the child]'s best interests for the return order to be set aside. But, depending on the correct legal approach to refugee status in these circumstances, it might have represented a more complete bar to [the child]'s return."

107. Black LJ declined to offer any views as to how the question of the child's refugee status should be approached prior to the Secretary of State having an opportunity of making submissions (see [38]). She did, however, set out a number of questions that the judge to whom the application was remitted might wish to consider, the first being whether the child's refugee status was an absolute bar to the Family Division ordering his return to Pakistan.

108. The case was remitted, and it came before Hayden J. Having considered the 1951 Geneva Convention, the Qualification and Procedures Directives and the domestic provisions, he found (at [41]) that "the determination of refugee status of any adult or child falls entirely within 'an area entrusted by Parliament to a particular public authority'", i.e. the Secretary of State; and, thus, he concluded (at [44]) 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".

109. In F v M (2017), by the time the application for a return order was considered, the child had obtained refugee status. In E v E (Secretary of State for the Home Department intervening) [2017] EWHC 2165 (Fam); [2018] Fam 24 ("E v E"), the children had made an asylum application which had been refused, but was the subject of an appeal. The father sought the summary return to Israel of seven-year-old twins who had been removed to the UK by their mother. She had claimed asylum on her own behalf and on behalf of the children on the basis of allegations against the father and her own family. The Secretary of State refused the claim a few days before the final hearing of the father's application under the 1980 Hague Convention. In granting a return order, but directing that it should not take effect until 15 days after the FtT had promulgated a determination on the asylum appeal or further order of the court, Mostyn J drew on both the principles underlying the Conventions and Directives, and Hayden J's judgment in F v M (2017). He said:

> "17. Approaching the matter from first principles I have no hesitation in concluding that where a grant of asylum has been made by the Home Secretary it is impossible for the court later to order a return of the subject child under the 1980 Hague Convention. Equally, it is impossible for a return order to be made while an asylum claim is pending. Such an order would place this country in direct breach of the principle of non-refoulement. It is impossible to conceive that the framers of the 1980 or 1996 Hague Conventions could have intended that orders of an interim procedural nature could be made thereunder in direct conflict with that key principle. In my judgment, the existence and resolution of the asylum claim

> amount to 'exceptional circumstances' within the terms of article 11(3) of [Brussels IIa].
>
> 18. If I needed to find a source of the power to refuse to make an order in such circumstances it would be article 20 of the 1980 [Hague] Convention, which is plainly part of our national law notwithstanding that it escaped incorporation by the [1985 Act].
>
> 19. If an asylum claim has been refused but an appeal has been mounted, then it is possible, indeed desirable, for the court to hear the return application but to provide that no return order shall take effect until, at the earliest, 15 days after the promulgation of the decision by the tribunal (that is one day more than the time allowed for seeking a further appeal). That is what I have ordered in this case.

110. On the basis that it would assist the FtT's consideration of the asylum appeal, Mostyn J proceeded to give his views on the mother's defences to the application for a return order: he concluded that she had no subjective fears, and any fears that she might have had would have had no objective foundation (see 34]).

111. F v M [2018] EWHC 2106 (Fam); [2018] 3 FCR 301 ("F v M (2018)") was a case with a particularly complicated background, in which the mother had fled from Russia to the UK with a new partner (who was a critic of the Russian Government) and had been charged there with large-scale fraud and being a fugitive from justice. The mother and new partner were granted refugee status, as was the child. It is unclear whether the child was granted that status under the 1951 Geneva Convention or simply under the API (see paragraphs 90-94 above); but all parties appear to have assumed it was the former, although (as we note below) Cohen J in any event appears to have equated the two. The judge held that (i) the procedure before the Russian court was deficient because, in violation of fundamental principles of procedure in England and Wales, the child was given no opportunity to be heard before the order was made; (ii) following Hayden J's judgment in F v M (2017), the court was absolutely barred from ordering the return of a child who was a refugee to the country from which the Secretary of State had recognised he required refuge; and (iii) in any event, even if there had not been such a bar, the balance overwhelmingly fell in favour of the child not being returned to Russia. Despite the apparent assumption that the child had been granted refugee status because she was in fact a refugee, at [58], Cohen J appears to have included, within the scope of the principle that children with refugee status cannot be returned to their country of nationality, "a child with refugee status… as a dependant" as well as a child who has refugee status on his or her own behalf.

112. Finally, our attention has been drawn to the judgment of Darren Howe QC sitting as a Deputy High Court Judge in Re K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation) [2020] EWHC 2394 (Fam), handed down on 4 September 2020 after the hearing of this appeal. The father of a 9-year old boy, habitually resident in Russia, brought the child to the UK where Cobb J made an order for his return under the 1980 Hague Convention on an application by the left-behind mother [2020] EWHC 1903 (Fam). The father then made what he accepted was a "tactical" (although, he submitted, justified) application for asylum on

behalf of the child. The Deputy Judge, having considered the earlier authorities referred to above, notably E v E (which he considered was not obviously wrong, and should therefore be followed), held that return of the child was barred as a consequence of his pending asylum appeal (see [24]), and that was so even if the asylum application were a "sham" (see [30]-[31]).

Issue 1: Asylum Bars to 1980 Hague Convention Proceedings

Introduction

113. In the context of an application for a return order under the 1980 Hague Convention, does the fact that the child and/or taking parent have refugee status or a pending asylum claim or appeal act as any form of bar, either (i) to determining the application, or (ii) to making a return order, or (iii) only to implementing any return order? Although they are in reality inextricably linked, it is convenient to deal first with the issue of principle (Issue 1), followed by the nature of any bar (Issue 2).

114. We make two preliminary observations. First, as we have described (paragraph 56 above), any bar to refoulement is a bar to return to a country of nationality (or to another state with the risk on onward refoulement to the country of nationality). Consequently, where the country of habitual residence from which a child has been taken is not a country of nationality of the child, and there is no risk of further refoulement to that country, then there is no refoulement bar. Therefore, when Hayden J said that refugee status is a bar to an order to effect the return of a child "to an alternative jurisdiction", that is too wide if he meant to *any* alternative jurisdiction.

115. Second, an order made under the 1980 Hague Convention will require the return of the child and *only* the child. We touch upon with this further below in the context of the exercise of discretion (paragraph 155(i)); but make the point now to explain why the categories of case identified and discussed before us were based on the status/position of the child, namely:

    i) a child who has had his or her refugee status recognised by the Secretary of State;

    ii) a child who has made an independent application for asylum, pending determination of the application;

    iii) a child who has made an independent application for asylum which has been refused but has appealed, pending determination of the appeal; and

    iv) a child in respect of whom no independent application for asylum has been made, but who has been named as a dependant by a principal asylum applicant.

116. In respect of these categories, before us, positions were taken across the whole gamut. On behalf of the mother, Mr Setright's primary position was that, in each of these cases, there is a bar to a court determining the application for return. Mr Harrison for Reunite submitted that in none of these circumstances is there a bar on the High Court determining and implementing a return order, in each case the matter being one of discretion for the court. Other parties fell somewhere between these positions.

117. We will consider these categories of case in turn.

Category 1: Child with Refugee Status

118. In F v M (2017), Hayden J concluded that there was a bar to making a return order in respect of a child with refugee status. We deal with the nature of the bar under Issue 2; but, as a matter of principle, we consider that there is a bar to returning a child who has refugee status essentially for the reasons given by Hayden J.

119. As we have described (paragraphs 58-61 above), whilst the 1951 Geneva Convention affords rights attached to refugee status to all those who satisfy the definitional criteria of article 1A of the Convention, in practice – and now, vitally, as a result of the Qualification Directive – a refugee's rights (including the right not to be refouled) are dependent upon and flow from formal state recognition of that status.

120. In England and Wales, as we have again described (paragraphs 69-71), pursuant to article 4 of the Procedures Directive and deriving from statutory authority, under the Immigration Rules the Secretary of State is made solely responsible for investigating and determining claims for asylum or subsidiary protection, including the withdrawal or revocation of such status, subject to statutory appeal rights. In other words, whether a person has refugee status at any particular time is a matter exclusively for the Secretary of State. As Hayden J said F v M (2017), at [42], drawing on Re W:

> "[T]he determination of refugee status of any adult or child falls entirely within 'an area entrusted by Parliament to a particular public authority'. In this case the public authority is the Secretary of State."

121. In our view, given that the Secretary of State is the decision-maker assigned by the statutory scheme to determine whether a person has refugee status at any particular time, although it may be required to resolve overlapping issues in exercising its own functions, the court has no power to interfere with refugee status or in the rights which flow from such status, except under a statutory appeal or judicial review on conventional grounds.

122. It is not unusual that administrative and/or judicial decision-makers with different functions are required to make possibly overlapping decisions but in accordance with the evidence before them (which may well not be the same as that available to another decision-maker exercising a different function) and the substantive and procedural provisions of the statutory scheme under which they are each operating, albeit against the backdrop of the same factual matrix. Examples which have come before the courts include R (PM) v Hertfordshire County Council [2010] EWHC 2056 (Admin) (which involved the assessment of age in the context of (i) an asylum claim and (ii) a claim for local authority support), R (Children) [2018] EWCA Civ 198; [2018] 1 WLR 1821; [2018] 2 FLR 718 (consideration of the circumstances in which the father killed the mother of children in the context of (i) criminal proceedings and (ii) children proceedings), and Secretary of State for the Home Department v Suffolk County Council [2020] EWCA Civ 731 (the assessment of the risk of female genital mutilation in the context of (i) an asylum claim and (ii) an application for a female genital mutilation protection order).

123. In each of these cases which have considered the approach to different statutory regimes but against the same factual backdrop, the court has been properly sensitive to the fact that decision-making functions have been assigned to particular primary decision-makers by Parliament or under powers emanating from Parliament; and has been clear that the court has no power to review or otherwise interfere with the decision-making of that body except on a statutory appeal or on conventional judicial review grounds. As Lord Scarman put it in Re W (A Minor) (Wardship: Jurisdiction) [1985] AC 791 ("Re W") at page 797C (quoted by Hayden J in F v M (2017) at [42]):

> "The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized of the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority."

Or, as more succinctly put by Lord Denning MR in Re Mohammed Arif (An Infant) [1968] Ch 643 at page 662A-B, in the context of an application for wardship which would have had the effect of circumventing the scheme of the Immigration Acts:

> "The court will not exercise its jurisdiction so as to interfere with the statutory machinery set up by Parliament".

124. As all decisions relating to asylum applications (including decisions to withdraw or revoke asylum status) fall within the exclusive powers of the Secretary of State, no court or tribunal has any power to intervene outside the statutory appeal process set out in the 2002 Act (see paragraphs 74-75 above). In our respectful view, references to other jurisdictions where, it appears, in contradistinction to the position here, the power to recognise refugee status is not exclusively in the hands of an arm of the executive so that the judiciary are able to examine anew and adjudicate upon the justification for the grant and maintenance of refugee status in a particular case – we were referred to cases from the USA, Canada and New Zealand – are of no assistance.

125. Therefore, certainly since the Qualification Directive, a refugee's rights are dependent upon and flow from formal state recognition of that status. Consequently, we consider that generally, in determining an application for the return of a child under the 1980 Hague Convention, the High Court can neither question the refugee status of a person whom the Secretary of State recognises as having refugee status, nor interfere with that person's right not to be refouled which attaches to that status. In respect of the right of a person with refugee status not to be refouled, Mr Payne submitted that, as a matter of domestic law, that flowed from the Immigration Rules themselves (see paragraph 21(3) of his skeleton argument); and, although there is no express prohibition on removing an asylum seeker in the Immigration Rules, we agree that it is necessarily implicit in paragraph 334, being inherently an aspect of being "granted asylum"; and, in any event, as we have indicated (see paragraphs 48-50

above), the Secretary of State rightly accepts that the UK's obligation under article 21 of the Qualification Directive not to refoule refugees has been recognised by our domestic courts and will therefore continue after 31 December 2020.

126. We say that the High Court can only "generally" not return a child with "refugee status" because we know from the API, JS (Uganda) and the submissions made in this case (see paragraphs 90-94 above) that the Secretary of State sometimes purports to grant "refugee status" to those who do not satisfy the definition of "refugee", namely dependants of those who are granted asylum but who do not have any independent claim of their own. These dependants therefore have what the SSHD currently describes as "refugee status", but they can be refouled because they are not refugees. Hopefully, after JS (Uganda), the Secretary of State will reconsider the designated "status" of such individuals; and, until then, that she will respond promptly to any request from the High Court seized of a 1980 Hague Convention application as to whether the grant of "refugee status" to a dependant of an asylum applicant was on the basis that the dependant was considered to have the relevant risk of persecution if returned or on the basis of dependency alone.

127. However, subject to the exception of those who are said to have "refugee status" under the API despite not being refugees, in our view children with refugee status cannot be returned under powers within the 1980 Hague Convention to the country from which they have been given refuge (or to a third country from which they risk being removed to such a country).

Category 2: Child with a Pending Asylum Application

128. The position of a child who has a pending independent application for asylum is that he or she cannot be returned to the country of his habitual residence under the 1980 Hague Convention until the application is determined, because of the effect of article 7 of the Procedures Directive. By requiring asylum applicants to be allowed to reside pending the determination of an asylum application made by them or on their behalf, article 7 prevents or bars the removal (and, hence, the refoulement) of refugees during the pendency of their application for refugee status.

129. As we understood it, it was generally submitted before us that, insofar as article 7 has been transposed into domestic law, that transposition is by section 77 of the 2002 Act. However, as we have explained (paragraph 79(i) above), on its face, section 77 is narrower than article 7, because, rather than imposing a positive obligation to allow an asylum applicant to reside pending determination of the application, it is in the form of a prohibition on an applicant being removed from, or required to leave, the UK "in accordance with a provision of the Immigration Acts". As we have described (see paragraph 99 above), in Re S (2002), the terms "remove" and "required to leave" in this context (then section 15 of the Immigration Act 1999) were construed as terms of art in immigration law, so that the prohibition did not apply to removal in the exercise of other statutory powers such as those under the wardship jurisdiction and the 1980 Hague Convention. Given that there was no asylum application on behalf of the children in that case, observations regarding the construction of section 15 were clearly *obiter*; but this construction appears subsequently to have been adopted or confirmed by the insertion into what is now section 77, after the reference to removal etc, of the words "in accordance with a provision of the Immigration Acts" (see paragraph 77 above).

130. In the circumstances, we do not consider that it is now possible to construe section 77 as fully transposing article 7. However, asylum applicants are able to rely upon the right within article 7 to be allowed to reside in the UK during the pendency of their application on the basis of the Marleasing principle (see paragraph 48 above). This right has readily, and rightly, been recognised by our courts in such cases as F v M (2017). Given its form, we do not consider it gives any room for the exercise of powers of removal or return under any other provision, including the 1980 Hague Convention and 1985 Act. As it is a right arising from a Directive which has been recognised by our courts, the position will not be changed by the UK's exit from the EU (see paragraphs 49 -50 above).

131. For those reasons, in our view, where an application for asylum has been made by or on behalf of a child, that operates as a bar to return in 1980 Hague Convention proceedings during the pendency of the application; and it will continue to operate as a bar after the end of the Brexit transition period on 31 December 2020.

Category 3: Child with a Pending Asylum Appeal

132. Article 7 only applies "until the determining body [i.e. here, the Secretary of State] has made a decision" on the application, i.e. it does not extend to a child who has had an asylum claim refused but has an appeal pending.

133. However, Mr Payne submitted that such a child cannot be returned under the 1980 Hague Convention because, by virtue of article 39(1)(a) of the Procedures Directive, a Member State must provide an effective remedy against a negative decision on an application for asylum before a court or tribunal; and, by article 39(3), it must provide rules for dealing with the question of whether the right to an effective remedy shall have the effect of allowing applicants to remain in the country pending its outcome (see paragraph 67 above). The UK, he submits, has given effect to that obligation by granting an in-country right of appeal where the claim, although refused, is not considered by the Secretary of State to be clearly unfounded under section 94 of the 2002 Act (see paragraph 75 above). Under the statutory scheme, whether an asylum claim is clearly unfounded is entirely a matter for the Secretary of State.

134. A return under the 1980 Hague Convention of a child with a pending asylum appeal child would, he submitted, render the appeal ineffective. In particular, (i) a child who is returned to his or her country of nationality could not meet the definition of "refugee" under article 1A of the 1951 Geneva Convention because that requires the person to be "outside their country of nationality"; and (ii) a child who is not in the UK would not meet the criteria for the grant of refugee status if he or she is not in the UK and therefore the asylum claim could not be granted (paragraph 334 and 336 of the Immigration Rules: see paragraph 71 above). Furthermore, if the appeal were allowed, there would be no means to require the left-behind parent to or otherwise enforce the return of the child to the UK. So, Mr Payne submitted, where an in-country appeal is pending (as defined in section 104 of the 2020 Act: see paragraph 78 above) – but only, post-determination of an asylum claim, in those circumstances – a return under the 1980 Hague Convention is barred. Mr Payne's submissions were supported by Counsel for both the mother and SBS.

135. We do not find this issue easy. Four points illustrate potential difficulties with Mr Payne's analysis.

i) As Mr Devereux emphasised in his submissions, article 7 of the Procedures Directive expressly distinguishes asylum applicants who are awaiting a determination from the "determining authority" (here, the Secretary of State) from those who have had their applications determined even if they have appealed. The article 7 requirement to allow applicants to remain in the territory of the Member State is restricted to the former. Consequently, compared with the position where there is an asylum application pending (see paragraphs 129-131 above), that leaves section 78 of the 2002 Act (with its restriction on removals to those "in accordance with the Immigration Acts") more exposed.

ii) Despite the terms of article 1A of the 1951 Geneva Convention and paragraphs 334 and 336 of the Immigration Rules, sections 92 and 94 of the 2002 Act (see paragraph 75 above) clearly envisage asylum appeals being made out-of-country.

iii) Not all decisions relating to an asylum application are appealable. Appeal rights do not fully satisfy or exhaust the requirements for an effective remedy, because the availability of judicial review to challenge material non-appealable decisions (e.g. decisions that representations do not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules, or certification under section 94 or 96 of the 2002 Act: again, see paragraph 75 above) is an essential element in satisfying the UK's obligation to provide an effective remedy under article 39 of the Procedures Directive (see, e.g., TN (Afghanistan) and MN (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 1609; [2014] 1 WLR 2095 at [16] per Maurice Kay LJ with whom Beatson and Briggs LJJ (as he then was) agreed).

iv) An asylum appeal having an automatic and full suspensive effect is not necessarily required to satisfy the obligation to provide an effective remedy: even if the statutory immigration and asylum scheme does not itself directly and automatically bar removal under a return order, it is arguable that the requirements for an effective remedy are fulfilled by the ability to make an interim application in the relevant appeal or judicial review proceedings for an order prohibiting removal pending the outcome of the challenge.

136. We are grateful for the (mainly written) submissions we have received on these matters, but we did not hear full oral argument on this difficult issue, which of course does not arise on the facts of this case. Had it been possible, of course, we would have preferred to have given some guidance on the issue; but, after considerable reflection, we have concluded that, without having the benefit of full argument, it would not be appropriate to make any observations on whether there is any bar to the return of a child with a pending asylum appeal under the 1980 Hague Convention. That issue will have to await clarification from Parliament or the Secretary of State; or, failing that, a case in which the issue is live. In the meantime, it is in our view vital that steps are taken to avoid asylum appeals being used as a tactical device to delay and potentially prevent the return of children under the 1980 Hague Convention (see paragraph 159 below).

Category 4: Child with no Asylum Application

137. We do not consider that there is any bar where the child is named as a dependant in an application for asylum by a parent, but makes no independent claim for international protection.

138. Neither the 1951 Geneva Convention nor the Directives require any such protection, which can only arise from either (i) the parent's application with the child as a named dependant being treated as a claim for asylum and subsidiary protection by the child himself or herself, or (ii) from considerations of family unity and the right to family life under article 8 of the ECHR.

139. As we have described (paragraphs 86-89 above), whilst we understand that, on an application by a parent, the Secretary of State in fact considers whether a child requires international protection, the application is not properly construed as – nor is it treated by the Secretary of State as – a form of deemed application for protection by the child.

140. In our view, as described above and as intimated by Laws LJ in Re S (2002) (see paragraphs 80-82 and 100 above), paragraph 329 of the Immigration Rules (which prohibits the removal of a dependant during the pendency of the principal applicant's asylum claim) has nothing to do with the status and/or rights of a refugee. In particular, it is not an emanation of the duty not to refoule a refugee, but rather of the duty to have proper respect for family life. As such, on a proper interpretation, it cannot in our view act as a bar to the return of a child under the 1980 Hague Convention which is itself driven by welfare considerations and the principle of family unity.

Issue 2: What is barred?

141. In the circumstances in which the grant of asylum or a pending asylum application is a bar, does it act as a bar to (i) the determination of the application, or (ii) the making of a return order, or (iii) the implementation of the return order?

142. We consider this issue to be more straightforward. In argument, Mr Payne accepted that the High Court could determine an application for and even order the return of a child who has been granted refugee status, even though he submitted that that order cannot be implemented whilst that status is maintained; and *a fortiori* where an application for asylum remains outstanding. In our view, he was right to accept that the only bar is to actual return – although the precise course the court should follow in a particular case (including the stage of the proceedings when any stay should be imposed) is a different question which we consider below (paragraphs 157-158). The duty of non-refoulement and the article 7 duty to allow asylum applicants to remain involve a prohibition on returning a person to his or her country of nationality: they do not prohibit either (i) the return of a child to the country of his or her habitual residence which is not the country of nationality; and (ii) the taking of decisions which are preliminary or ancillary to actual return. Nothing in the domestic provisions impose any such prohibitions. Indeed, sections 77 and 78 of the 2002 Act make the line in (ii) clear, by prohibiting any act of removal of an asylum applicant whilst expressly allowing "interim or preparatory action" up to and including the giving of removal directions (see paragraphs 77, 78 and 79(iii) above).

143. For our part, we see no inconsistencies between the 1951 Geneva Convention and the 1980 Hague Convention, nor any real tension between the decision-making functions of the Secretary of State under the former and of the High Court under the latter.

144. Of course, as in other circumstances (see paragraph 122 above), the same factual background might form the basis for both (i) an application for asylum on the ground that a child may have a well-founded fear of being persecuted for one of the reasons set out in article 1A of the 1951 Geneva Convention and (ii) a "defence" to an application for a return order on the ground that there would be a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. However, as Hayden J indicated in F v M (2017) (at [48] and following), the decision-making exercises undertaken by the Secretary of State in considering an asylum claim, and the High Court in determining an application for the return of a child, are different in several important ways, including the following.

i) An application for a return order under the 1980 Hague Convention is an adversarial, private law proceeding before the High Court; whilst an application for asylum is determined by the Secretary of State as an administrative matter by way of an essentially investigatory process.

ii) The statutory tests are, self-evidently, different.

iii) The approach to risk in asylum claims and family cases respectively is different (see Re H (2016) at [25] per Black LJ, and Re E at [36] per Baroness Hale and Lord Wilson)).

iv) The available evidence, although overlapping, will almost certainly be different. The Secretary of State will have access to substantial evidence of (e.g.) country conditions which the parties to an application for a return order will not have; and, as Mr Turner submitted, evidence from (say) an anonymous whistle-blower in the home country might be available to the Secretary of State to take into account in considering an asylum claim (a reflection of the investigatory nature of her task) but which, for reasons of confidentiality (or otherwise), might not be available in the 1980 Hague Convention proceedings. On the other hand, whilst the evaluation of evidence in a Convention application has to be made "within the confines of the summary process" (Re K (1980 Hague Convention: Lithuania) [2015] EWCA Civ 720 at [52]), the court will have the benefit of the evidence adduced by and the submissions of the left-behind parent, who will almost certainly play no part in any asylum claim. This evidence can, and often will, include a broad range of evidence or information from other sources, such as other family members or other relevant individuals and/or institutions such as schools. In addition, the left-behind parent may well offer undertakings or propose other protective measures (including orders in the home state) which may also not feature in the determination of the asylum application.

v) In addition, although the Secretary of State may interview a child of an appropriate age and despite the terms of section 55 of the 2009 Act (see paragraph 65(ii) above), the voice and interests of the child are not usually at the forefront of an asylum claim. Indeed, it became apparent during the

> hearing of this appeal that, over and above section 55, the part of the asylum and immigration structure and system with which we are concerned does not appear to have provisions reflecting the specific interests and needs of abducted children. This is illustrated by the fact that the API has no reference to abducted children. In contrast, as we have described (paragraphs 30 and 42 above), when the court is determining an application under the 1980 Hague Convention, the interests of the child are "at the forefront of the whole exercise". This includes ensuring that the child is given an appropriate opportunity to be heard in a manner which, as Baroness Hale said in Re D, is consistent with the UK's obligations under article 12 of the UNCRC. We return below to address what form, in our view, a child's participation should take in 1980 Hague Convention proceedings when there is a connected asylum application (paragraphs 162-164). In the meantime, we note that the Secretary of State, recognising her duties of expedition under the 1980 Hague Convention, has confirmed that, when she is made aware of a connected application under the Convention, she will use her best endeavours to prioritise an asylum claim or reconsideration of current refugee status (see paragraph 155(v) below).

145. We do not, therefore, agree with Lieven J's observation, at [11] of her judgment (quoted at paragraph 18 above), if she meant that the Secretary of State is necessarily in a better position to consider factual issues than the court exercising the 1980 Hague Convention summary jurisdiction. They are in different positions and performing different functions: which decision-maker is in the "better" position to determine a common or overlapping issue (and, if so, whether the decision-maker should await determination of that issue elsewhere) will depend upon the circumstances of the particular case (including the matters to which we refer in paragraph 161 below).

146. What is clear is that, in determining an application for a return order under the 1980 Hague Convention, the court does not impinge in any way upon the Secretary of State's exclusive function in determining refugee status. As Mr Devereux submitted, even where they have the same factual background, the determination of a person's asylum claim does not determine (or represent a proper substitute for the determination of) an application for a return order under the 1980 Hague Convention – or, we would add, *vice versa*. Despite the summary nature of 1980 Hague Convention proceedings, it is possible for a child who has been found by the Secretary of State to have a "well-founded fear of being persecuted" in his or her country of nationality, and for the High Court to conclude (perhaps having regard to a different risk and on different evidence) that, for example, he or she does not fall within the scope of article 13(b) of the 1980 Hague Convention. Equally, it is possible that, even where the High Court has concluded that there is a grave risk that his or her return to that country would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the Secretary of State (perhaps on different evidence) may conclude the child is not a refugee and return would not breach his or her human rights etc.

147. Therefore, although issues may overlap, in our view Lieven J was right when (at [12] of her judgment, also quoted in paragraph 18 above) she declined to consider the merits of the asylum claims made: a judge tasked with considering an application for a return order has an exclusive focus on the merits of that application in the light of

the relevant statutory framework (including article 13(b) of the 1980 Hague Convention) and the evidence properly before the court.

148. We can deal briefly with the other submissions made in relation to this issue.

149. First, in E v E, although he considered that the application for a return order should be determined (but not implemented) when the child's application for asylum had been refused but was being appealed, Mostyn J said (at [17]) that "it is impossible for a return order to be made while an asylum application is pending". Although we accept that in these circumstances the court may well decide not to make a return order, we do not agree that that course is impossible; nor, in this regard, do we see any difference in principle between a case where there is an asylum application pending and a case where an appeal on the merits is pending.

150. Second, we do not accept Mr Setright's submission that, generally, the High Court should not consider an application to return a child where an application for asylum by the child (or, indeed, by the taking parent) is outstanding, because it would inevitably involve looking into the nature and merits of the asylum claim which is the exclusive province of the Secretary of State and would involve an elaborate investigation of the facts unsuited to the summary jurisdiction under the 1980 Hague Convention. As we have indicated, the court does not have any part to play in the assessment of whether an individual is a "refugee" for the purposes of the 1951 Geneva Convention; but, for the reasons we have given (see paragraphs 143-147 above), an application for a return order under the 1980 Hague Convention does not require the court to make any such assessment.

151. Nor do we accept Mr Setright's submission that, as the mother's allegations in the asylum claim are apparently made primarily against her family, it would be entirely inappropriate (and contrary to the confidentiality in the asylum process) for the nature of those allegations to be disclosed to them as the alleged perpetrators or for them to be asked to answer those allegations. He prays in aid the cloak of confidentiality that generally encompasses an asylum claim. Therefore, he submits, the court will not be able to evaluate the mother's allegations against any other evidence. But that, in our view, misses the target. In the application for a return order, the burden of establishing an exception falls upon the mother as the taking parent who opposes return (Re E at [32]). She has, in general terms, indicated the nature of those allegations. Given that burden of proof, the court must do its best within the confines of an essentially summary procedure, to ascertain whether the grounds relied upon have been made good, e.g. if appropriate, by taking the allegations at their highest and considering whether the risk to the child that they pose can be mitigated by protective measures (Re E at [36]). In any event, whatever the response of the Secretary of State may be, the mother's asylum claim will not (or, at least, will not necessarily) provide an answer to the return order application.

152. For those reasons, we have concluded that any bar applies only to implementation: even where a child cannot be returned under the 1980 Hague Convention because he or she has been granted or has applied for refugee status, the High Court is not prevented from *determining* an application for a return order, or indeed from making a return order; although, if a return order were to be made, it may be required to stay implementation.

Issue 3: The Discretion to Stay the Proceedings

153. How, then, should the court go about its task of deciding whether to determine or stay a 1980 Hague Convention application in circumstances in which the child and/or the taking parent have applied for or been granted refugee status?

154. Over and above the usual principles that apply to an application to stay any children proceedings, we see the force in Mr Devereux's submission that, generally, the provisions and underlying policy of the 1980 Hague Convention require that applications for a return order are expeditiously determined, notwithstanding that the taking parent and/or child may have been granted asylum status or have a pending asylum application or appeal. In our view, in these circumstances, the High Court should be slow to stay an application prior to any determination.

155. In coming to that conclusion, we have taken into account, in particular, the following.

i) As we have indicated, the fact that the taking parent has been granted refugee status or has a pending asylum claim or appeal prevents neither the determination of the application under the 1980 Hague Convention nor the making or the implementation of a return order. We reiterate that a return order only requires the return of the child; it does not require the taking parent to return (see paragraph 115 above). We recognise, of course, that whether the taking parent will be returning with the child can be a significant factor itself in the determination of the application. We also recognise that the taking parent will typically wish to return with the child. However, the order does not *require* the parent to do so. In those circumstances, the prohibition on refoulement of the parent is not infringed by an order that the child be returned.

ii) If the child has been granted refugee status or has an independent asylum application pending, then a return order cannot be implemented because that would breach the prohibition on refoulement of the child and/or article 7 of the Procedures Directive and/or section 77 of the 2002 Act. However, even in those circumstances, there are additional reasons why it could well be appropriate for the court substantively to determine the application. In summary, this is because of the differences between the two processes, as set out in paragraph 144 above, in particular, the participation of the left-behind parent and of the child. The 1980 Hague Convention is expressly designed to give the left-behind parent access to justice and to ensure that the voice of the child is heard. Further, the differences in the processes might lead to different conclusions being drawn (see paragraph 146 above).

iii) Although there may be cases in which it is appropriate for the High Court to stay an application for a return order pending determination of an asylum claim (e.g. where the risk to the child derives solely from country conditions which the Secretary of State may be eminently better placed to determine), the primary statutory obligation on the court is to "act expeditiously" and "reach a decision" promptly on an application for a return order before it (see article 11 of the 1980 Hague Convention), even in circumstances in which, if made, any return order could not be implemented because of the obligation not to refoule. We also note Article 11(3) of Brussels IIa which requires the court "except

where exceptional circumstances make this impossible, [to] *issue its judgment* no later than six weeks after the application is lodged". We appreciate that expedition is primarily required with a view to the actual return of the child; but expedition in producing a reasoned decision is expressly urged.

iv) Just as a reasoned decision on an asylum claim, if available to the High Court, will be relevant in the subsequent determination of an application for a return order, a reasoned High Court decision on the evidence available to it (which will very likely be different from that available to the Secretary of State, for the reasons we have explained: see paragraph 144(iv) above), and tested to an extent by the adversarial process not available in the assessment of an asylum claim, could be expected to assist the Secretary of State in determining an outstanding application for asylum by either the parent and/or the child. Whilst not creating any form of presumption, depending on the nature of the respective applications and defences, the earlier decision may not only be relevant, but possibly of some considerable weight. That may particularly be so where the risk being assessed in each exercise is similar in nature.

v) The Secretary of State is under an obligation to determine an asylum application in accordance with the Immigration Rules. Where that status has been granted but the court has determined that a return order should be made, before us, the Secretary of State through Mr Payne (in our view, rightly) acknowledged that (as a result of paragraph 339J(iii) of the Immigration Rules, if nothing else), she would be under an obligation to reconsider refugee status. The Secretary of State also confirmed that, where requested to do so by the High Court and recognising the state's duty to expedite 1980 Hague Convention process, whilst always acting consistently with her substantive and procedural obligations to apply anxious scrutiny, she would use her best efforts to prioritise consideration of a pending asylum application or whether to revoke a grant of asylum in light of the High Court decision and any material obtained during the 1980 Hague Convention proceedings. In those circumstances, the determination of an application for a return order by the High Court will usually have some real point, even where the relevant child currently has refugee status.

vi) If the court determines that the child's return should otherwise be ordered, delay will be avoided if and when the child's application for asylum is refused or his or her refugee status is revoked. Proceeding to determine the application for return is likely to reduce if not abrogate the advantage that may accrue to an unscrupulous taking parent making a meritless asylum application on behalf of the child to gain some jurisdictional advantage.

156. There are three additional observations which we need to make in respect of the discretion to stay.

157. The first is that the determination of an application under the 1980 Hague Convention does not necessarily mean that a return order should immediately be made. It hardly needs to be said that the court might decide either that the Convention does not apply (for example, because there has been no wrongful removal or retention) or that one of the exceptions is established. However, even if the court decides that the 1980 Hague Convention application should be heard and (but for the asylum grant/claim) a return

order would be made, the court is not required immediately to make an order with a fixed date for return. It seems to us that a return order with a fixed date for return without any form of stay would be inappropriate in circumstances where there is currently a bar to return: the court will not generally make an order without the expectation that it will be put into effect. Even where there is no bar, the court may nevertheless conclude that the asylum position is such that to make a return order with a fixed date for return would be inappropriate. Alternatives to such an order would include:

i) the court making a return order with a fixed return date, but with a stay until the outcome of the asylum claim/appeal is known;

ii) the court making a return order but with a date to be fixed when the outcome of the asylum claim/appeal is known; or

iii) the court making relevant findings but deferring making a return order until the outcome of the asylum claim/appeal is known.

158. The appropriate course will of course depend on the facts and circumstances of the particular case. In our view, there are many cases in which it would be preferable for the terms of any return order to be resolved, in part so that any issues as to the nature of any required protective measures are addressed and delay further down the line is avoided. However, there may be reasons why it would be more appropriate for all the issues connected with the terms of any return order to be adjourned pending the resolution of the outstanding asylum issues. The course adopted by the court will also of course be influenced by whether it is only the taking parent who has a direct asylum claim (or refugee status), or whether a claim has also been made on behalf of the child (or the child has independent refugee status). We refer to other potentially relevant factors below in considering the exercise of discretion to stay more generally (paragraph 161).

159. Second, we welcome the Secretary of State's indication that she will use her best efforts to prioritise consideration of a pending asylum application or whether to revoke a grant of asylum (see paragraph 155(v) above). This is of critical importance for three reasons. First, absent the prompt determination of any asylum application, the state will potentially be failing to comply with its obligations under the 1980 Hague Convention promptly to determine any application under that Convention. Second, again absent the prompt determination of any asylum application, the making of such an application would have the potential significantly to undermine the efficacy of the 1980 Hague Convention and the attainment, in the interests of children, of its objectives. We are only too aware of the potential for tactical asylum applications to be made by taking parents on behalf of themselves and/or a child, and pursued through appeals, with a view to their own position so far that the child is concerned being enhanced by the passage of time. The Secretary of State, any appeal tribunal and any court dealing with immigration challenges or appeals will not doubt be vigilant to prevent the abuse of the asylum process to the detriment of prompt and effective remedies in respect of child abduction. Third, any delay caused to the determination of any application under the 1980 Hague Convention and/or to the implementation of any decision that a child should be returned, has the potential to be contrary to the interests of the child who is the subject of the application and detrimental to their welfare. In this respect we agree with Mostyn J's observations in

E v E at [20], that, to comply with the obligations of expedition imposed by the 1980 Hague Convention, it is necessary for both the executive and the courts/tribunals to act expeditiously in respect of any matters which bear upon a Convention application for the return of a child; and we would likewise urge expedition at all stages of the determination of a relevant asylum claim including any appeal at all levels.

160. Third and finally, we heard submissions on the factors which the court should take into account in deciding whether – and, if so, when – to grant a stay in these circumstances. There is inevitably some considerable overlap with the factors which the court would take into account in determining a 1980 Hague Convention application.

161. It seems to us that the relevant matters would include:

i) Potential timings for both the 1980 Hague Convention application and for the asylum claim, and the stage which the asylum claim has reached. The court is bound to expedite the former, but nevertheless the process may take several months, particularly if issues of disclosure and obtaining information from the Secretary of State arise. Generally, the evidence before us suggests that asylum claims take at least six months to determine and often longer, although (as referred to above: paragraph 155(v)) the Secretary of State has confirmed that she will use her best efforts to prioritise the consideration of claims for and revocation of refugee status where there are parallel 1980 Hague Convention proceedings.

ii) The nature of the alleged risk in the application for return and the asylum application (so far as that is known). Some risks (e.g. as a result of persecution of a particular group) may require substantial evidence from the other country, which may be difficult to obtain in 1980 Hague Convention proceedings and, if obtainable, result in delay. Where the risk is inherently personal, e.g. where it arises as a result of domestic abuse, evidence may be more easily assessible by the High Court in summary proceedings. Issues of disclosure as between the two procedures may arise which may not only be relevant to the evidence available to the Secretary of State and the court respectively, but also to the question of delay.

iii) The adverse impact – in practice, and in terms of their rights and interests – on both child and each parent in being separated.

iv) In particular, the welfare of the child, including the degree of urgency in determining welfare issues that arise and the ability of the court, within the constraints of a 1980 Hague Convention application, to deal with such issues whilst the application is pending. An important factor in assessing the best interests of the child may be who has been the primary carer. Rights of access under article 21 of the 1980 Hague Convention may also have to be considered.

v) The human rights of both child and each parent. We are unpersuaded by Mr Setright's submission (and the views of Professor Weiner, upon which he relies) that article 20 is a key factor in the determination of an application for the return of a child where the taking parent claims that he or she cannot return

to the country of habitual residence because of the threat of domestic violence (see paragraph 41 above). The refusal or inability of a parent to return to the child's home country, and the reasons for this, including allegations of domestic violence, will be taken into account when the court is determining whether one of the exceptions to return under the 1980 Hague Convention has been established. Equally, the court will take into account the fact that the taking parent has made an asylum claim when determining, in particular, whether the article 13(b) exception has been established. Even if return would not directly expose the child to physical or psychological harm, as we have described, he/she might otherwise be placed in an intolerable situation (Re S, DT and LBT (Abduction: Domestic Abuse) [2010] EWHC 3177 (Fam); [2011] 1 FLR 1215, Re W (Abduction: Intolerable Situation) [2018] EWCA Civ 664; [2019] Fam 125 and the cases cited at paragraph 38 above). Whilst we accept that the taking parent might be put into a difficult position, that is the result of the focus on (and the weight given to) the interests of the child in the 1980 Hague Convention process. Of course, the rights of the left-behind parent are also engaged.

Issue 4: The Voice of the Child

162. What part, if any, should the child play in the application?

163. In our view – supported, as we understood it, by all Counsel before us – when the taking parent has made an asylum claim (and *a fortiori* when a claim has been made on behalf of the child the subject of the application under the 1980 Hague Convention) the child should be joined as a party to the Convention proceedings. This applies equally to circumstances in which the taking parent and/or child have been granted refugee status; and, for these purposes, the grant of rights to the child by the Secretary of State because of the grant of refugee status to the parent.

164. This is so because of the particular complexities of such a case, and the enhanced need for the child's interests to be separately represented, particularly given the potential for the taking parent to make a tactical asylum claim on behalf of the child to enhance the parent's own position. One specific advantage highlighted by Mr Payne was that the child's representatives would be able to have access to the papers in the asylum claim.

Issue 5: Liaison with the Secretary of State

165. What steps should the court take to apprise the Secretary of State of the application under the 1980 Hague Convention and any material used in that application?

166. In our view, the Secretary of State needs to be informed about the following matters, so that she can take appropriate steps and use her best efforts to prioritise the determination of a pending application or the reconsideration of the grant of asylum in line with her duty to ensure expedition in 1980 Hague Convention applications.

    i) Where the child is said to have "refugee status", the High Court should promptly ask the Secretary of State whether this is a reflection of a determination that the child is a refugee as defined in article 1A of the 1951 Geneva Convention or simply as a the result of the child being a named

dependant of a successful asylum application by a parent (see paragraph 126 above).

ii) The High Court should promptly inform the Secretary of State that an application has been made under the 1980 Hague Convention when the court is aware that an asylum claim has been made by the taking parent or the child. In the absence of powerful reasons to the contrary – and it is not easy to conceive of any such reasons – the papers in the Convention application should be disclosed to the Secretary of State.

iii) The High Court should promptly inform the Secretary of State in the event that it decides to stay the determination of the application under the 1980 Hague Convention pending the resolution of the asylum claim(s) and/or appeal(s).

iv) The High Court should promptly provide the Secretary of State with the court's judgment determining the application under the 1980 Hague Convention.

v) The High Court should request the Secretary of State to keep the High Court informed of the progress of the asylum claim(s) and/or appeal(s) and of any reconsideration of refugee status.

Grounds of Appeal: Conclusion

167. Applying those principles to the facts of this case, in our view this appeal must be allowed.

168. Although they have been somewhat left behind as a result of the change in the factual basis of the appeal, we should deal with the grounds of appeal in turn. For convenience, we will deal with them in a different order from that in which they have been put forward.

Ground 4

169. It was submitted that Lieven J erred in failing to consider G's own status within the asylum claim (i.e. whether she made an application for asylum in her own right, or merely as a dependant of the mother), because different considerations apply to each of those circumstances.

170. Mr Devereux explained that the concession at [10] of Lieven J's judgment – that "[G] cannot be returned to South Africa until the asylum application is determined" – was made on the basis that Lieven J was bound to conclude that, as a pending asylum applicant, G could not be returned as a result of Hayden J's judgment in F v M (2017) (which it could not be contended was obviously wrong). He made clear that no criticism of Lieven J was suggested in relation to her proceeding on the basis that G was a pending asylum applicant. On the basis of the 12 May 2020 letter, it was common ground that she was.

171. As it is framed, there is no force in this ground; but, of course, through no fault of her own, Lieven J's analysis and conclusion were entirely undermined as a result of the revelation of the correct factual position in relation to G.

Ground 1

172. It was submitted that the judge erred in considering that there is "an absolute bar as a result of any refugee status to a return under the 1980 Hague Convention"; or, alternatively, insofar as there is a bar, it is to the *implementation* of a return order, not to the *determination* of the application. In the event, this was the key ground of appeal.

173. For the reasons we have given:

    i) Had the factual position been as Lieven J believed it to have been (i.e. an independent asylum claim had been made on behalf of G, which was still pending), there would have been no bar to the determination of the 1980 Hague Convention application before her; but there would have been a bar to the implementation of any return order made.

    ii) On the basis of the facts as we now know them to be (i.e. no such application has been made, but G was named as a dependant in the mother's asylum claim), there was a bar to neither determination of the application nor implementation of any return order made.

174. We would allow the appeal on this ground.

Ground 3

175. It is submitted that, by staying the 1980 Hague Convention application in the way she did, the judge erred because such a stay was in breach of article 11 of the Convention which requires the judicial or administrative authorities of Contracting States to act expeditiously in proceedings for the return of the child.

176. We would also allow the appeal on this ground. In our view, even on the factual basis as Lieven J understood it to be, there was no bar on determining the claim, and she erred in not taking properly into account the need for expedition in 1980 Hague Convention proceedings and the advantages of determining the application even if it could not be immediately implemented. We note that the hearing was not set up to consider whether the proceedings should be stayed, and therefore the judge does not appear to have heard full argument on (e.g.) the countervailing factors.

Ground 2

177. It was submitted that, in respect of the application for disclosure of the documents within the asylum file into the 1980 Hague Convention application, the judge erred in relation to their relevance and weight by failing to follow the procedure set out in R v G and H (cited at paragraph 21 above).

178. Permission to appeal was not granted on this ground on a paper consideration, but was adjourned to the hearing before us. In fact, little attention was given to it during the hearing.

179. The hearing on 5 June 2020 was originally fixed to consider the application for disclosure into the 1980 Hague Convention proceedings of what were described as the mother's asylum documents. Both parties made written and oral submissions about

that issue, which Lieven J considered. In particular, she referred to the judgment of MacDonald J in R v G and H and his later judgment in the same case ([2020] EWHC 1036), which were recently upheld by this court in Secretary of State for the Home Department v G and RH [2020] EWCA Civ 1001.

180. Having decided to grant a stay of the proceedings, Lieven J returned to the question of disclosure. She expressed the view that there would be no benefit in disclosure at that stage, and noted the mother's concerns that the material might be passed to her family, something that could not be effectively policed. She found that, as the case was not going to be heard for some time, the balance was plainly in favour of not disclosing the material behind the asylum application at that time. However, she acceded to the father's application that there should be disclosure of material in the Hague Convention proceedings to the Secretary of State.

181. On the premise that the 1980 Hague Convention proceedings were going to be stayed for a considerable time, there can be no real criticism of the judge's approach to the issue of disclosure. She did not carry out an exhaustive survey of every consideration for and against, but she identified the prominent twin features of a probably lengthy period of adjournment and the risks that would arise from the information leaking to the mother's family. But, more pertinently, the outcome of this appeal concerning the stay of the proceedings means that the judge's decision on disclosure has now been overtaken by events.

182. We would therefore refuse permission to appeal from this part of the judge's order on the basis that, if an application for disclosure from the asylum file is made in future by the father or by G's guardian (and we are not assuming it will be, nor encouraging such an application) the decision will rest with the High Court, which will look at the matter afresh and apply the principles contained in the cases mentioned above in the context of whatever situation then exists.

Conclusion

183. We therefore refuse permission to appeal on Ground 2 and we dismiss the appeal on Ground 4; but we allow the appeal on Grounds 1 and 3.

184. In short, for the reasons we have given, we have concluded that the judge was wrong to proceed on the basis that there was a bar to determining the 1980 Hague Convention application, because (i) contrary to the facts as she had been given them, no independent application for asylum had been made by or on behalf of G, and (ii) in any event, there was no bar to determining the application or even to making a return order, as opposed to implementing any such order.

185. Therefore, subject to submissions in relation to the form of order, we shall remit the matter to the Family Division for further consideration of the 1980 Hague Convention application in the light of this judgment.