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Although there have been a great many authorities (including before the UK Supreme Court and the Court of Justice of the European Union) clarifying its application, the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 1980 Hague Convention) is at its heart an incredibly simple instrument. It operates as follows: if an applicant can demonstrate that they had rights of custody at the time of the alleged wrongful removal or retention and that the child was habitually resident in the state from which they were removed or retained, they are entitled to pursue an application for return. Once the applicant has established their case (often described as the 'Article 3 case'), the court 'shall order the return of the child forthwith', unless the respondent can establish one (or more) of the exceptions to return that are contained within Arts 12, 13 and 20 of the Convention. If the respondent fails to establish any applicable exception, the court must order the child's return. If the respondent does establish an exception, the court has a discretion as to whether to order the child's return or not.

This article focuses upon the Supreme Court judgment in *G v G* [2021], in which the court was concerned with the protection of a child from refoulement (ie a forcible return) where the child is a dependant on a parent's asylum application and the stay of 1980 Hague Convention proceedings prior to the determination of such an application. There are three judgments in *G v G*. The Court of Appeal judgment is published as *G (A Child: Child Abduction)* [2020]. The first instance judgment of Lieven J has not been published, but the most important parts of it were quoted by the Court of Appeal in its judgment at para 18.

General approach

The 1980 Hague Convention proceeds on the basis of certain assumptions. In the judgment of Lady Hale and Lord Wilson in *Re E (Children)* [2011], the Supreme Court described (at para 15) its operation as follows:

> *The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act 1989 makes clear, in section 1(3)(c), the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of any dispute about her future, for the courts and the public authorities in her own country will have access to the best evidence and information about what that will be.*

Before adding (at para 16), that '[t]hose assumptions may be rebutted, albeit in a limited range of circumstances, but all of them are inspired by the best interests of the child'.

The approach that is described above was taken by the Hague Conference on Private International Law (HCCH) in order to ensure that proceedings issued under the Convention can be determined as swiftly as possible. The 1980 Hague Convention includes as a stated aim 'the prompt return of children wrongfully removed to or retained in any contracting state' (Art 1(a)). Article 2 requires contracting states to 'use the most expeditious procedures available'. Article 11 requires judicial or administrative authorities of contracting states to 'act expeditiously in proceedings for the return of children', going on to provide that:

> *If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the central authority of the requested State, on its own initiative or if asked by the central authority of the requesting State, shall have the right to request a statement of the reasons for the delay.*

Article 11 has been translated into a requirement that proceedings brought pursuant to the 1980 Hague Convention be concluded within six weeks, though in practice that target is very rarely met.

The 1980 Hague Convention does not, however, operate independently of other international instruments, whether they are directly relevant to its operation or not. One example that is well known is Council Regulation (EC) No 2201/2003 (Brussels IIA or Brussels II bis) which directly impacts upon the operation of the 1980 Hague Convention in cases involving two EU member states.

G v G involved a situation which was previously far less common, but which may now become more common, in which it was the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 (Cmd 9171) and 16 December 1966 (Cmd 3906) (together, the 1951 Geneva Convention or the Refugee Convention) that had, within the proceedings at first instance, impacted upon the operation (and, particularly, the

expeditious operation) of the 1980 Hague Convention.

That was because on her arrival in England, the mother (who had wrongfully removed the child from South Africa) had claimed asylum, with the subject child named as her dependant. When a person is a refugee, they are granted protection from refoulement, which was described by the Supreme Court as 'expulsion or return to a country where they may be persecuted'. Accordingly, this case was said to have brought (para 2):

> *... into particular focus the relationship between the provisions protecting refugees from refoulement... and the requirement to return a child under the 1980 Hague Convention to the country from which the child or the child's parent has sought refuge.*

Accordingly, in an abduction context the aims of the 1980 Hague Convention (to secure the prompt return of abducted children) and of the Refugee Convention (to ensure that refugees cannot be returned to countries where they may be persecuted) may act in competition with each other. The Supreme Court highlighted a particular issue with the conduct of 1980 Hague Convention proceedings in this context (at para 3 of its judgment), as follows:

> *There is a substantial risk that the time taken to determine an asylum application, which even if it is genuine can take months if not years, will frustrate the return of children under the 1980 Hague Convention because, by the time the asylum application concludes, the relationship between a child and the left-behind parent may be harmed beyond repair. In addition, there is a substantial risk of sham... or tactical asylum claims being made by the taking parent with the intention of achieving that very objective.*

However, there is an obvious and competing substantial risk in cases where a parent or child has sought asylum that too great a focus on the need to expeditiously determine the 1980 Hague Convention proceedings will lead to children who are refugees being refouled.

The Supreme Court defined what it described as the 'central questions' as being (para 5):

> *... whether these two Conventions occupy different canvasses and, if not, how they can operate hand in hand in order to achieve the objectives of each of them without frustrating the objectives of either of them.*

Proceedings at first instance and in the Court of Appeal

On 11 March 2020, the father made an application for the return of the child to South Africa, following her wrongful removal from South Africa to England by her mother. At the first hearing of that application, orders were made seeking disclosure from a number of

agencies, including from the Home Office. On 12 May 2020, the Secretary of State for the Home Department (SSHD) responded to the disclosure order by providing the mother's address. Within the same letter, however, the SSHD stated that an application for asylum had been made 'by or on behalf of' both the mother and the child.

A return date was then listed for 5 June 2020. One of the issues that was listed for that hearing was whether documents associated with the asylum claims should be disclosed into the 1980 Hague Convention proceedings, and vice versa (para 15 of the Court of Appeal judgment).

The hearing on 5 June 2020 came before Lieven J. In accordance with the letter from the SSHD, the court approached the case on the basis that both the mother and the child had made asylum claims. On that basis, it was accepted by both parties that whatever the outcome of the 1980 Hague Convention application, the child could not be returned to South Africa until the asylum claim had been determined. In that context, Lieven J stayed the 1980 Hague Convention proceedings pending determination of the child's asylum claim (see paras 17-18 of the Court of Appeal judgment).

The father appealed that decision to the Court of Appeal. While he advanced four grounds of appeal, the point of principle was engaged by his first ground, which was as follows:

> *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.*

Prior to the hearing in the Court of Appeal, the SSHD confirmed that its earlier communication to the High Court was mistaken, in that no asylum application had been made in relation to the child. In fact, the mother had made an asylum application with the child named as her dependant.

The Court of Appeal separated its determination of that ground into four different categories, which were:

- **Child with refugee status:** which children the Court of Appeal held (para 127):

  > *... 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).*

- **Child with a pending asylum application:** in respect of which the Court of Appeal held (para 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 [or her] habitual residence under the 1980 Hague Convention until the application is determined.*

- **Child with a pending asylum appeal:** which the Court of Appeal held could be returned under the 1980 Hague Convention, as Art 7 of 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) only extends protection from refoulement 'until the determining body has made a decision' on the application, ie the protection does not extend to a child who has had an asylum claim refused but has an appeal pending (para 132).
- **Child with no asylum application:** the Court of Appeal considered the child to fall within this category, and held (para 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.*

It went on to hold that, even where a bar against return existed, it was a bar to the implementation of a return order, with the effect that the High Court would be able to:

- determine an application; and
- if no exception to return was established, make a return order.

If a return order was to be made, its operation would then be suspended pending determination of the asylum claim.

Supreme Court decision

The mother then appealed the Court of Appeal's decision. By her first ground of appeal, she challenged the Court of Appeal's conclusion that a child that had been named as a dependant on a parent's asylum claim had no protection from refoulement, and so could be returned pursuant to the 1980 Hague Convention. The issue was defined (at para 11) before the court as follows:

> *Can a child that is named as a dependant on a parent's asylum application, but has not made a separate independent application for asylum, have protection from refoulement pending the determination of that application?*

The Supreme Court subdivided that broad issue into four questions, which were:

- whether naming a child as a dependant on an asylum application can be understood to be an application by the child;
- if so, whether the child is entitled to protection from refoulement pending the determination of that application, so that a return order cannot be implemented;
- when is an application for asylum determined and is an application still pending during any appeal period; and
- at what point in time does any remedy against a refusal of refugee status no longer have suspensive effect on the implementation of a return order.

In answer to those four questions, the court held that:

- A request for international protection made by a principal applicant naming a child as a dependant is also an application by the child, if objectively it can be understood as such. Further, generally speaking such an application can and should objectively be understood as an application by the child (para 117).
- A dependant who can objectively be understood as being an applicant for international protection is entitled to rely on Art 7 of the Procedures Directive or para 329 of the Immigration Rules, which ensure non-refoulement of a refugee who is awaiting a decision, so that a return order cannot be implemented pending determination by the SSHD (paras 130 and 131).
- The application for asylum was pending and would not have been determined until the conclusion of the appeal process in accordance with s104(1), Nationality, Immigration and Asylum Act 2002. The judgment of the Supreme Court further states that (paras 139 and 140):

> *In effect the appeal is pending during any period where an appellant has either an underdetermined appeal in or below the Court of Appeal, or a right to seek permission to appeal up to the Court of Appeal.*

- An in-country appeal acts as a bar to the implementation of a return order in 1980 Hague Convention proceedings (notwithstanding the court's apparent misgivings, due to the length of time taken by the in-country appeal process). An out-of-country appeal would not act as a bar to the implementation of a return order (paras 152 and 153).

So, on the basis summarised briefly above, the Supreme Court overturned the Court of Appeal's conclusion that an application for asylum made by a parent with the child named as a dependant would not give rise to protection from refoulement. As a consequence, the child had protection from refoulement, which would last until determination of the mother's asylum claim and the exhaustion by her of her right to appeal that determination.

The Supreme Court was, however, plainly concerned with the practical consequences of this decision, with particular reference to the potential for delay in the resolution of 1980 Hague Convention proceedings that may result from the court being unable to implement orders for return made in relation to children that can be understood to have made applications for international protection.

Accordingly, a substantial portion of the hearing, and a number of paragraphs of the judgment, are devoted to attempting to ensure that 1980 Hague Convention proceedings can continue to be determined expeditiously in circumstances where there is an associated asylum claim.

It is not possible to summarise all of that material within this article. The relevant part of the judgment begins at para 163. The key points are as follows:

- as soon as it is understood that there are related 1980 Hague Convention and asylum proceedings, it will generally be desirable for the SSHD to be requested to intervene in the 1980 Hague Convention proceedings (para 166);
- there should be liaison and a clear line of communication between the courts and the

Home Office (para 167);
- the child should be joined as a party to the 1980 Hague Convention proceedings, and the papers that have been provided to the SSHD in relation to the asylum claim should be disclosed to the child's representative (para 167);
- the documents filed with the court in the 1980 Hague Convention proceedings should be disclosed to the SSHD (para 169);
- the court should give early consideration to the question of whether the asylum documents should be disclosed in the 1980 Hague Convention proceedings (para 170);
- in cases linked to 1980 Hague Convention proceedings, consideration should be given to ensuring that any asylum appeal or juridical review will be assigned to a Family Division High Court judge (para 175); and
- the High Court should have oversight over and be in a position to coordinate both proceedings until both have concluded (para 177).

At appendix two, the Supreme Court provided (following considerable input from all parties) suggested standard directions that could be adopted in cases of linked 1980 Hague Convention and asylum claims.

Conclusion

There are likely to be continuing difficulties in cases where a respondent to 1980 Hague Convention proceedings has made an application for asylum which names the subject child as a dependant, or where the parent has made an application for asylum on behalf of the child. While the Supreme Court and all parties before it worked hard to arrive at a solution that minimises delay, it relies upon considerable coordination between the High Court and the Home Office and is currently untested in practice. It is easy to imagine delay becoming a factor of proceedings of this type.

There is also a risk that situations of the type encountered by the Supreme Court in *G v G* will become more prevalent. Until this case was heard on appeal, linked Hague Convention and asylum cases were extremely rare. Following publication of the Court of Appeal's judgment, they are becoming increasingly common.

* (together with Jason Pobjoy and Emmeline Plews of Blackstone Chambers)

Cases Referenced

- G (A Child: Child Abduction) [2020] EWCA Civ 1185
- G v G [2021] UKSC 9
- Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27