IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2020/0191**

ON APPEAL FROM:
THE COURT OF APPEAL (CIVIL DIVISION)
***G v G* [2020] EWCA Civ 1185**

BETWEEN:

[redacted]

Appellant

and

[redacted]

Respondent

and

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE
(3) INTERNATIONAL CENTRE FOR FAMILY LAW, POLICY AND PRACTICE
(4) SOUTHALL BLACK SISTERS
(5) UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(6) INTERNATIONAL ACADEMY OF FAMILY LAWYERS

Interveners

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF INTERNATIONAL ACADEMY OF FAMILY LAWYERS ("IAFL")

Introduction

1. The IAFL is grateful to the court for its invitation to address the issues raised during the course of the hearing as summarised in the email from the Chief Case Manager / Registry Manager on 4 February 2021 at 17.22.

2. In these supplementary submissions, the IAFL makes representations in respect of Issue 1 (guideline directions) and Issue 3 (a return order where there is an on-going asylum claim by or on behalf of the child); no submissions are made in respect of Issue 2 (the point at which an application for asylum can be said to be determined).

3. Issue 3 is taken first, before moving onto issue 1.

4. At the outset, it is perhaps worth emphasising a general point: just because you may require asylum, it does not mean you are compelled to abduct your child. Whatever the merits of the former claim, the making of it cannot in itself be permitted to become a shield to or excuse for a criminal act, often causing wretched harm. That proposition remains a strong one until and unless the same facts can be shown to amount to an appropriate defence within proceedings issued for the child's return.

5. The IAFL refers back in these supplementary submissions to its written case, which the court is invited to consider in conjunction with this document (the IAFL's written case is contained in the supplemental bundle, pp 3166 – 3185).

Issue 3

6. This is a point of importance to the IAFL.

7. Having expressed its concern about the conclusions reached by the Court of Appeal (para 38), the IAFL framed the issue at para 53 of its written case in these terms, "*The question, really, becomes whether the Secretary of State is the sole decision-maker as to who is what* [i.e., who is protected by non-refoulement] *within that net.*"

8. In doing so, the IAFL invited "*this court to consider whether, in an overlapping abduction / asylum case, in which the child is not herself an asylum applicant,*[1] *there is any principled reason why the 1980 Hague Convention*[2] *judge cannot consider the underlying facts, as against the tests for the definition of refugee and non-refoulement in the 1951 Geneva Convention, so far as they are relevant to the dependent child. It is far from apparent that the obligation in article 21 of the Qualification Directive – namely, "Member States shall respect the principle of non-refoulement in accordance with their international obligations" – would be in any way offended by such an approach*" (para 54) (original emphasis).

[1] Dealing there only with the category (iv) case technically the subject of this appeal.
[2] The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (**"the 1980 Hague Convention"**).

9. The question now posed by the court is, "*In circumstances where an application for asylum has been made by or on behalf of a child and the Secretary of State has not yet made a decision on the application, is there any bar in law to a Family Court* [sic. High Court] *deciding in Hague Convention proceedings that the child is not a refugee and making and implementing an order for the return of the child to the country from which he or she has been removed in accordance with the Hague Convention?*".

10. The IAFL suggests that the answer to that question is "no" in light of the distinction between those obligations that apply to the State generally (including the 1980 Hague Convention judge) and those which apply solely to the asylum process, i.e., the point alluded to by the IAFL at para 54 of its written case and developed by the ICFLPP at paras 32 – 39 of its own written case, as amplified in the ICFLPP's oral submissions.

11. In providing this more detailed analysis of Issue 3, the IAFL builds on the central points from its written case. Namely:

    a. the asylum process is prone to misuse by an abducting parent in that an application for asylum might be employed as a device to frustrate and delay the Hague Convention application; and, consequently, to manufacture a defence from such delays as the asylum process may cause (for example, that a return after significant delay would "*place the child in an intolerable situation*" pursuant to article 13 (b), 1980 Hague Convention) which would not have been available but for those delays;

    b. the 1980 Hague Convention is designed to return children wrongfully removed from their country of habitual residence swiftly by way of a summary, expeditious process. The driving force behind this aim is that abduction harms children; and it is in their best interests for the harmful effects of an abduction to be addressed and reversed as soon as possible;

    c. in the "abduction context" an asylum application in respect of the child will almost certainly constitute a further unilateral act of parental

responsibility in breach of, and without regard to, the parental rights of the left-behind parent. In that respect and in significantly more detail, see paras 10 and 19 – 35 of the IAFL's written case;

d. the 1980 Hague Convention and the 1951 Convention relating to the Status of Refugees and attendant 1976 Protocol (**"1951 Geneva Convention"**) should travel, hand-in-hand, each with the other: one should not be employed to the obstruction of the other;

e. neither the 1951 Geneva Convention nor the domestic and European framework directed to the implementation of it has been drafted with issues arising out of the abduction of children or parental disputes over the international movement of children in mind. The working assumption, that parental applications for asylum made on behalf of children are made with the promotion of the best interests of those children in mind, may well be incorrect in cases of child abduction.

Distinction in obligations

12. The distinction between those obligations imposed upon the State (including the 1980 Hague Convention court) and the asylum claim decision-maker is discussed by the ICFLPP in its written case, at paras 32 – 39; the ICFLPP's Court of Appeal skeleton argument, at para 102; and in the oral submissions of Mr James Turner QC.

13. Those are submissions that the IAFL endorses for the reasons given by the ICFLPP.

14. As such, in these supplementary submissions, the IAFL draws to the court's attention, in short form, comments in respect of (i) jurisdiction; (ii) the vehicle: article 13 (b), 1980 Hague Convention; (iii) applying article 13 (b) to abduction/asylum cases; and (iv) <u>not</u> the vehicle: article 20, 1980 Hague Convention.

15. In considering article 13 (b) generally, the court may wish to have regard to the 2020 Guide to Good Practice on Article 13 (1)(b), published by the Hague Conference on International Law. That is available online, https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf. It has been endorsed inter alia by Moylan LJ (who, as the court will be aware, is Head of International Family Justice for England and Wales) in *B (A Child) (Abduction: Article 13 (b))* [2020] EWCA Civ 1057, [2021] 1 WLR 517, at para 71.

(i) jurisdiction

16. The starting point must be to consider the extent of the jurisdiction provided by Parliament to the court determining the 1980 Hague Convention application. Section 1(2) of the Child Abduction and Custody Act 1985 (**"the 1985 Act"**) gives "*the force of law in the United Kingdom*" to those parts of the Convention as appear in Schedule 1 to the 1985 Act. Jurisdiction is governed by section 4,

> *"4. The courts having jurisdiction to entertain applications under the Convention shall be –*
> *(a) in England and Wales or in Northern Ireland the High Court; and*
> *(b) in Scotland the Court of Session."*

17. The jurisdiction of the High Court (*not* the Family Court) hearing the 1980 Hague Convention application is, thus, limited to the issues relating directly or incidentally to the questions arising under the 1980 Hague Convention. There is no express jurisdiction to determine issues falling outside of the 1980 Hague Convention, such as the question of whether or not a parent or child is a refugee. On the other hand, by reason of the 1980 Hague Convention application constituting a wholly discrete and separate jurisdiction, there is no express or implied bar to the court proceeding to determine the issues raised by the application.

18. The 1980 Hague Convention court is required only to decide the issues pertinent to the Hague Convention. It must be permitted to proceed to discharge its

functions unless or until it might act unlawfully. As such, the application can proceed to a final determination and, where appropriate, implementation, notwithstanding the parallel asylum process unless or until it might be said that an order requiring the return of the child is unlawful.

19. The question of potential unlawfulness arises from the obligation under article 33 of the 1951 Geneva Convention. This is because a court making an order for the return of an abducted child[3] to her country of habitual residence could not lawfully permit implementation of that order if to do so would breach the prohibition against refoulement in article 33. Whether directly (as a public body, an emanation of the State) or indirectly (because the State should not allow its courts to permit refoulement) the issue of refugee status arises but, in legal terms, only does so (i) once the court has discharged its primary function to determine the abduction issues; and (ii) when the court is being asked whether or not to stay or permit enforcement of its order.

(ii) the vehicle: article 13 (b), 1980 Hague Convention

20. The 1980 Hague Convention provides a comprehensive scheme in respect of the return of those children within its provisions who have been wrongfully removed or retained in breach of rights of custody. As explained by Professor Elisa Perez-Vera in her explanatory report, which is an aid to construction recognised under article 32 of the 1969 Vienna Convention, central to the framework of the 1980 Hague Convention is the recognition that not all abducted children should be returned, "*it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the… principle whereby the interests of the child are stated to be the guiding criterion in this area*" (para 25).

[3] The court will note, of course, that the 1980 Hague Convention application is not capable of ordering the return of the parent.

21. Indeed, in respect of the non-return[4] of children, there is nothing to suggest that it is anything but a complete scheme, with the only exceptions to the presumption of return those provided for within the 1980 Hague Convention itself.

22. One such exception is provided for by article 13 (b). Article 13 (b) is explained in the following terms by Professor Eliza Perez-Vera's explanatory report, "*Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation*" (para 29). One might add to that, "in the country to which it is proposed that the child be returned". Whilst drafted in different terms, it echoes the spirit of articles 1A (2) and 33 of the 1951 Geneva Convention in respect of the definition of refugee and the prohibition on non-refoulement. Certainly, when one recalls the terms of article 33, "*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*", it is hard (if not impossible) to envisage a situation in which a factual circumstance that would bring a child within the prohibition on non-refoulement would not equally lead to non-return pursuant to article 13 (b), 1980 Hague Convention. (The other argument, of course, being that, where article 13 (b) is outflanked, article 20, 1980 Hague Convention would act as a safety net. For the reasons explained at paras 33 - 34, below, that is not an approach the IAFL endorses).

(iii) applying article 13 (b) to abduction/asylum cases

23. In a case in which there is an order for non-return pursuant to article 13 (b), the immediate tension between the competing abduction and asylum claims dissolves.

[4] That is not to say that it provides a complete scheme for the return of those same children: see articles 18 and 34 of the 1980 Hague Convention. Article 18, in this jurisdiction, is commonly used for secondary claims for return to be pursued under the inherent jurisdiction.

24. The issue, instead, is in respect of the small class of cases in which the asylum claim remains extant at the point at which an order for return is made despite the raising of an article 13 (b) defence based on "asylum issues". It is here that the question arises as to whether the 1980 Hague Convention court's treatment of non-refoulement is sufficient or whether the asylum mechanism must be permitted to run its course prior to the implementation of a return order.

25. In that respect, the IAFL distinguishes between two types of case:

    a. that in which the facts asserted are incapable of satisfying article 1A (2) and/or article 33, 1951 Geneva Convention. For example, the applicant is not outside his or her country of nationality or habitual residence (a perhaps unusual set of facts in a 1980 Hague Convention application). In that case, the issue is easy and there can be no real complaint as to the High Court judge being the decision-maker;

    b. that in which the facts asserted *are* capable of satisfying those definitions but, on consideration pursuant to the article 13 (b) vehicle, the definitions are not made out and the protection from non-refoulement that flows as a consequence is not found to be applicable.

26. In the latter type of case, it is acknowledged that this court may be particularly concerned by (i) the different standard of proof; and (ii) the current practice that may tend toward different evidence being adduced in the asylum claim as opposed to that relied upon by the taking parent who is running an article 13 (b) defence in the 1980 Hague Convention application.

27. Those are taken in turn.

28. In respect of (i), the IAFL endorses the submissions of the ICFLPP that the distinction is more theoretical than practical. In particular, the IAFL agrees with paras 35 - 47 and 69 - 70 of the ICFLPP's skeleton argument for the Court of Appeal. Additionally, the IAFL notes that article 33 of the 1951 Geneva Convention imports

or requires no particular standard of proof. A court addressing issues under article 33 on the balance of probabilities, precisely as it would address any article 13 (b) defence, would not be acting in breach of the obligations imposed by article 33.

29. Turning to (ii), the asserted problem is the inability of the taking parent to rely within the 1980 Hague Convention proceedings on evidence not shared with the other parent. To that, there are two answers.

30. The first is to say that the issue here (a wish, for whatever reason, not to have evidence examined on an inter partes basis) is common across all areas of law. In children law, it is felt particularly acutely, where one is required to evidence allegations of the most intimate and distressing character against family members. Nevertheless, that is not enough to dislodge a principle at the core of the UK legal system, which is the right to know the evidence presented against you. In *R v G and another (Secretary of State for the Home Department intervening)* [2019] EWHC 3147 (Fam), MacDonald J described this as the "*cardinal right to know those… allegations against him, a cardinal right to answer those allegations and, ordinarily...* [an entitlement] *to see the information that is said to evidence the conduct alleged"* (para 83). On appeal to the Court of Appeal, reported as *Re H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001, Baker LJ (with whom Phillips and Peter Jackson LJJ agreed) held, "*For my part, I am not persuaded that the confidentiality of information relied on by an asylum application should be treated any differently from other categories of potential information. The fact that the information was provided to the asylum authority on a confidential basis, and the public interest in maintaining the confidentiality of the asylum process, are both factors which the judge must take into account. The fact that, if disclosed, the information would be seen by the person accused of persecuting the applicant is manifestly a factor which carries weight in the balancing exercise. It is not, however, determinative"* (para 55). Whilst those comments were made in the context of an application in respect of *disclosure* of asylum evidence into Children Act 1989 proceedings, it is suggested that the general principle, that evidence linked to asylum cannot simply be "ringfenced", is of broad application. Indeed, it is far from apparent why the "*cardinal right"* and "ordinary entitlement"

would be dislodged where a respondent is claiming fear of persecution etc., as opposed, say, to the day-to-day subject-matters of family law, including rape and child sexual abuse.

31. The second answer is to note that, in certain areas of the law (for example in matters of national security), there is a process for that evidence to be "fairly" considered, through the use of special advocates. If really required (and the IAFL does not suggest it is) consideration could be given to such a mechanism in this context, with the law in that respect to be developed on a case-by-case basis.

32. It is noted, too, that:

    a. there are distinct advantages to the 1980 Hague Convention court considering the issue of non-refoulement (through the vehicle of article 13(b)). Namely, (i) the separate representation of the subject child which could be made available, providing to the child a guardian who could individually and independently assess the child's position, away from the competing aims of the parents; and (ii) the 1980 Hague Convention process considering the matter on an inter partes basis, as opposed solely to hearing from the asylum applicant (and, if required, hearing oral evidence), providing, one might think, a much fuller examination of the pleaded facts than the asylum process itself offers;

    b. family court judges are required to make findings, from time to time, of facts and matters which might more usually be decided elsewhere. In Ramsamy v Babar [2003] EWCA Civ 1253, [2005] 1 FLR 113, the Recorder hearing a claim for possession of property had to consider whether the occupant enjoyed protection consequent upon the home being the matrimonial home. This protection, in turn, depended upon the woman being lawfully married. The Recorder declined to consider the issue of the validity of the marriage as only a High Court judge had the jurisdiction to make a declaration as to the validity of the marriage. The appeal was allowed, Sedley LJ noting in his concurring judgment, "*It is understandable that she preferred not to decide*

an issue which is ordinarily one for declaratory judgment in the High Court but, like Thorpe LJ, it seems to me that the issue is one ineluctably for her to decide. In my judgment, she had jurisdiction to do so. When the issues of fact and law which were set on one side have been resolved by her, or, in her absence, by another judge, it will be possible for the court below to proceed to a fresh conclusion on the issue Thorpe LJ has delineated, if meanwhile a compromise has not been reached", at para 12.

(iv) <u>not</u> the vehicle: article 20, 1980 Hague Convention

33. As referred to at para 22, above, the IAFL does not support the extension of article 20 to fill any perceived gap left by article 13 (b), 1980 Hague Convention. That is for two reasons: (i) it is not accepted that there is, in practice, any relevant gap; and (ii) the IAFL would be extremely concerned about the aggrandisement of article 20, for the reasons set out at paras 48 and 49 of the IAFL's written case.

34. In particular, the IAFL reminds the court of the first two points made at para 48 of its written case. Namely, commending the words of the US District Court, Northern District of Illinois, which in the case of *Walker v Kitt, 900 F.Supp.2d 849 (2012)* held, "*To invoke article 20 to refuse to return a child for anything less than gross violations of human rights would seriously cripple the purpose and effectivity of the Convention"* (p 864); and, noting that the widening of the provision would have broad and significant consequences, striking at the very heart of the principle of comity (after all, it is hard to see one can judge another country as failing to uphold fundamental freedoms in case A, and then order the return of a child in case B; indeed, one questions whether the effect would be the *de facto* exclusion of a country so judged from the 1980 Hague Convention).

<u>Additionally:</u> Interim orders under section 5 of the Child Abduction and Custody Act 1985

35. The proposed directions settled by the appellant and respondent refer to cases where there is a parallel asylum claim. The consequences for the 1980 Hague Convention application of the abducting parent making a unilateral asylum application for the child are potentially so significant that thought should be given to proactive rather than reactive directions.

36. Section 5 of the 1985 Act provides the High Court dealing with the 1980 Hague Convention application very wide powers to deal with interlocutory matters,

> *"5. Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application."*

37. This court is invited to consider whether, under section 5, the 1980 Hague Convention court could make an order prohibiting the respondent (the taking parent) from exercising their parental responsibility through the making of an application for asylum on the child's behalf or from listing the child as a dependant to their own application, thus both securing the child's welfare in furtherance of the Hague proceedings and in preventing a change in the circumstances.

38. Conceivably, the court might include a standard direction as follows:

> *"You must not, directly or indirectly, take any steps to change the nationality of the child, or apply for asylum or rights of residence for the child whether directly for the benefit of the child or as your dependant without the permission of the court."*

39. Such an order supports the IAFL's contention in its written case (paras 27 -35) that the unilateral act of one parent making an asylum application particularly in the context of a concurrent 1980 Hague Convention application is inimical to a child's welfare.

40. This direction would only bite where no prior asylum application had been made. It is aimed, thus, at those who make an asylum application in answer to or following service of the 1980 Hague Convention application. The court would then, on joining the Secretary of State, be able to (i) scrutinise whether and to what extent the grounds are covered by the defences available under the 1980 Hague application Contention; and/or (ii) review the likely timescales, should the application be permitted to proceed.

Issue 1 (guideline directions)

41. In respect of the operation of the directions settled by the parties to this appeal, the court may wish to identify the need for such directions to be carried into effect on the basis that, where a decision as significant as a claim for refugee status of a child arises, it is, prima facie, one in respect of which those with parental or custody rights are entitled to be fully informed, consulted and involved.

1980 Hague Convention judges

42. The provision (arising from paragraph 3(e) of the draft directions) that the guardian appointed to represent the child in the 1980 Hague Convention case could make an application for asylum on behalf of the child is problematic.

43. Guardians are appointed from the Children and Family Advisory and Support Service ("CAFCASS"). The scope of the functions of CAFCASS is defined by section 12 - 14 of the Criminal Justice and Courts Services Act 2000. Section 15(1) reads as follows:

> *"(1)The Service may authorise an officer of the Service of a prescribed description –*
> *(a) to conduct litigation in relation to any proceedings in any court,*
> *(b) to exercise a right of audience in any proceedings before any court,*
> *in the exercise of his functions."*

44. A claim outside of family proceedings is considered to fall outside of the functions set out in sections 12-14. Accordingly, a guardian appointed by CAFCASS could

not issue an application for an asylum claim or act for or on behalf of the child within such an application.

45. A similar issue arose in cases where it appeared to children's guardians, in care proceedings brought under section 31 of the Children Act 1989, that the subject child had a valid claim under the Human Rights Act 1998 (usually because they had been languishing in care for lengthy periods before care proceedings were finally issued). A practice had developed where some children's guardians had sought relief by way of declarations and/or damages on behalf of the child. That practice was scrutinised in *SW & TW (Children: Human Rights Claim: Procedure) (Rev 1)* [2017] EWHC 450 (Fam) [2017] 1 WLR 3451, leading Cobb J to invite the Official Solicitor to intervene, in the light, particularly, of the following passage:

> *"Contrary to the impression which the Children's Guardian appears to have received in this case, Cafcass is clear that it cannot, and will not, permit its own officers (children's guardians) to become litigation friends in HRA 1998 proceedings. In a helpful e-mail communication from Ms. Melanie Carew (Head of Legal, Cafcass) sent to the parties when this problem came to light on the first day of the hearing (1 March) she said that:*
>
> *"… the legal advice given to Cafcass is that it is outside its statutory functions to act outside of family proceedings… A Cafcass officer acting in a professional capacity would therefore be acting ultra vires if they were acting as a litigation friend in civil proceedings".*

Asylum claim

46. Further and separately, in respect of an asylum claim made by a parent either where the child is expressed to be a dependant or where the application is made in the child's own right there appears to be no provision for the application to identify (i) the names of all those with parental or custody rights; (ii) whether other holders of parental or custody rights consent; and (iii) why, if consent is lacking, that is the case. That is a point that this court may wish to consider.

Conclusion

47. The court is invited to consider the matters set out in this document on behalf of the IAFL.

Mark Twomey QC
Sarah Tyler
Alexander Laing
Coram Chambers

Instructed by Simon Bruce, Claire Gordon and Clare Serenyi, Farrer & Co.
Edwin Freedman, Law Offices of Edwin Freedman

Signature(s) **10 February 2021**

Mark Twomey QC **Sarah Tyler** **Alexander Laing**