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IN HIS MAJESTYS COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

CD

and

EF

IN THE MATTER OF AB (A MINOR)

Mr Lavery KC & Ms Rice (instructed by Bernard Campbell and Co Solicitors) for the Appellant
Ms McGrenera KC & Ms Downey (instructed by McIvor Farrell Solicitors) for the Respondent
Ms Smyth KC & Ms Murphy (instructed by the Official Solicitor)

Before: Keegan LCJ, O'Hara J and McAlinden J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction and anonymity

All of the parties in this judgment have been anonymised to protect the identity of the child to whom the proceedings relate. Nothing must be disclosed or published which would identify the child, the adults or the family in any way.

[1] In child abduction cases there is a presumption of expeditious return to the country of a child's habitual residence so that the court there can determine any welfare dispute. In a small number of cases asylum applications have the potential to frustrate that aim. This may also affect the good operation of the 1980 Hague Convention ("the Hague Convention"). Reiterating the effect upon children of delay Lord Stephens in the case *G v G* [2021] UKSC 9 also remarked that "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."

[2] This is an appeal against the judgment of Mr Justice Kinney ("the judge") of 24 February 2023 whereby the court refused to implement the return order made in respect of the subject child under article 12 of the Hague Convention, as enacted by the Child Abduction and Custody Act 1985, until the mother's asylum application had been determined. The appellant father seeks the removal of the stay imposed and for the child to be returned without further delay to Switzerland. We have heard this appeal on an expedited basis given the need for promptitude in any Hague Convention case.

[3] There was originally no cross appeal against the making of an order for return and the dismissal of claims that the return should be refused by virtue of consent, acquiescence, or grave risk of physical or psychological harm or otherwise intolerable situation.

[4] During the course of the appeal before us, Ms McGrenera applied orally to appeal the return order out of time essentially on the basis that a subsequent successful grant of asylum meant that the return order should not have been made on the basis that there would be a grave risk of physical or psychological harm or an otherwise intolerable situation (the article 13(b) defence) if the child were returned to Switzerland. We refused the application to extend time made on the basis we have just described. We note that the father does not seek a review of the asylum decision and so the asylum process is now complete and uncontentious.

[5] This appeal has been superseded by events given that the stay has now lapsed as it was only imposed pending the determination of the asylum claim. There is also now a large measure of agreement about return arrangements. At the conclusion of the hearing last week, we expressed our view that the return order should now take effect and what follows is our reasons.

[6] The appeal points were simply framed as follows:

(i) The court erred in law by finding the factual matrix of this case could not be distinguished from *G v G* [2021] UKSC 9 and *Re R(A Child)* [2022] EWCA Civ 188.

(ii) The court misdirected itself in law by imposing a stay on the implementation of a return order on the basis it had to await the outcome of the mother's asylum application.

Background

[7] We adopt the comprehensive background set out by Kinney J in his judgment which we need not repeat in detail. Summarising, we can see that the appellant and the respondent are the father and mother respectively of AB. Both came originally from Eritrea and by various means made their way to Switzerland, the father first and then followed by the mother. They married in Ethiopia on 13 March 2015. They lived as a family in Switzerland. AB was born in Switzerland on 5 November 2016.

[8] The mother and father were divorced in Switzerland on 17 September 2019. By virtue of the divorce proceedings which were finalised by a court in Switzerland, the mother obtained custody of AB and the father gained visitation rights. The father also had a requirement to pay maintenance each month. The father continued to avail of contact and paid the maintenance until the mother left Switzerland in December 2021. The circumstances of this move are disputed.

[9] On the mother's account the father made all the travel plans for the mother and AB to travel to the United Kingdom and provided money required for such a journey. He planned for the mother to meet an Eritrean man in Amsterdam to help arrange onward travel to the UK. She said that the plans fell apart by the time the mother reached Amsterdam and it was left to the mother to reorganise her travel plans to get to the UK. The mother's case was that she subsequently discovered that her maternal aunt was also in Northern Ireland seeking asylum and that they met by coincidence in the hotel where they were staying.

[10] The mother claimed that there was domestic violence in the relationship and other abusive behaviour which she has described during these proceedings. The father denied the mother's allegations in their entirety. He said that as the mother's visa to remain in Switzerland was a marriage residence permit, he was concerned that if they divorced, she may not be able to stay in Switzerland. He explained to her that in order for the mother to be able to stay in Switzerland they had to remain married for three years. The mother agreed to wait. The father asserted that the mother's brother travelled from Luxembourg to try attempts at reconciliation. The father said that when the mother made it clear that she wanted a divorce he did not stand in the way but consented to it. The father said that he was a hands-on father and fully involved in the care of AB.

[11] In relation to the mother's move from Switzerland the father alleged that the mother approached him. She told him that her uncle was getting married in Ethiopia and that she and her aunt, who lived in Amsterdam, wanted to go to the wedding. The father confirmed that he bought flight tickets for her and AB to

Amsterdam along with a new phone. He paid for the Covid test required for both the mother and AB. The mother reimbursed him for these items. The father also gave cash to the mother for her trip.

[12] On 26 December 2021, the father sent a text message to the mother to check that they had arrived in Ethiopia safely. Thereafter, the father's attempts at contact failed. The father asserted that he would never have put AB at risk by making him travel to the UK without a visa.

[13] When the mother did not return as planned the father contacted members of her family and was given conflicting information. He did not know where she was until eventually contact was made through the Eritrean community to advise him that the mother and AB had been seen at a church in Northern Ireland. The father then initiated proceedings under the Hague Convention.

Agreed facts

[14] At first instance the parties agreed the following:

(i) The subject child was habitually resident in Switzerland immediately prior to his removal.

(ii) The respondent accepted that the appellant had rights of custody which were being exercised immediately before the child's removal on 24 December 2021.

(iii) The child was removed from Switzerland on 24 December 2021 by the respondent and a period of less than one year had elapsed before the proceedings commenced.

(iv) The removal of the child was wrongful in accordance with articles 3 and 12 of the Hague Convention.

[15] Therefore the dispute between the parties centred on the following:

(i) The veracity of the allegations made by the respondent in her affidavit;

(ii) Whether the allegations, if true, placed the child at grave risk;

(iii) If grave risk was established, the court then had to determine whether the protective mechanisms available in Switzerland are adequate to secure the protection of the child after their return; and finally

(iv) Whether the court should exercise its discretion to return the child.

[16] The first instance court was aware of the asylum claim. Although the Home Office was not joined to the proceedings relevant papers appear to have been

volunteered in relation to the asylum claim. It was the Official Solicitor who raised the case of *G v G* and queried whether the court should consider a stay of any return order. The judge sought further submissions on this point and ultimately decided to grant a stay of his return order pending determination of the asylum claim in the United Kingdom.

The asylum context

[17] The status of mother and child, post-divorce in Switzerland is found in official correspondence which emanates from the Swiss Ministry of Justice in answer to questions from the lawyers involved in this case. Two documents are worthy of complete repetition as they confirm the status of mother and child and the position if they were to be removed to Switzerland as follows. An email dated 13 January 2023 from Helen Milliken of the Northern Ireland Central Authority provides information from the Swiss Central Authority to Nicola McWilliams, solicitor for the father and reads:

> "Hi Nicola
>
> I have received the following email from the Swiss Central Authority:
>
> > 'Dear Helen
> >
> > In the aforementioned case we would like to provide urgent information concerning a possible return of the minor to Switzerland. We would be grateful if you could share this information with the applicant's lawyer in Belfast for the upcoming hearing on 24 January 2023.
> >
> > The Swiss State Secretariat for Migration has informed us as follows:
> >
> > Clarifications with the responsible Asylum Directorate have shown that it is possible for the above-mentioned person (mother) to return to Switzerland, as he/she has refugee status. Refugee status can only be withdrawn for the reasons stated in Art 63 para 1bis AsylA. The same applies to the son [AB] who also has refugee status.
> >
> > Asylum in Switzerland expires if refugees have resided abroad for more than one year (Art 64

> para 1 lit. a AsylA). If the woman does not return to Switzerland with the child by 17.02.23, the asylum expires. However, refugee status is not affected by this. The regulation under migration law will then be made in consultation with the Migration Office of the Canton of Zurich.'"

[18] A letter of 31 January 2023 was received from Freundliche Grusse of Migrationsamt des Kantons Zurich to Christine Ramp Attorney-at-Law, Federal Department of Justice and Police Federal Office of Justice in the following terms:

> "Dear Ms Ramp
>
> We refer to our phone call this morning and confirm the following:
>
> We can ensure you that we have no objections in view of the return of the persons mentioned above. Therefore, they are not at risk to be expelled by us after their re-entry to Switzerland. However, we recommend establishing contact with the border police before returning to Switzerland. According to the current status of the case we assume that they are going to get a stay permit (B permit) after they apply for.
>
> Do not hesitate to contact us if you have any further questions.
>
> Freundliche Grusse"

[19] An email from Ms Ramp to Ms Milliken was also sent on 31 January 2023 and is worthy of complete replication given the detail it contains:

> "Dear Helen
>
> Here are my answers to the questions concerning the afore-mentioned return case:
>
> 1. Please confirm what the practical effects will be in the event of the mother presenting at Zurich airport before 17/2/23 with the subject child. In particular:
>
> 2. **An email dated 24 January 2023 states that there will be an assessment of the basis upon which the mother and child can stay in Switzerland upon arrival. Does**

this take place immediately at the airport, or is this an ongoing process that takes place once entry has been permitted. Might this assessment include any risk of a summary deportation of either to Eritrea, the country from which both the mother and child have refugee/previous asylum status or any other country?

According to our information, the mother has refugee status but not asylum. On the basis of the refugee status she can enter Switzerland. If she informs us about date and time of her return, we can advise the airport authorities that mother and child are returning to Switzerland on the basis of a return decision. The residence permit seems to have expired. After her return to Switzerland, the mother needs to contact the Residents' Registration Office of the place where she used to live before. They will then start the process for the issue of a new residence permit. According to the Immigration Authorities, the mother will not face deportation to Eritrea but she will get a new residence permit. Furthermore, in the past years no deportation to Eritrea has taken place and the situation remains unchanged.

3. **Will she be free under refugee status to leave the airport and go to accommodation of her own choosing in Zurich upon arrival? Will she be provided – on arrival – with any state funding to assist her with immediate accommodation costs under her refugee status (ie hotel, Airbnb etc) and how practically would that happen in terms of who she would contact for funds etc?**

   Yes, the mother will be free to leave the airport and go to an accommodation of her choice in Zurich upon arrival. To organize accommodation, we recommend that she contacts the Social Service of the place where she used to live before leaving Switzerland. They can assist in finding accommodation.

4. **Would the mother on arrival be subject to any form of compulsory accommodation direction – ie that she and the child could (for whatever period of time) only reside at a specific location? Where would that be geographically – what other conditions of**

residence might be imposed and for what period of time would any of those restrictions be in place?

The mother should – for practical reasons – return to the place where she used to live before. She will not be subject of any form of compulsory accommodation direction.

5. **Upon her arrival in Zurich, what if any financial support is the mother entitled to avail of on her own behalf and that of the child – and how would she access that upon arrival? If this is subject to any restriction in time, how long would such entitlements continue?**

   As stated above, the mother needs to contact the Social Service of the place where she used to live before making an appointment to assess her financial situation. Such entitlement could continue at least until she has a residence permit and can work. Until then, she will receive financial support for housing, food, clothing, etc.

6. **Upon arrival, what is the mother's right to work and claim benefits in Switzerland under her status?**

   She has to wait until she gets the residence permit until she is entitled to work but she can immediately claim social benefits in Switzerland.

7. **Are there any steps that the mother could take on behalf of herself and the child to put in place financial and accommodation assistance in advance of leaving Northern Ireland?**

   The mother can contact both Social Service and Residents' Registration Office before leaving Northern Ireland to accelerate the process of having a valid residence permit and to get accommodation assistance.

8. **What rights does the mother have to seek to ensure that her child returns to his previous school. With particular reference to the questions posed at (b) and (c) above if any funding is provided or compulsory accommodation is directed would either of these processes have regard for the child's welfare, more**

particularly the return of the child to his previous school?

If the child returns in the same school district, he can return to his old school. The school is determined by the district, where the child lives. The mother can already contact the School Office in advance to enrol the child and to fix his first day back to school. As mentioned above, there will not be any compulsory accommodation so that he can return to his previous school if he returns to living in the same school district.

9. **In emails via the NI Central Authority dated 13/1 and 24/1 there was information provided suggesting that the Mother (and child's) status was that of refugee but also that if there was no return before 17/2 that 'asylum expires but refugee status is not affected by this.' Please confirm what status the mother and child currently hold in Swiss law and what – if any – practical differences there are should for whatever reason, the mother and child be unable to return back to Switzerland until AFTER 17/2/23 (particularly with reference to the questions posed at 1 above).**

   According to the information of the Immigration Authorities, the status of both of them is refugee without asylum. The residence permit seems to have already expired. However, the mother needs to present herself upon arrival in Switzerland to the Residents' Registration Office of Zurich. They will then start the necessary procedure for a new residence permit. As said before, she can also already contact them beforehand.

10. **Please provide confirmation as to the Mother's entitlement in terms of standing and access to funding to take or defend legal proceedings regarding herself or the subject child in Switzerland, either before or after 17/2/23**

    If the mother wishes to initiate legal proceedings, she can contact any lawyer of her free choice and the lawyer will then ask the Court or Child Protection Authority for funding (which is covered by the state). She should not face any problem in receiving such

funding until she does not have a monthly income from work.

11. **Please confirm what protective measures exist in Swiss law, and to which the mother would be entitled to apply for, to protect either her or the child from physical, emotional, or other harm – for example Non-Molestation orders, Exclusion orders, family court orders etc?**

    Swiss law provides a bunch of protective civil and penal measures to protect women or children from physical or psychological harm. The mother could already contact a lawyer to discuss her concerns so that the lawyer can file a request for protection with the competent authority. There is also the possibility to seek protection in a women's shelter if there is immediate danger. She can also seek assistance in any police station, and they will inform her about her options.

12. **Please confirm what assistance, if any, the Swiss authorities can provide to the mother and child in gaining entry to Switzerland given neither currently hold valid travel documents. If there was a court order provided to the Swiss authorities from this jurisdiction would this be sufficient to issue emergency documents that they could successfully travel under? If such documentation can be provided, how quickly could same be made available? And what, if any, documents in addition to the Court Order would be required?**

    Mother and child should carry with them all expired travel documents along with the Court Decision. If we know date and time of the arrival in advance, we can advise the Airport Police to make sure there is no problem for them to enter Switzerland.

I hope this is helpful. The confirmation by the Immigration Office of Zurich that the mother and child will get a residence permit was already sent to you before.

Best regards

Christine Ramp"

[20] Self-evidently, the particular dimension to this case flows from the asylum claim made by the mother on her arrival in Northern Ireland. The date for this is 15 January 2022 which was the first interview. There is no dispute that in her initial contact and asylum registration questionnaire the mother provided a false account of her background and travel to the United Kingdom. That history was detailed, including references to being pregnant and being raped in Libya because she had not paid her money on time, having to subsequently pay for a journey by sea and that she was hit by a metal bar on her leg whilst in Libya. She said she had applied for asylum in Germany in 2016 and had been fingerprinted in Switzerland but only for border crossing. She said she stayed in the Sudan for seven years.

[21] One question on the form referenced whether she may have had an opportunity to claim asylum on occasions on her way to the UK. The mother answered that she did not want to apply anywhere else, her intentions were to come to the UK. She was asked if she had any evidence that she was in any of the countries she had mentioned and she said she did not. She was asked if she had any close family in any other European country and she said she did not.

[22] The mother subsequently completed a preliminary information questionnaire for her asylum application dated 29 March 2022 to which she appended a statement. In that statement she provided an account which was closer to the account given in these proceedings. However, there was no mention in this statement of her status in Switzerland, or of the allegation of strangulation made in her affidavit to this court. The mother said in the statement she had never been in Sudan, Libya, Italy, Germany, France, or Belgium. She said that this was the story the father made her tell.

[23] Although the form to which the statement is attached is dated 29 March 2022 an issue arose late in the proceedings as to when the statement was actually made. Despite requests for clarification made by the judge he records that none was forthcoming. The statement concludes:

> "I was surprised to receive papers from the court in relation to my son, my ex-husband claims that I took him away from him without him knowing which is not true as he was the one that gave the idea for me to come here."

[24] In her position paper of 9 February 2023 the mother provided further detail saying that the father was exceptionally abusive to her. She alleged that he was regularly physically abusive, and this occurred on an almost daily basis, an account significantly at odds with her affidavit in August 2022. She asserted in her position paper that she left Switzerland due to the ongoing domestic violence and due to a specific threat made by the father to her and to AB. She said that the father told her that he wanted to make her scared and that he would find her wherever she would

go. This does not sit easily with her account that the father told her to destroy all methods of communication with him when she got to the UK.

[25] In her statement to the asylum authorities the mother said that AB had settled well in school, was making big improvements and did not require any other professional support. She believed that being away from the abusive environment had helped her son to get better. In her affidavit in August 2022, she said that AB required no additional supports. He had taken well to school and enjoyed all aspects of school life. He had made several friends and was a very different child. At para 33 she said that AB has flourished. At para 34 she said that he never spoke about his father.

[26] The position at first instance and at the hearing of this appeal was that the asylum claim we have just discussed was outstanding. This court joined the Home Office to proceedings but did not receive any submissions by the date of hearing which was expedited before the Court of Appeal. However, after the substantive hearing of the appeal by letter of 3 May 2023 we were informed that the Home Office had granted asylum to the mother in the following terms:

> "Your claim for asylum has been successful and you have been granted refugee status and five years permission to say in the United Kingdom (UK).
>
> This decision was made in line with the Immigration Rules which were in force before 28 June 2022 (because you made your asylum claim before this date). For further information on the Immigration Rules under which your asylum claim as been considered, please see: https://www.gov.uk/government/collections/archive-immigration-rules#2022
>
> This means that we accept you have a well-founded fear of persecution and therefore cannot return to your country Eritrea, and we have recognised that you are a refugee under the 1951 Refugee Convention.
>
> You have been granted permission to stay for five years.
>
> Your permission to stay ends on 01 May 2028. After 5 years you can apply to extend your stay in the UK. Information on how to do this can be found in the 'Next Steps' section of this letter."

[27] It is patently clear from the above grant of asylum that contrary to the rather far-fetched suggestions made before us, asylum is granted from persecution in Eritrea. Unsurprisingly, her claim is not related to residence in Switzerland. The

fact that asylum in the UK has now been granted obviously changes the dynamic of this case. However, we will discuss the core authorities and issues in play before explaining our conclusion on the basis of the facts as they now stand.

G v G [2021] UKSC 9

[28] This case addresses important questions as to the interplay between the 1980 Hague Convention and asylum law. This was an appeal brought by the mother of G, an eight-year-old girl, born and habitually resident in South Africa. In March 2020, G's mother wrongfully removed G from South Africa to England, in breach of G's father's custody rights. G's father applied for an order under the Hague Convention for G's return to South Africa. The mother opposed his application relying on article 13(b) that there was a grave risk that return would expose G to physical or psychological harm or otherwise place her in an intolerable situation and 13(2) (child's own objections).

[29] An important factor in this case as in the instant matter before the court was that upon arrival in England the mother applied for asylum. This was on the basis of fear of persecution by her family (the mother identifies as lesbian and alleged that after separating from the respondent and coming out her family subjected her to violence and death threats). She listed G as a dependant on her asylum application.

[30] Lord Stephens delivered judgment on behalf of the court. Particular focus was on the relationship between the provisions which protect refuges from refoulement, that is expulsion or return to a country where they may be persecuted, and on the other hand the requirement to return a child under the Hague Convention to the county from which the child and/or the child's parent sought refuge. Lord Stephens recognised the time taken to determine an asylum application could frustrate the return of a child under the Hague Convention and that there was therefore also a substantial risk of sham or tactical asylum claims being made by the taking parent.

[31] In summary, the Supreme Court found as follows:

(i) That a child named as a dependant on the parent's asylum application can be understood to be an application by the child.

(ii) A dependant who objectively can be understood to have made a request is entitled to protection from refoulement pending the determination of the request so that a return order cannot be implemented.

(iii) As the factual findings made in Hague Convention proceedings are neither made by the "determining authority" nor pursuant to a process which complies with the examination procedure in the Procedures Directive, they do not bring to an end the protection provided by article 7 of that Directive.

(iv) If a return order were made and implemented before the Secretary of State has discharged her obligation to determine whether the child is a refugee this would effectively pre-empt her decision. Furthermore, the implementation of a return order made in Hague Convention proceedings would deny applicants the right to have their claims for asylum determined by the determining authority.

(v) The protection in article 7 continues until the Secretary of State has made her determination.

(vi) The obligation in article 7 binds the State in its entirety so as to preclude any emanation of the State (including the High Court) from implementing a return order so as to require an applicant to leave the United Kingdom whilst their asylum claim is being considered by the "determining authority."

(vii) A pending asylum application is not a bar to the determination of a Hague Convention application or the making of a return order, but it is to the implementation of a return order.

[32] The Supreme Court substantially allowed the mother's appeal on the basis that a child who can objectively be understood to be an applicant for asylum cannot be returned to the country from which he or she has sought refuge before the final determination of the asylum claim. The case was remitted to the High Court for reconsideration of the Hague Convention application on that basis.

***Re R (A Child)* [2022] EWCA Civ 188**

[33] This was the second application made by the father in this case under the Hague Convention in relation to the return of the parties' child M to the Ukraine. The Court of Appeal sought to distinguish this case from the facts of *G v G* and Moylan LJ (with whom Coulson LJ and Lewis LJ agreed) held that whereas in *G v G* the application for asylum and summary return were made "effectively simultaneously" and proceeded "in parallel", in this case the asylum application was a "late claim" such that it did not run in parallel with the Hague Convention application.

[34] The court held at para [9]:

> "The judge appears to have considered, at [57], that "the timing of the asylum claim" in this case did not impact on the application of the principles set out in *G v G*. She accepted Mr Payne's submission that those principles should apply "with appropriate modification … irrespective of the precise time during the Hague proceedings when the claim for asylum is either made or determined." As a very general proposition this may be

> right, but, in my view, the timing of an asylum claim is, potentially, of considerable importance to the application of the principles set out in *G v G*. If this was ignored as a relevant factor, it would open the door to manipulative applications used to seek to subvert the expedited process that is required in the determination of applications under the 1980 Convention."

[35] In this case asylum was granted in May 2021. The High Court set aside the return orders and dismissed the father's application under the Hague Convention. The father appealed and the Court of Appeal held the High Court had been wrong to dismiss the father's application simply because of the grant of asylum and without any further consideration of its merits. The application was remitted.

Current position in this case

[36] As we have referred to above the mother and child were granted asylum in the UK. We asked all parties to address us on the implications of this for travel to Switzerland and we also sought assurances from Switzerland which were provided to the Northern Ireland Central Authority in two emails as follows:

> "Dear Helen,
>
> I am sending you the answer of the Migration Office of Zurich, in accordance with the Airport Police.
>
> As it is in German, here a short translation:
>
> Dear Sir or Madam
>
> According to the letter from the Migration Office of the Canton of Zurich and the State Secretariat for Migration, entry into Switzerland has been granted for the above-mentioned persons.
> Provided that the flight details are made known, the border control of the airport police will aim to grant the aforementioned persons entry into Switzerland.
> In order to be able to guarantee a smooth procedure, we require a lead time of at least three working days.
>
> Kind regards
> Roman Huber
> Canton of Zurich Security Directorate Migration Office Teamleader"

"Dear Helen,

After having spoken with everyone involved, I can now provide you with our answers to your questions:

1. The recognition of asylum changes the initial situation to the extent that upon the child's return, it would have to be examined whether they receive a residence title on the basis of asylum or if an ordinary residence permit would be granted. The UK asylum thus opens up another option - in addition to the one already envisaged in the letter from the Zurich Migration Office.

2. Accordingly to 1.) they remain eligible to enter Switzerland.

3. Mother and child do still both have a valid travel document issued by Switzerland (expiration date 31 January 2023). The Airport Police of Zurich Airport assured me that they can enter Switzerland with this document. It is important that, in addition to the travel document, they also carry with them the written confirmation from the Migration Office of the Canton of Zurich dated 31 January 2023. If they inform us in advance of the return flight, we can also inform the airport police that the entry will take place within the framework of a Hague return procedure so that they can enter safely.

4. The mother can file such an application with the competent court in Switzerland immediately after her return. She can already contact now a lawyer so that the application can be prepared.

5. If the mother can prove that she does not have the necessary financial means, she is eligible for public funding for legal representation in any application in a Swiss Court to determine child arrangements.

I hope this is helpful. Best regards, Christine

Christine Ramp
Attorney-at-law

Federal Department of Justice and Police Federal Office of Justice"

[37] Ms McGrenera on behalf of the mother has specifically said that the assurances are accepted and are satisfactory. In addition, the mother and child now have a biometric residence permit which we have seen. Subject to a typographical error being corrected on the child's permit these are now operative. The only remaining query is as regards issue of a refugee travel document which we assume the Home Office will now expedite given this ruling which should be provided to them.

Discussion

[38] The Hague Convention was adopted into our domestic legislation by the Child Abduction and Custody Act 1985. This was to accord proper recognition to the principle that a child's interests must be protected in international disputes between estranged parents. In particular, the purpose of the Convention is to protect children "from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence as well as to secure protection for rights of access." The Convention is a forum treaty and provides for summary return to the courts of the habitual residence of the child.

[39] In *Re E (Children Abduction: Custody Appeal)* [2011] UKSC 27 the Supreme Court reiterated the fact that whilst the best interests of the child or children concerned is a primary consideration this does not mean that the welfare of the child or children must be propelled to a level where it becomes the court's paramount consideration. The court stressed the point that these are summary proceedings. The policy of dealing with cases with expedition is reflected in the fact that the court hearing a Hague Convention case does not conduct a welfare hearing.

[40] Article 3 of the Convention provides:

> "The removal or the retention of a child is to be considered wrongful where –
>
> (a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or

> administrative decision, or by reason of an agreement having legal effect under the law of that State."

[41] Article 12 of the Convention provides the mechanism for return. It reads as follows:

> "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."

[42] When asylum issues arise in Hague Convention proceedings particular considerations apply which essentially emanate from a need not to prejudice an asylum claim or cause refoulement to a state of persecution.

[43] The primary provision of law when considering the effect of asylum is the 1951 Geneva Convention. Article 1(A)(2) of the 1951 Geneva Convention contains the following definition of a "refugee":

> "[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."

[44] An individual who satisfies the definition of article 1A(2) has, subject to limited exceptions, the right not to be refouled. Article 33 of the 1951 Geneva Convention sets out the "Prohibition of Expulsion or Return" as follows:

> "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 judgement of a particularly serious crime, constitutes a danger to the community of that country."

[45] *G v G* discusses these issues in detail in the context of a case where an asylum claim was pending. This case is distinguishable from *G v G* on its facts in that a third country is involved which affords safety from persecution upon which the claim for asylum is based. Here that country is Switzerland. It is also accepted that Switzerland is the State of habitual residence of the child.

[46] For present purposes we are concerned with two questions namely whether the judge in this case was correct to grant a stay and second whether the grant of asylum in the UK effectively now trumps a return under the Hague Convention to Switzerland.

[47] With the facts of this case in mind the simple point to make in this case is that a return of the child is sought to Switzerland not Eritrea. Therefore, it cannot realistically be argued that a return breaches the principle of non-refoulement. The documentation from the Swiss authorities provides reassurance that the mother and child do not face refoulement and will be afforded sufficient protections and support in Switzerland.

[48] In the circumstances we have described we cannot see that there is really any convincing argument to be made against the return order. In fact, any argument against return in these circumstances renders the Hague Convention totally redundant and meaningless. If the Contracting State to which the child is to be returned has sufficient protective measures in place and there is no risk of refoulement to another State from which the subject has sought refuge from persecution, we see no reason why return under the Hague Convention cannot be effected in the circumstances that arise in this case to determine the welfare arrangements for the child. The only additional factor which the court must address concerns travel arrangements.

[49] As we understand it a person granted asylum may travel outside of the UK but should not travel to the country from which protection was sought as that may result in the withdrawal of refugee status. We have not been advised by any party that the grant of asylum is compromised in any other way by travel to Switzerland in compliance with a return order under the Hague Convention to have the state of a habitual residence determine welfare arrangements.

[50] Whilst the stay question is now overtaken and academic in these proceedings, we have heard some argument on this issue and based upon what we have

examined we are also of the view that a stay should not have been granted pending the determination of the asylum claim in the circumstances of this case which differ from those in *G v G*. Our view is primarily based upon the fact that refoulement to Eritrea was not presented as a risk at any stage in these proceedings given the assurances from the Swiss authorities. In addition, we do not think that the immigration rules precluded a return under the Hague Convention. This is effectively as Laws LJ found in *Re S (Children) (Child Abduction: Asylum Appeal)* [2002] EWCA 843 (Civ) in relation to the previous immigration rules, and on the basis that the Procedures Directive is not part of retained EU law.

[51] *G v G* clearly considered, at para [133], that the rights conferred by article 7 of the Procedures Directive could be relied upon by applicants for asylum based on the *Marleasing* principle and that the position had not been changed by the UK's exit from the EU. We stress that we have not had the detailed legal argument that we might have had on this point given how the case unfolded however we offer some observations as follows on the points arising.

[52] First, it appears that matters may have moved on since *G v G* in that the Secretary of State no longer maintains that the Procedures Directive is part of EU retained law, most recently in *King v AAA & Others* [2022] EWHC 3230 (Admin). The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 Act"), section 1 and Schedule 1 now applies. Section 1 of the 2020 Act was brought into force on "IP completion day" by Regulation 4 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020. IP completion day" is defined by section 39(1) of the 2020 Act as 31 December 2020 at 11:00pm.

[53] Section 77 of the Nationality, Immigration and Asylum Act 2002 Act ("the 2002 Act") was the domestic law that applied to the application for asylum in this case at the relevant time. This is made clear in decision making correspondence which reads that "This decision was made in line with the Immigration Rules which were in force before 28 June 2022 (because you made your asylum claim before this date)." This provision was amended to introduce the references particularly noted by the court (s.77 (2A) and 2(B)) by sections 29 and Appendix 4, paragraph 4 of the 2022 Act. Those amendments were brought into force on 28 June 2022 and provide going forward (subject to legal challenges which are ongoing) that refugees may be removed to a safe third country pending asylum claims.

[54] On the basis of the respondent's application for asylum, which was made on 15 January 2022, the relevant paragraph 329 of the Immigration Rules was:

> "Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 no action will be taken to require the departure

> of the asylum applicant or their dependants from the United Kingdom."

[55] This is in the same terms of the rule as considered by Lord Stephens in *G v G*. The Supreme Court's consideration of the effect of this rule, is found at para [131] of the judgment.

[56] In addition to the amendments made to section 77 of the 2002 Act which have been noted, para 329 of the Immigration Rules has also been amended, so that it currently provides:

> "For so long as an asylum applicant cannot be removed from or required to leave the UK because section 77 of the Nationality, Immigration and Asylum Act 2002 applies, any dependants who meet the definition under paragraph 349 must also not be removed from or required to leave the UK."

[57] The pre-amendment protection afforded by paragraph 329 of the Immigration Rules as it applied to this case, was discussed in *G v G* as operating to prevent implementation of a return order until the Secretary of State either issued a determination or granted a certificate relating to a safe third country in the context of article 7 of the Procedures Directive being retained EU law. It is of note that the language of rule 329 (as applied at the relevant time) is in similar "negative" terms as section 77 of the 2002 Act, as opposed to the positive obligation that was apparent from article 7 of the Procedures Directive.

[58] Article 7 was at the core of Lord Stephens' analysis of the obligation extending to all emanations of the state. The dicta at para [113] of *G v G* is of particular importance in highlighting that the safeguards within the immigration process do not extend beyond that, and, in particular, do not fetter a judge considering an application under the Hague Convention.

[59] At first instance the judge found a return to Switzerland would not breach the principle of refoulement but again referring to paras [128] and [129] of the judgment in *G v G* the judge held these were clear statements that it is not just the risk of refoulement which prevents the implementation of a return order. We do not think that there are any other arguments to be made in this case as it stands before us which militate against a return order to Switzerland for the reasons we have given, specifically a return of the child to the state of habitual residence which is not the State of persecution cannot offend the current immigration rules and accords with the Hague Convention. This brings us back to the position enunciated by Laws LJ in which is discussed at paras [112]-[114] of *G v G*.

Conclusion

[60] The appeal is allowed, and the return order is confirmed. The parties have substantially constructed a return order upon undertakings save an effective date. We set this as two weeks from the date of this judgment to allow for all travel arrangements to be made and any additional travel documentation to be provided. There is liberty to apply.

Good practice guidance

[61] Going forward, we recognise that there are very few (single figure) cases in this jurisdiction under the Hague Convention which will involve asylum claims. Nonetheless practitioners need to be specialist in this area and observe good practice. We remind Counsel of the need to address asylum issues swiftly and seek relevant information from the Home Office. In *G v G* Lord Stephens went onto say that "all the parties and interveners in this case recognised the need for mechanisms to enable the court and the Secretary of State to co-ordinate their respective proceedings, to secure expedition in both" and, having invited the parties and intervenors in *G v G* to suggest standard directions in the Hague Convention proceedings where there is a parallel asylum claim, the Supreme Court drew up some standard directions for problem areas and suggestions, and set out these out in Appendix Two of the judgment.

[62] We hope that the Official Solicitor with the assistance of specialist counsel who usually appear could in Northern Ireland act as an effective conduit at least to draft e-mails for the approval of the court to engage the Home Office on the relevant issues which the Official Solicitor has helpfully set out in its paper as follows.

[63] Core to the suggestions in Appendix Two of *G v G* is that there would be a line of communication between the court and the Home Office. Of note is the suggestion in para 2 that the court rather than a particular party would request the Secretary of State to:

(i) intervene in the 1980 Hague Convention proceedings;

(ii) allocate the asylum application to the Expedited Team;

(iii) indicate to the court and to the parties what further preparatory steps, if any, are required prior to a determination of the asylum application;

(iv) indicate in writing whether any request for international protection has been made (or can be understood to have been made) for refugee status in respect of the child;

(v) keep the court informed of the progress of the asylum application(s) and/or appeal(s) and of any reconsideration of refugee status and in particular to

promptly inform the court of any delays in, or requests for extensions of time in respect of, the asylum application;

(vi) make requests to the court if the Secretary of State considers that the court can use its case management powers to expedite the asylum application;

(vii) provide the court with an anticipated timetable for the determination of the asylum application by the Secretary of State;

(viii) ensure that there is a clear line of communication between the courts and the Secretary of State;

(ix) request that the Secretary of State attend all hearings by a representative; and inform the court of the outcome of any asylum application including any certification by the Secretary of State pursuant to section 94 of the 2002 Act.

The draft Order

[64] We are grateful for counsel providing a draft return order which we set out as follows. Other than to allow a little more time for travel arrangements to be finalised we adopt the order as suggested. Appropriate undertakings have also been given set out as follows in the draft order.

[65] Counsel may raise any additional issues by 4pm on Monday 5 June 2023 otherwise this draft order will become the final order of this court as follows:

1. The child's habitual residence as of the 30 June 2022 is and remains Switzerland.

2. The Court having received information from the Central Authority is satisfied that there exists no travel impediment to the child's return to Switzerland. The child AB shall be returned to Zurich, Switzerland in the week commencing 19 June 2022 by connecting flight from Belfast and through a Hague Convention country to Zurich, Switzerland.

3. Both parties shall enter into mutual undertakings as set out in the Schedule attached hereto.

4. There shall be no order as to costs between the parties. The costs of the appellant and of the respondent, assisted persons, be taxed forthwith in accordance with the provisions of Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

5. Liberty to apply.

SCHEDULE

UNDERTAKINGS

1. The Plaintiff will pay for the reasonable air fare expenses incurred for the child and the Defendant to return from Belfast to Zurich. The flights shall be booked for the week commencing the 19th June 2023 by the Plaintiff for the Defendant and the child and shall include one hold luggage bag each for the Defendant and the child.

2. The Defendant shall provide on or before the 12th June 2023 a copy of the travel documents to enable the flight to be booked. The Plaintiff's solicitor shall confirm the flight booking and shall send copies of the booking to the Defendant's solicitor.

3. The Defendant must provide a list of all of the child's necessary items to be returned to Switzerland with him and which cannot be transported by hand/hold luggage by Monday 12th June 2023. Upon receipt of same, the Plaintiff will pay a reasonable sum as contribution to the costs of same being returned to Switzerland if not able to be taken on board the plane.

4. The Plaintiff undertakes that the child will remain in the care of the Defendant until such times as either the Swiss Court orders otherwise or there is an intervention from Swiss Social Services.

5. The Defendant shall enrol the child in school in Zurich on or before the 26th June 2023.

6. The Plaintiff will provide financial assistance to the Defendant for the purposes of securing accommodation in Zurich. Upon the child's return to Zurich, the Plaintiff shall vacate his accommodation for a period of 4 weeks and thereafter shall provide financial assistance to the Defendant up to the sum of 1500 Swiss Francs per month for a period of two months. The Defendant will be required to provide proof of rental agreement confirming the cost of the rental before the first payment is made and within 4 weeks of arriving in Zurich. The Defendant shall vacate the Plaintiff's accommodation or on before the 4th week of her return to Zurich and shall provide the Plaintiff with the date for her vacating the property.

7. The Plaintiff shall pay the sum of 700 Swiss Francs per month as maintenance for the child. The 1st payment shall be made following the child's return to Zurich.

8. The Plaintiff will not actively pursue a criminal complaint against the Defendant for child abduction in respect of the removal of the child from Switzerland or about December 2021.

9. Both parties undertake that neither will remove the child from Switzerland without the written consent of both parties or by Order of a Court within the relevant jurisdiction of Switzerland.

10. The Plaintiff will co-operate with the Swiss authorities in respect of any enquiries made of him to ensure that the mother and child can remain in Switzerland.

11. Until her departure for Zurich with AB, the Defendant shall not remove AB from Northern Ireland;

12. Having returned to Zurich, the Defendant will not remove AB from Switzerland without the permission of the Swiss Court;

13. The Defendant shall permit the Plaintiff to have weekly video contact with AB until AB arrives in Zurich and the Defendant shall then permit direct contact as per the joint custody order of the Zurich Court dated the 17th September 2019.

14. The Defendant will accompany AB to Zurich in accordance with the Return Order.

15. The Defendant will promptly co-operate with the process of obtaining the necessary documentation for AB to return to Zurich.