Neutral Citation Number: [2022] EWCA Civ 188

Case No: CA-2021-000083

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE ROBERTS
FD20P00168

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:18 February 2022

Before :
LORD JUSTICE MOYLAN
LORD JUSTICE COULSON
and
LORD JUSTICE LEWIS

- -

Re:- R (A CHILD)
(Asylum and 1980 Hague Convention Application)

- -
- -

Richard Harrison QC, Andrea Watts and Mehvish Chaudhry (instructed by **Osbornes Law**) for the **Appellant**
Mark Twomey QC, Cliona Papazian and Ralph Marnham (instructed by **Brethertons LLP**) for the **Respondent**
Christopher Hames QC and Charlotte Baker (instructed by **Goodman Ray**) for the **Respondent (Guardian)**
Alan Payne QC and Remi Reichhold (instructed by **Treasury Solicitor**) for the **Secretary of State for the Home Department**

Hearing dates : 7 and 8 December 2021

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on 18th February 2022 by circulation to the parties or their representatives by email and release to BAILII.

Lord Justice Moylan:

1. The father appeals from the order made by Mrs Justice Roberts ("the Judge") on 1 October 2021 which dismissed his application under the provisions of the 1980 Hague Child Abduction Convention ("the 1980 Convention") for the summary return of the parties' child, M, to Ukraine.

2. This is the second application made by the father under the 1980 Convention. His first application led to a summary return order being made on 7 May 2019. The mother briefly returned to Ukraine with M but wrongfully removed him on 2 October 2019. A second summary return order was made on 17 July 2020. The mother failed to comply with that order and with further orders which were subsequently made also requiring M to be returned to Ukraine.

3. Following the second summary return order, M made a claim for asylum which was received by the Home Office on 2 November 2020. The father was still seeking to enforce the return orders, and to obtain disclosure of material from the asylum claim, when, on 28 May 2021, M was granted asylum. As can be seen, the asylum claim was made some 18 months after the first application under the 1980 Convention had been determined and nearly four months after the second had been determined.

4. The Judge rejected the father's application for disclosure; and decided, in essence summarily, both to set aside the orders requiring M to be returned to Ukraine and to dismiss the father's substantive application under the 1980 Convention. The Judge made the latter order because she concluded, at [76], that, following the grant of asylum, the 1980 Convention proceedings were "without further purpose" and there was "nothing further for this court to examine".

5. For the reasons set out below, I consider that the Judge's decision as to disclosure was flawed and that she was wrong summarily to dismiss the application under the 1980 Convention.

6. Further by way of introduction, I make the following additional observations in order to set this case in its broader context.

7. In the years 2017/2020 there were between 180 and 220 incoming applications made under the 1980 Convention through the International Child Abduction and Contact Unit (Table 4.2, Royal Courts of Justice Annual Tables 2020). Although separate statistics are not kept, there appear to be an increasing, although still small, number of cases in which either the respondent to an application under the 1980 Convention, and/or a child who is the subject of the application, claim asylum. This is a very recent development in this jurisdiction which raises serious issues about how the effective operation of the 1980 Convention can be maintained when an asylum claim has been made by the taking parent and/or the child(en).

8. These issues were considered in *G v G (Secretary of State for the Home Department and others intervening)* [2021] 2 WLR 705, decided by the Court of Appeal in September 2020 and the Supreme Court in March 2021. That case addressed the relationship between the two applications and the effect of an asylum claim and of the grant of asylum on an application and an order under the 1980 Convention. This is another such case but one with a very different factual background to that in *G v G*. In

contrast to the present case, in *G v G* the application under the 1980 Convention and the asylum claim were made, effectively, simultaneously.

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.

10. The parties to the proceedings are the father, represented by Mr Harrison QC, Ms Watts (who did not appear below) and Ms Chaudhry; the mother, represented by Mr Twomey QC and Ms Papazian (neither of whom appeared below); the Guardian, represented by Mr Hames QC and Ms Baker; and the Secretary of State for the Home Department, represented by Mr Payne QC and Mr Reichhold (who did not appear below).

Background

11. The judgment below is reported at [2021] EWHC 2642 (Fam). This sets out the background in some detail. The references below are to that judgment.

12. The mother, the father and their child, M, now aged 12, are all Ukrainian nationals. The mother and the father had a brief relationship but did not live together. They, and M, lived in Ukraine until January 2018 when the mother and M came to England pursuant to an agreement with the father that M could live here for six months.

13. The father had direct contact with M until mid-2016. The mother commenced parental responsibility proceedings in Ukraine in November 2017. In January 2018 she applied for permission to relocate to England with M. This was the context in which the father agreed to M temporarily living in England.

14. The mother did not return with M to Ukraine in July 2018, as had been agreed, but wrongfully retained him in England. This led to the father making an application under the 1980 Convention.

15. That application was determined by Theis J on 7 May 2019. The mother opposed the application but indicated that, if M's return was ordered, she would return with him. The mother relied on the following in opposing the application: (a) the father was not exercising rights of custody; (b) the father had consented to or acquiesced in M's retention in England; (c) M objected to returning; (d) there was a grave risk that M would suffer harm or be placed in an intolerable situation if returned to Ukraine; and (e) article 20 of the 1980 Convention.

16. Theis J rejected (a) and (b). It is only relevant for the purposes of the present appeal to refer to the matters relied on by the mother in support of (c), (d) and (e). In respect of M's objections, these were summarised in the Cafcass report as follows: M said he "is happy living" in England and did "not want to live in the Ukraine and with his father";

he said that his father "shouts, is rude and uses bad language"; he also referred to his asthma and said that "his health was affected living in the Ukraine because of the pollution".

17. The mother's case in respect of article 13(b) was summarised by Theis J as follows:

> "In relation to Article 13(b) (the mother's then counsel) submits the evidence demonstrates M's strength of feelings, he is settled here, doing well at school and for him to return to the Ukraine is likely to put him at grave risk of psychological harm and/or place him in an intolerable position. He has no relationship with the father, would be separated from his step-father who he clearly has a close relationship with and would have to return to a school system where he had previously not settled. Additionally, it is submitted his asthma would deteriorate."

No additional matters were advanced in support of the mother's reliance on article 20.

18. Theis J decided that the article 13(b) threshold had not been met. She accepted that M might be "unsettled" by a return to Ukraine but noted that he would "be returning to much that remains familiar to him". In her view, there was "no credible evidence" that M's health would be affected. She also decided that article 20 raised no "separate freestanding defence".

19. As to M's objecting to returning, Theis J decided that he did object to returning to Ukraine but, in her discretion, she made a return order. She considered that M had "been heavily influenced by his mother" and that his welfare interests would be best determined by the courts in Ukraine.

20. The mother and M returned to Ukraine in June 2019. What then happened is set out by the Judge, at [10]:

> "The collective expectation at the time was that she would apply immediately in the domestic courts in that jurisdiction for permission permanently to remove M to live with her and her husband in the home they had established in England. That did not happen. After what appears to have been a somewhat peripatetic existence, she left Ukraine at the beginning of October 2019 and travelled via Lithuania back to England."

This wrongful removal led to the father's second application under the 1980 Convention.

21. I would also mention that proceedings concerning M have been continuing in Ukraine with each party making applications and with a number of hearings. For example, on 6 June 2019, the mother applied for child support from the father. In addition, as part of the parental responsibility proceedings, M was seen by a child care professional when he was in Ukraine in June 2019.

22. The father's second application was determined by Robert Peel QC (as he then was), sitting as a Deputy High Court Judge, on 17 July 2020. He made an order requiring M to be returned to Ukraine by 5 August 2020.

23. The mother had contested that application on the basis: (a) that M was not habitually resident in Ukraine at the date of his removal; (b) article 13(b); and (c) M's objections.

24. Robert Peel QC decided that M was habitually resident in Ukraine as at 2 October 2019. In respect of the mother's case under article 13(b), he noted that this was "almost identical to that put forward in May 2019". In summary, the matters relied on by the mother were M's "stability and integration" in England, including his attachment to his step-father; that M's asthma "would be aggravated by a return" to Ukraine; and that M's "mental health may deteriorate if he returns" to Ukraine. Robert Peel QC decided that the mother's "contentions … fall far short of the necessary threshold to establish this defence".

25. Robert Peel QC found that M objected to returning to Ukraine. In the Cafcass report he was described as expressing "strong negative views both about the Ukraine and his father". He said that his father "had called him names and shouted at him". He was also "angry his father does not accept he did not want to live with him or in the Ukraine". For reasons set out in his judgment, Robert Peel QC decided to exercise his discretion by making a return order.

26. On 3 August 2020, I dismissed the mother's application for permission to appeal the return order made by Robert Peel QC.

27. On 4 August 2020, the day before she was required to return M to Ukraine, the mother applied for a stay on the basis, at [14], "that she herself was unwell and she was concerned about compromising M's health, as well as her own, as a result of the Covid pandemic". That application was dismissed by Keehan J on 17 August 2020.

28. On 24 August 2020, the mother applied to set aside the return order "because of what she alleged to be 'a significant deterioration in [M's] mental and physical health'". The mother relied on a report by an independent social worker and "other medical evidence". That application was dismissed by Charles Geekie QC, sitting as a Deputy High Court Judge, on 22 September 2020.

29. On 9 October 2020, the mother again applied for a stay of the return order, at [14], "on the basis that Covid-19 restrictions were preventing [her] from travelling to Ukraine with M". Williams J dismissed that application on 16 October 2020 and made an order requiring M to be returned to Ukraine by 27 October 2020.

30. On 26 October 2020, the mother applied for a stay on the basis that M had made an application for asylum on 20 October 2020. As set out in the Guardian's skeleton argument for this appeal, the "application for asylum was instigated by" the mother.

31. On 30 October 2020, the father applied for the mother's committal for being in breach of the return order.

32. On 2 November 2020, the Home Office recorded their receipt of M's asylum claim.

33. On 15 January 2021, the Ukrainian District Court made an order that M should live with the father. The mother appealed against this order asserting, as set out in the judgment of the Kiev Court of Appeal, "that the Court decision was arbitrary, unmotivated and inconsistent with the circumstances of the case".

34. On 22 January 2021, the father applied for disclosure of M's asylum application and all accompanying documentation including the records of any asylum interviews and witness statements.

35. M, through his Guardian, and the Secretary of State for the Home Department ("the SSHD") were joined to these proceedings by orders made in May 2021.

36. On 19 May 2021, the Kiev Court of Appeal allowed the mother's appeal and set aside the order made on 15 January 2021. This was because the lower court "did not fully ascertain all the circumstances and misapplied substantive law".

37. On 28 May 2021, M was granted asylum by the SSHD. We were told at the hearing that the notification of the grant of asylum simply stated that asylum had been granted, without any reasons or further explanation.

38. In order for M to have been granted asylum, the SSHD must have concluded that he was a refugee within the meaning of the 1951 Refugee Convention. This provides, by article 1A(2), that a person is a refugee if:

> "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 …"

Hearing and Judgment below

39. The hearing below was initially listed solely to determine the father's application for disclosure from the asylum claim which, as referred to above, had been made by him on 22 January 2021. At that date, the father's application for the mother's committal remained outstanding. Shortly before the hearing (30 June 2021), the child had been granted asylum (28 May 2021). This development led, in my view, to some conflation of the issues being considered by the court. There was, for example, no application either by the mother or M for the previous return orders to be set aside.

40. In essence, the court had to determine: (a) whether to set aside the previous return orders or to give directions in respect of that issue: (b) if the orders were set aside, how the father's application under the 1980 Convention should be determined: and (c) whether, for the proper determination of the father's application, disclosure of documents from the asylum claim should be ordered.

41. In her judgment, the Judge first addressed the issue of disclosure, then, effectively, dealt with the issues of set aside and the determination of the father's substantive application together.

42. As set out, at [17], the "complete asylum file [had] been made available to the Guardian and to the court but not to either of M's parents". The Judge was, therefore, aware of

the basis on which the asylum claim had been made. This is relevant because the Judge made a number of comments about the nature of the claim. It would not have been appropriate for this court to have access to the file and, accordingly, our understanding of the nature of the claim and its connection to the application under the 1980 Convention derives from these references.

43. At [72], the Judge explicitly stated that:

> "In this case, it is the 'left behind' parent who is the alleged persecutor in the context of the asylum claim."

This comment has to be seen in the context of M not having seen his father since 2016, in other words, for at least two years prior to the mother's wrongful retention of M in England in July 2018 and five years before his asylum claim.

44. Another comment is, at [69], when the Judge said:

> "I have had the benefit of reading the asylum material as has M's Guardian. The basis of the child's application for asylum is *anchored to* the Article 13(b) defence which the respondent ran in these proceedings", (my emphasis).

The Judge then referred to "additional information" having been provided in support of the asylum claim. She also said:

> "I accept that there is an inconsistency in terms of the totality of the information which has been made available to the SSHD and that which has been placed before this court for the purposes of the earlier consideration which two previous judges of the Division have given to the respondent's Article 13(b) defence".

These observations indicate that the matters relied on in support of the asylum claim and those relied on in support of article 13(b) overlapped but that the former contained matters which were additional to the latter. The matters relied on in support of the mother's case under article 13(b) were, in summary, as referred to above: M's "strength of feelings"; that he was settled in England; that he had no relationship with his father; and that M's asthma would deteriorate in Ukraine. They were summarised by Robert Peel QC as being that the mother "and M are settled [in England] and do not want to return to the Ukraine". It is not easy to see how these matters could establish a claim for asylum.

45. The father's case below was, at [27], that the material from the asylum claim was "plainly relevant" to the 1980 Convention proceedings. Mr Harrison invited the Judge, at [29], "to proceed on the basis of a deemed application made by either or both of the respondent and/or M for set aside" and, at [75], "to make case management directions in relation to the deemed set aside application" which would include further statements and a further substantive hearing.

46. The mother supported the submissions made by the Guardian and the SSHD. Additionally, she submitted, at [31], that the asylum documents were not relevant and that "disclosure would infringe M's Article 8 rights to confidentiality in his family life

and further that, if released, the court would lose all control over wider dissemination of the asylum material".

47. The Guardian's case was, at [32], that "as a result of the decision to grant M asylum, the court must set aside the return order by operation of law and thus the asylum file has no relevance for the purposes of the first limb of the test in *Dunn*". It was said that the grant of asylum had "created a jurisdictional vacuum and there is no longer any 'live' context for the grant of further relief in the 1980 Convention proceedings which are effectively concluded". It was submitted alternatively, at [34], that even if the asylum material was relevant, "the balance falls firmly in favour of refusing the disclosure application".

48. The SSHD submitted, at [57], that the principles set out in *G v G* applied "with appropriate modification, … irrespective of … when the claim for asylum is either made or determined". The disclosure application was opposed on the general basis, at [37], of "the importance of maintaining confidentiality of the asylum system". It was submitted that permitting disclosure "to the alleged perpetrator" would "act as a compelling deterrent" to claimants and witnesses providing evidence and impede the State's ability to identify and protect "genuine refugees".

49. In respect of the father's disclosure application, the Judge referred, at [19], to *Dunn v Durham County Council* [2013] 1 WLR 2305 and *Re H (A Child) (Disclosure of Asylum Documents)* [2021] 1 FLR 586. She noted that the latter decision made clear that the "approach to disclosure" set out in the former, namely that "the denial of disclosure is limited to circumstances where such denial is strictly necessary", "applies in Hague Convention proceedings in the context of the disclosure to the alleged 'persecutor' of asylum records".

50. The Judge dealt at some length with *G v G*, starting at [39]. She also referred to *F v M and Another (Joint Council for the Welfare of Immigrants intervening)* [2018] Fam 1. She noted, at [47], the power available to the SSHD to revoke a grant of asylum. She then set out, at [48]:

> "It was acknowledged on behalf of the SSHD in *F v M* that it would in principle be open to the father to judicially review a failure by the SSHD to revoke the grants of asylum on public law grounds: see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351."

She observed that such a challenge in the present case would face "significant hurdles":

> "In this case the SSHD has already been provided with the entire bundle of material produced during the currency of the 1980 Convention proceedings to date, including the orders flowing from the earlier judgment of Theis J and the subsequent judgment of Mr Robert Peel QC. That evidence was available to her for the purposes of her review of the evidence provided by, or on behalf of, M independently in the context of his asylum claim. She reached her decision in the full knowledge of the

> public law duty to which she was, and is, subject to consider any material relevant to her decision. All the evidence given by the father in the family proceedings to date has been made available to the SSHD as well as the previous judicial findings based upon that evidence."

It can be seen that the Judge was looking at the issue without reference to the fact: (a) that the 1980 Convention proceedings had been decided on evidence which did *not* include any suggestion that M was at risk of persecution if he was returned to Ukraine nor which contained any allegations which might appear to provide any foundation for an asylum claim; and (b) that "additional information" had been provided in support of the asylum claim leading to what the Judge called "an inconsistency" in the material available to the SSHD and that provided to the court.

51. The Judge set out her conclusions, from [56].

52. The Judge rejected, at [60], the submission that the 1980 Convention proceedings had come to an end by "operation of law" or that she was "obliged by operation of law to set aside the return order". She considered that "the court retains a power to review and set aside a final order made under the 1980 Convention". It can be seen that the Judge was considering, at least at that stage, only the power to set aside and was not considering what should happen to the substantive application if the return orders were set aside.

53. The Judge next turned to consider the father's disclosure application dealing first with the issue of relevance. She decided, at [61], that it would not be appropriate to order disclosure "where its sole or dominant purposes was to breach the confidentiality of the asylum process simply to enable the applicant and his legal team to investigate the potential merits of fresh public law proceedings by way of judicial review".

54. She also did not consider, at [62/63], that the asylum evidence should be disclosed for the purposes of the father's committal application or other "enforcement proceedings".

55. Next, the Judge noted, at [64/65], that the father had made no welfare application under the Children Act 1989.

56. Again, it can be seen that the Judge did not consider the disclosure application in the context of any reconsideration of or determination of the father's substantive application under the 1980 Convention. As referred to above, this may well, in part, be due to the fact that the nature of the hearing had changed from that previously anticipated because of the recent grant of asylum. It may also be due, in part, to the father, at [65], declining "to elect how he intends to proceed in the light of the asylum decision".

57. This limitation in the Judge's approach can also be seen when the Judge dealt substantively with the disclosure application. Before setting out her reasons for dismissing that application, the Judge said the following, at [69], part of which I have quoted above:

> "It would be difficult … for me to hold, on any objective basis, that the material presented to the SSHD in the context of the

> asylum claim had no relevance whatsoever to the application to set aside the return order … In considering where the balance in this case lies, I have focussed on the additional information which was provided to the SSHD because it is the confidentiality of that information which is asserted as the basis for withholding disclosure from the applicant. I have considered the relevance of that information to any potential challenge to the SSHD's decision and in the wider context of M's welfare in the context of a summary return to Ukraine. I accept that there is an inconsistency in terms of the totality of the information which has been made available to the SSHD and that which has been placed before this court for the purposes of the earlier consideration which two previous judges of the Division have given to the respondent's Article 13(b) defence. In circumstances where the additional information might have resulted in different outcomes on both occasions in terms of the decision whether or not to order return, it is reasonable in principle for the applicant to wish to see that material in order to know the case which is advanced against him."

58. The Judge set out, at [73], her reasons for dismissing the application for disclosure of the asylum material. I set out her first two reasons in full:

> "(i) Insofar as the current disclosure application amounts to an enquiry into the prospects of a collateral challenge to the SSHD's decision in the asylum process (which I consider to be its principal focus), the application for disclosure should be refused.
>
> (ii) In the context of a deemed application to set aside the return order, the combined weight of M's own Article 8 rights, those of his mother and the wider policy considerations underpinning the confidentiality of the asylum process operate in this case to tip the scales firmly in favour of refusing disclosure. I acknowledge that different considerations may apply in an alternative context."

59. The Judge next set out, at [73(iii)], that if the father made a welfare application in England, she considered that there were "aspects of the material submitted to the SSHD which the court may consider to be relevant". The Judge also acknowledged that that process:

> "might hypothetically provide him with a judgment which could in due course be sent to the SSHD with a request that she reconsider her decision in the light of any findings made by the court after a full forensic examination of all the evidence".

She then added in respect of disclosure:

> "I recognise that different considerations might apply in that event to any request for disclosure of the asylum file. Mr Payne QC acknowledges that in this event different considerations

> might apply in relation to both disclosure per se and any redaction required to preserve necessary elements of confidentiality."

60. I repeat that the Judge did not consider whether disclosure should be ordered for the purposes of determining the father's application under the 1980 Convention following the extant return orders being set aside.

61. The Judge's ultimate conclusion was as follows:

> "[76] … In this case there has been a decision made by another arm of the state which operates to prevent the enforcement of an order for summary return to a different jurisdiction. I accept the submissions of the respondent, the Guardian and the SSHD that little purpose is served by allowing the 1980 Convention proceedings to 'limp' on without further purpose or effective remedy for the applicant. In the context of those proceedings there is nothing further for this court to examine. In accordance with paragraph 89 of *Re B* I have considered the applicant's request for disclosure of the asylum file which I have dismissed in the context of the Convention application. There is no further evidence which is relied on as potentially relevant to the set aside decision. In the context of Mr Harrison QC's proposal that there might be a further round of written statements in anticipation of a further lengthy hearing, I ask myself what would inform the content of those statements? I have thus considered separately whether there is any purpose in prolonging the life of the proceedings and reached the conclusion that there is not."

62. I would also note that the mother filed two statements in these proceedings subsequent to M's asylum claim being made. These contain no detail about the nature of that claim. There is also no explanation as to why that claim was not made until October/November 2020. There is a puzzling reference in one statement to M having been "detained" by the father in Ukraine for three months in summer 2019. This supposed detention appears to be no more than the mother not being able lawfully to remove M from Ukraine either pursuant to a specific order or under the general provisions of Ukrainian law.

Law

63. The 1980 Convention sets out the grounds on which an application for a summary return order can be refused. These include under article 13:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> …

> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views …"

64. Article 13(b) is, "[b]y its very terms, ..of restricted application": *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, judgment of Lady Hale and Lord Wilson, at [31]. This conclusion is then explained in the subsequent paragraphs which first address the burden of proof (which is on the respondent) and the standard of proof (the balance of probabilities) before then dealing with the following:

> "[33] Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
>
> [34] Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.
>
> [35] Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the

> situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist."

65. I have set out the above paragraphs at length because, although article 13(b) is of "restricted application", this is because a "grave risk" has a high threshold and not because of any limitation in the circumstances which can be relied on in support of the asserted grave risk. I mention this because, in my view, although the nature of the respective risks is different, it is not easy to conceive of circumstances which could be relied on in support of establishing a "well-founded fear of being persecuted" (the test for the asylum claim) which could not also be relied on in support of a case under article 13(b) even if combined with other matters.

66. The Family Procedure Rules 2010 ("the FPR 2010") were amended in 2020 (SI 2020/135) to include a new Rule 12.52A. This rule provides as follows:

> "Application to set aside a return order under the 1980 Hague Convention
>
> 12.52A
>
> (1) In this rule -
>
> "return order" means an order for the return or non-return of a child made under the 1980 Hague Convention and includes a consent order;
>
> "set aside" means to set aside a return order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule.
>
> (2) A party may apply under this rule to set aside a return order where no error of the court is alleged.
>
> (3) An application under this rule must be made within the proceedings in which the return order was made.
>
> (4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.
>
> (5) Where the court decides to set aside a return order, it shall give directions for a rehearing or make such other orders as may be appropriate to dispose of the application.
>
> (6) This rule is without prejudice to any power the High Court has to vary, revoke, discharge or set aside other orders, declarations or judgments which are not specified in this rule and where no error of the court is alleged."

This is also addressed in PD 12F – International Child Abduction which states, at paragraph 4.1A, that the court might set aside an order when "there has been a fundamental change of circumstances" and also where there has been "material non-disclosure".

67. In Lord Stephens' judgment in *G v G* (with which the other members of the court agreed), he identified, for example at [6], the need for the 1951 Refugee Convention and the 1980 Convention "to operate hand in hand" and for "practical steps [being taken] … to co-ordinate both sets of proceedings". In that case, the mother had made an asylum claim immediately on arriving in this country on 2 March 2020. The father's application under the 1980 Convention was issued on 14 April 2020. The two applications were, therefore, proceeding in parallel. This was the context for the observations made by the Court of Appeal and the Supreme Court. It is also clear, however, that this was expected typically to be what would happen.

68. It was expected because, as explained above, facts relied on in support of an asylum claim would be very likely to be included in any case advanced under article 13(b); and vice-versa. Accordingly, the courts in *G v G* expected both claims to be running in parallel. I recognise, of course, that there might be circumstances which explained why an asylum claim was not made until later, such as a change in the conditions in the home State or the development of a new risk of persecution. However, absent such an explanation, the court is entitled to expect, and there is an obligation on, a parent to advance their full case in the 1980 Convention proceedings. If this requires some procedural adjustments, then they can be sought by that parent.

69. The Supreme Court in *G v G* rejected, at [157], the mother's contention that the High Court should neither determine the 1980 Convention proceedings nor make a return order when there was a pending asylum claim by either the taking parent or the child. Lord Stephens agreed, at [159], with the Court of Appeal's conclusion that "any bar applies only to implementation". In addition, he said, at [158]:

> "Furthermore, if as a result of the decision of the Secretary of State in relation to the asylum process a reconsideration of the 1980 Hague Convention proceedings is required, then the court has power in England and Wales under FPR rule 12.52A or under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention: see *B (A Child) (Abduction: article 13(b))* [[2021] 1 WLR 517]."

This last paragraph was a general observation as to the court's power to set aside any order following the determination of a linked asylum claim. It is clear, for the reasons set out below, that it was not envisaged that the grant of asylum would, of itself, prevent a return order being made in the 1980 Convention proceedings.

70. Lord Stephens set out, from [165], a number of practical steps which he suggested could be taken, including in respect of the disclosure of information from the 1980 Convention proceedings to the SSHD and from the SSHD to the court:

> "[165] For these Conventions to operate hand in hand, I consider that there are various practical steps which should ordinarily be taken, aimed at enhancing decision making in both

> sets of proceedings, where they are related. I consider that proceedings are related once it becomes apparent that an application for asylum has been made by a parent (regardless of whether the child is objectively understood to have made an application or been named as a dependant) or by a child."

Among these steps were: at [167], that, as soon as it was known "that there were related proceedings", the child should be joined as a party to the 1980 Convention proceedings and "the papers that have by that stage been provided to the Secretary of State in relation to the asylum application should be disclosed to the child's representative"; at [169], that "the documents in the 1980 Hague Convention proceedings should ordinarily be made available to the Secretary of State"; and, at [170], "the court should give early consideration to the question as to whether the asylum documents should be disclosed in the" 1980 Convention proceedings".

71. Lord Stephens then referred, at [170]-[173], to the balancing exercise which the court has to carry out, when deciding what information/documents should be disclosed from the asylum proceedings, confirming that it is that set out in *Re H (A Child) (Disclosure of Asylum Documents)*.

72. Next, I refer to *Re B (A Child)* [2021] 1 WLR 517. In that case, which preceded the introduction of rule 12.52A of the FPR, I set out the process which, I suggested, should be followed when an application was made to set aside an order made under the 1980 Convention:

> "[89] I suggest the process, referred to above and adapted as follows, should be applied when the court is dealing with an application to set aside 1980 Convention orders: (a) the court will first decide whether to permit any reconsideration; (b) if it does, it will decide the extent of any further evidence; (c) the court will next decide whether to set aside the existing order; (d) if the order is set aside, the court will redetermine the substantive application.
>
> [90] Having regard to the need for applications under the 1980 Convention to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing. More typically, I would expect there to be a preliminary hearing when the court decides the issues under (a) and (b), followed by a hearing at which it determines the issues under (c) and (d). These will, inevitably, be case management decisions tailored to the circumstances of the specific case."

Stage (d) of the process is redetermination of the substantive application. It is clearly relevant to note, and I repeat, Lord Stephen's reference in *G v G*, at [158], to the court's *reconsideration* of the 1980 Convention proceedings. The setting aside of an order does not determine those proceedings. It remains necessary for the court to determine

what substantive order to make so that the proceedings are fairly and properly determined.

73. It is also necessary to deal with the circumstances in which the SSHD will or might reconsider the grant of asylum. This issue has been addressed in a number of authorities and, at the hearing of this appeal, Mr Payne made clear that the SSHD was not seeking to depart from what had previously been said on her (or her predecessors') behalf.

74. In *F v M*, Hayden J set out, at [46], the submissions made on behalf of the SSHD as follows:

> "54. It is therefore accepted that SSHD has a public law obligation to consider material relevant to the discharge of her obligation to revoke the grant of asylum. This is reflected in the Asylum Policy Instruction "Revocation of refugee status" (the 'Revocation Guidance") which provides that "careful consideration must be given to revoking refugee status" where, amongst other matters, "evidence emerges that status was obtained by misrepresentation" (paragraph 1.2).
>
> 55. In the context of any such decision the SSHD: - (i) bears the burden of establishing that the requirements of paragraph 339AB are met, and (ii) is required under section of the Borders, Citizenship and Immigration Act 2009 to take into account as a primary consideration the best interests of the Child.
>
> 56. Accordingly, if evidence emerges during the course of these Family proceedings that is relevant to whether the grant of asylum to the Child should be revoked this material will be considered by the SSHD.
>
> 57. The SSHD accepts that it would in principle be open to the Father to judicially review a failure by the Secretary of State to revoke the grants of asylum on public law grounds."

75. In the Court of Appeal's judgment in *G v G*, a number of reasons were given for the conclusion, at [154]:

> "that, generally, the provisions and underlying policy of the 1980 Hague Convention require that applications for a return order are expeditiously determined, *notwithstanding that the taking parent and/or child may have been granted asylum status* or have a pending asylum application or appeal. In our view, in these circumstances, the High Court should be slow to stay an application prior to any determination", (my emphasis).

These included the following, at [155]:

> "(ii) If the child has been granted refugee status or has an independent asylum application pending, then a return order cannot be implemented because that would breach the

> prohibition on refoulement of the child and/or article 7 of the Procedures Directive and/or section 77 of the 2002 Act. However, *even in those circumstances, there are additional reasons why it could well be appropriate for the court substantively to determine the application*. In summary, this is because of the differences between the two processes, as set out in para 144 above, in particular, the participation of the left-behind parent and of the child. The 1980 Hague Convention is expressly designed to give the left-behind parent access to justice and to ensure that the voice of the child is heard. Further, the differences in the processes might lead to different conclusions being drawn (see para 146)", (my emphasis).

And:

> "(iv) Just as a reasoned decision on an asylum claim, if available to the High Court, will be relevant in the subsequent determination of an application for a return order, a reasoned High Court decision on the evidence available to it (which will very likely be different from that available to the Secretary of State, for the reasons we have explained: see para 144(iv) above), and tested to an extent by the adversarial process not available in the assessment of an asylum claim, could be expected to assist the Secretary of State in determining an outstanding application for asylum by either the parent and/or the child. Whilst not creating any form of presumption, depending on the nature of the respective applications and defences, the earlier decision may not only be relevant, but possibly of some considerable weight. That may particularly be so where the risk being assessed in each exercise is similar in nature.
>
> (v) The Secretary of State is under an obligation to determine an asylum application in accordance with the Immigration Rules. Where that status has been granted but the court has determined that a return order should be made, before us, the Secretary of State through Mr Payne (in our view, rightly) acknowledged that (as a result of paragraph 339J(iii) of the Immigration Rules, if nothing else), she would be under an obligation to reconsider refugee status. The Secretary of State also confirmed that, where requested to do so by the High Court and recognising the state's duty to expedite 1980 Hague Convention process, whilst always acting consistently with her substantive and procedural obligations to apply anxious scrutiny, *she would use her best efforts to prioritise consideration of a pending asylum application or whether to revoke a grant of asylum in light of the High Court decision* and any material obtained during the 1980 Hague Convention proceedings. In those circumstances, the determination of an application for a return order by the High

> Court will usually have some real point, even where the relevant child currently has refugee status", (my emphasis).

76. The Court of Appeal returned to this, at [165]-[166], when dealing with the issue of liaison with the SSHD. A number of specific steps were proposed, at [166(i)-(v)], to assist the SSHD when determining an asylum claim *and* when reconsidering the grant of asylum:

> "[165] What steps should the court take to apprise the Secretary of State of the application under the 1980 Hague Convention and any material used in that application?
>
> [166] In our view, the Secretary of State needs to be informed about the following matters, so that she can take appropriate steps and use her best efforts to prioritise the determination of a pending application *or the reconsideration of the grant of asylum* in line with her duty to ensure expedition in 1980 Hague Convention applications", (my emphasis).

77. Reconsideration by the SSHD, and what the Court of Appeal had said about this, was touched on by Lord Stephens, at [47]

> "[47] At para 165 the Court of Appeal posed the question 'What steps should the court take to apprise the Secretary of State of the application under the 1980 Hague Convention and any material used in that application?'. At para 166(i)-(v) the Court of Appeal set out various matters about which the Secretary of State needed to be informed 'so that she can take appropriate steps and use her best efforts to prioritise the determination of a pending application *or the reconsideration of the grant of asylum*…'", (my emphasis).

78. It is also relevant to note one of the submissions made on behalf of the United Nations High Commissioner for Refugees ("the UNCHR"), as recorded by Lord Stephens, at 55(v):

> "If (a) the left behind parent has not been able properly to participate in the asylum process; (b) the Secretary of State has recognised the taking parent or the child as refugees; and (c) relevant material emerges in 1980 Hague Convention proceedings, then the Secretary of State should/must be prepared to reconsider the asylum decision (eg to revoke or re-open it)."

79. In *Re (A Child)* [2021] CSIH 52, 5 October 2021, a decision of the Inner House of the Court of Session, Lord Doherty, giving the opinion of the court, quoted from *F v M* and *G v G*. He recorded, at [13], that the SSHD confirmed that her "position on revocation was as stated in *F v M*" (as quoted above) and, at [14], that the SSHD "did not take issue with the observations of the Court of Appeal in *G v G*" at [155(iv)] (as also quoted above).

80. That case did not concern an application under the 1980 Convention but parental responsibility proceedings under the relevant Scottish legislation by which a child's parents were seeking an order for her return to them in Qatar. She had been brought to the United Kingdom by her older siblings. The Lord Ordinary had dismissed the proceedings because the child had been granted asylum and he concluded, at [12], that they "no longer had a practical purpose". That decision was overturned because, at [28], "Any order or findings which the court made would be likely to be of significant interest to the Secretary of State". This conclusion was based on the following analysis:

> "[24] We are mindful that the asylum claim and the present proceedings address different issues, and that different standards of proof apply in each process (*G v G*, judgment of the Court of Appeal at paras 144-146; Lord Stephens JSC at paras 154-157). In the asylum claim the Secretary of State's official made an administrative decision on the papers on the basis of the material put before her by M and her sisters. The issue for the Secretary of State was whether M had a well-founded fear of persecution for a Refugee Convention reason if she were to be returned to Qatar. The standard of proof was a low one - whether there was a reasonable possibility that M's allegations were well-founded. In determining the claim the Secretary of State required to comply with her duty in terms of section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of M. The focus of, and the process in, the present proceedings would be different. The inquiry would concentrate on M's best interests. Section 11(7)(a) of the 1995 Act would be engaged. The court would require to treat the welfare of M as the paramount consideration. It would not be able to pronounce the order sought unless it considers that it would be better for M that the order be made than that none should be made at all. The standard of proof would be the normal civil standard requiring proof on the balance of probabilities.
>
> [25] In our opinion the Lord Ordinary was wrong to conclude that an inquiry in relation to the issues raised by the first conclusion could have no practical effect. Although an order for the return and delivery of M pronounced by the court could not be implemented while the grant of asylum was extant, it would be a matter which the Secretary of State would be likely to have regard to. Equally, if the court made findings which tended to indicate that it would be in M's best interests to be in her parents' care, the Secretary of State would be likely to have regard to those findings. Of course, she would not be bound by the court's order or findings. However, she would have the benefit of a reasoned decision by a judge of the Court of Session on evidence which had been tested by an adversarial process (cf *G v G*, Lord Stephens JSC at para 160). The order or findings would be matters which would be likely to lead her to consider reviewing the grant of asylum (*G v G*, judgment of the Court of Appeal at

> para 155 (iv) and (v); *F v M*, para 46); and they would be matters to which she might be expected to attach significant weight (*G v G*, judgment of the Court of Appeal at para 155 (iv) and (v)).”

The fact that “different standards of proof apply in each process” and the references, at [25], to the practical consequences of an order, of findings and of a reasoned decision are similarly relevant in the circumstances of the present case.

81. Further, again disagreeing with the Lord Ordinary, Lord Doherty considered that the parents’ motivation in pursuing the proceedings was not illegitimate. I quote what he said in full:

> “[28] In our view the present proceedings remain important notwithstanding the grant of asylum to M. They are the process in which M’s best interests may best be established. Any order or findings which the court makes would be likely to be of significant interest to the Secretary of State. The Lord Ordinary’s reference to the pursuers having an “ulterior” purpose which was “more properly” addressed elsewhere infers that the purpose is an illegitimate one. We disagree. In our opinion the obtaining of any such order or findings with a view to placing them before the Secretary of State is neither improper nor illegitimate. On the contrary, it may be an important step towards obtaining the remedies which the first conclusion seeks. Moreover, if the Secretary of State does decide that the grant of asylum should be revoked, it will be necessary for the pursuers to obtain and implement the order.”

82. I also, briefly, refer to the issue of disclosure. As stated by the Judge, at [19], the balancing exercise which the court must undertake is that set out in *Dunn v Durham County Council* and *Re H (A Child) (Disclosure of Asylum Documents)*. One element of that exercise is that “the denial of [relevant] disclosure is limited to circumstances where such denial is strictly necessary”.

Submissions

83. I do not propose to set out the parties’ submissions at any length because they largely mirrored those made to the Judge, as summarised above.

84. Mr Harrison, on behalf of the father, initially focused his submissions on the Judge’s order setting aside the extant return orders. However, during the course of the hearing they began to focus more on his case that there has been no properly reasoned decision determining the father’s application under the 1980 Convention. The Judge had rightly rejected the argument that the grant of asylum somehow led automatically to the previous orders being set aside and the substantive application dismissed. But, Mr Harrison submitted, this was effectively what the Judge had done as there had been no finding, for example, that the article 13(b) exception had been established nor had the Judge exercised any discretion. In essence, he submitted that the summary approach taken by the Judge had improperly bypassed the proper process with the result that the father’s 1980 Convention application had not been fairly and properly determined.

85. Mr Hames, on behalf of the Guardian, repeated his submission that the effect of the grant of asylum was to bring the 1980 Convention proceedings to an end by "operation of law". More narrowly expressed, he submitted that, when the grant of asylum followed the determination of the 1980 Convention application, the Family Division had "no choice other than to dismiss the Hague" application. This was, he submitted, the necessary legal consequence of the prohibition on refoulement. The SSHD had had the benefit of the Family Division judgment and any further substantive reconsideration of those proceedings would amount to "an impermissible review of the SSHD's decision-making". Mr Hames accepted that it was desirable that all claims should be advanced at the same time but, he submitted, the SSHD could not refuse to deal with a tactical claim.

86. Mr Twomey did not support the submission made on behalf of the Guardian that the 1980 Convention proceedings had to be dismissed by "operation of law". He did, however, support the submission to the effect that the father was wrongly seeking to use these proceedings "as a means of reviewing the SSHD's decision". He also submitted that it was "not proper to use the Hague process to seek to obtain the asylum information". In his submission, the Judge was entitled to decide that the grant of asylum meant that the continuation of the 1980 Convention proceedings served no purpose and should be dismissed.

87. Mr Payne's submissions seemed at times to diverge into the merits of this case. However, he made clear that the SSHD intended only to make submissions about matters of practice or procedure which were of general application. He raised concerns that the reconsideration of a 1980 Convention application following the grant of asylum might amount to "a *de facto* appeal against the SSHD's decision" and to an illegitimate use of those proceedings to interfere with decision-making in the asylum process. He also submitted that "routinely holding fresh hearings" would "damage" the asylum process.

88. As referred to above, Mr Payne made clear, despite some broad observations in his written submissions which might have suggested otherwise, that the SSHD was not seeking to depart from what had previously been said on her (or her predecessors') behalf.

Determination

89. The context of this case is important. The father had obtained two orders under the 1980 Convention requiring M's return to Ukraine before any asylum claim was made. The reasons for such a late claim are not apparent from the documents available to this court because no explanation has been proffered in those documents. In addition, it is not apparent how the facts relied on by the mother in her unsuccessful opposition to those orders could be recrafted to support an asylum claim. Yet, as set out in the judgment below, the "basis of the child's application for asylum is anchored to the article 13(b) defence which the (mother) ran in the proceedings".

90. There is a heavy obligation on parties to proceedings under the 1980 Convention to advance all the facts which are material to the proper determination of the application. It would be an abuse for a party deliberately to keep facts, so to speak, in reserve to be used for other purposes such as a later asylum claim. That is why, as referred to above, *G v G* proceeded on the basis that an asylum claim and an application under the 1980

Convention would be expected to be running in parallel and that the material in each would be likely to be relevant to the determination of the other.

91. If an application under the 1980 Convention and an asylum claim do run in parallel, with the result that all the practical points referred to by Lord Stephens in *G v G*, in particular in respect of the disclosure of material, have taken place, it would seem probable that there would be no reason for the Family Division substantively to reconsider the application when it has decided to set aside a previous return order because of the grant of asylum. In those circumstances, the Family Division would probably consider it appropriate simply to dismiss the application. But, this is not the situation which we are addressing because the respective claims did not run in parallel. I return to this below.

92. Before dealing with the merits of this appeal, I sound the following note of caution. If greater experience demonstrates or suggests that the respective processes are being manipulated by one party, it may well be that the court will have to revisit the guidance given in *G v G* and determine whether it requires adjustment to seek to prevent such manipulation. I do not propose, at present, to suggest where that might lead but I would draw attention again to the different standards of proof applied in the determination of an asylum claim and an application under the 1980 Convention and to the other observations made, in particular by the Court of Appeal in *G v G* and by the Inner House in *Re (A Child)*.

93. In my view, the focus of the hearing below was misplaced. This can be seen, for example, from the written submission made by Mr Payne to this court that "the principal issue raised in this appeal is whether the Judge erred in making the Set Aside order without first undertaking a further … hearing to consider the Asylum Material". This summary by Mr Payne is a fair reflection of the way, at least, the written submissions for this appeal were structured. For the reasons set out below, I consider that the real focus is on whether there has been a fair and proper determination of the father's application under the 1980 Convention.

94. As summarised above, the court below had to determine the following issues: (a) whether to set aside the previous return orders or to give directions in respect of that issue: (b) if the orders were set aside, how the father's application under the 1980 Convention should be determined: and (c) whether, for the proper determination of the father's application, disclosure of documents from the asylum claim should be ordered.

95. First, I would endorse the Judge's rejection of the submission made on behalf of the Guardian that there is, somehow, some principle of law which operates automatically, following the grant of asylum, either to require that a return order be set aside or that proceedings under the 1980 Convention be dismissed. In both respects, as set out in rule 12.52A of the FPR (and in *Re B (A Child)*), the court has to *decide*, first, whether to set aside an order and, if it does, how to dispose of the substantive application.

96. The latter is a distinct and necessary part of the process, to ensure that an application is fairly and properly determined. As I said in *Re B (A Child)*, at [89], "if the order is set aside, the court will redetermine the substantive application". To the same effect, Lord Stephens said in *G v G*, at [158], it is the grant of asylum which results in a "reconsideration" of the 1980 Convention proceedings. Reconsideration means reconsideration, not some automatic outcome by operation of law or otherwise.

97. Secondly, some of the submissions made on behalf of the Respondents to this appeal were similar to those made in *Re (A Child)*, and accepted by the Lord Ordinary but rejected by the Inner House, namely that the father's purpose in pursuing his application under the 1980 Convention was somehow improper or illegitimate. I agree with, and would adopt, the response given by Lord Doherty to the effect that seeking to obtain an "order or findings with a view to placing them before the Secretary of State is neither improper nor illegitimate". It is clear from *G v G*, and from *Re (A Child)*, that seeking to obtain reconsideration by the SSHD of the grant of asylum, following the determination of an application under the 1980 Convention, is not an improper use of the proceedings under the 1980 Convention. That subsequent use of a reasoned judgment was clearly anticipated in *G v G* and does not make a parent's pursuit of the proper determination of his application either improper or illegitimate. This was recognised in the submissions made in *G v G* on behalf of the UNCHR, as referred to above. I would also repeat that the judgments in *G v G* make clear that a return order can still be made in 1980 Convention proceedings *after* asylum has been granted, either by way of initial consideration or on a reconsideration.

98. In summary, the fact that the proper determination of an application under the 1980 Convention might enable the left behind parent to request the SSHD to reconsider or review the grant of asylum does not make such a determination or the pursuit of such a determination improper or illegitimate. An applicant is entitled to this determination and, contrary to Mr Payne's submissions, I do not consider that this interferes in or with the asylum process.

99. Accordingly, I do not consider that this approach will "damage" the asylum process as suggested by Mr Payne. Nor, for the avoidance of doubt, do I consider that it would amount to "a *de facto* appeal against the SSHD's decision". As set out in *G v G*, it is abundantly clear that the two processes are distinct and that any decision by the Family Division does not in any way bind the SSHD or interfere with the exercise by her of her powers in respect of asylum claims. However, as the Court of Appeal said in *G v G*, I repeat:

> "[155(iv)] … a reasoned High Court decision on the evidence available to it (which will very likely be different from that available to the Secretary of State, for the reasons we have explained: see para 144(iv) above), and tested to an extent by the adversarial process not available in the assessment of an asylum claim, could be expected to assist the Secretary of State in determining an outstanding application for asylum …
>
> [155(v)] In those circumstances, the determination of an application for a return order by the High Court will usually have some real point, even where the relevant child currently has refugee status."

And, I would add, could be expected to assist the SSHD when considering whether to review, reconsider or revoke the grant of asylum.

100. This case and *G v G* are addressing the *very* small cohort of asylum cases when the same family are involved in an asylum claim and an application under the 1980 Convention. Nothing said in either has any wider application. Further, the differences

in the respective procedures, as referred to in *G v G* and *Re (A Child)*, provide good reasons for the court to ensure that an asylum claim and even the grant of asylum do not subvert the fair and proper determination of an application under the 1980 Convention.

101. Accordingly, I disagree with the Judge's conclusion, at [76], that, because the grant of asylum "operates to prevent the enforcement of an order for summary return", the 1980 Convention proceedings are "without further purpose". Nor do I agree with her conclusion that "there is nothing further for this court to examine". The timing of the asylum claim in this case has frustrated one of the principal objectives identified by Lord Stephens in *G v G*, at [5], namely, to seek to ensure that the 1980 Convention and the Refugee Convention "can operate hand in hand in order to achieve the objectives of each of them without frustrating the objectives of either of them".

102. I have concentrated, so far, mainly on issue (b), as referred to above, namely how the father's application under the 1980 Convention should be determined, if the previous returns orders are set aside. As to the latter, namely issue (a), I consider that the Judge was entitled to deem a set aside application to have been made and was also entitled to decide that the grant of asylum justified setting the previous orders aside. Even with the history of the proceedings in this case, that was a sufficient "fundamental change of circumstances" which, by itself, could warrant those orders being set aside. There was no need for a further hearing to determine that issue.

103. However, I consider that the Judge was wrong to dismiss the father's application under the 1980 Convention simply because of the grant of asylum and without any further consideration of its merits. This was, as Mr Harrison submitted, a denial of due process and did not provide a fair and proper determination of that application.

104. On the question of disclosure of the asylum material, issue (c), I have somewhat laboured the point that the Judge did not consider whether such disclosure should be made *for the purposes of* determining the 1980 Convention application. I reject Mr Twomey's submission that it was "not proper to use the Hague process to seek to obtain the asylum information". I reject it because that is not an apt description of the father's application. The father is seeking disclosure of the asylum material so that all relevant material is before the court when determining his application under the 1980 Convention. The processes are distinct and, as made clear by Lord Stephens in *G v G*, at [170], it is not only permissible for an applicant to seek disclosure of asylum material but "the court *at an early stage* of a 1980 Hague Convention application *should* consider disclosure of the asylum documentation in the 1980 Hague Convention proceedings" (my emphasis).

105. For obvious reasons, this did not happen in the present case. But, the late making of an asylum claim provides no reason why it should not happen now. The fact that no opportunity arose in the proceedings leading to the two return orders for the court to consider whether there should be disclosure of the asylum material into the 1980 Convention proceedings supports, rather than militates against, that occurring now.

106. At present, there is nothing before this court which would justify the denial of disclosure of the asylum material into the 1980 Convention proceedings. As set out above, "the denial of [relevant] disclosure is limited to circumstances where such denial is strictly necessary". For the avoidance of doubt, in my view, there is nothing in the judgment

below which explains why it would be "necessary" to withhold disclosure of that material from the father for the purposes of redetermining his application under the 1980 Convention. It is not uncommon in family proceedings that very serious allegations are made by a child against a parent or parents. It would be very unusual for such allegations and the evidence supporting them not to be provided to the alleged perpetrator. Indeed, it would be difficult to see how a fair trial could take place without the alleged perpetrator being informed of, at least, the allegations.

107. In conclusion, as sought by Mr Harrison, I would propose that the appeal be allowed and that the 1980 Convention application be remitted for an urgent case management hearing. The issue of disclosure of the asylum material will, clearly, have to be determined as part of that process. A hearing will then be required for the fair and proper determination of the father's substantive application.

LORD JUSTICE COULSON:

108. I agree. I repeat my surprise, first expressed at the hearing, that both the Guardian and the Secretary of State supported the mother's submission that the father's previously-successful 1980 Convention application should now be summarily dismissed without a rehearing, on the basis of allegations against him which, it appears, should have been made at the outset but which were not, and which they said the father was not even allowed to see.

LORD JUSTICE LEWIS:

109. I agree that the appeal should be allowed for the reasons given by Moylan LJ.