Asylum/abduction cross-over

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Relevant provisions where there are parallel abduction and asylum proceedings

Abduction

The Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980 ("the 1980 Hague Convention") as incorporated by the Child Abduction and Custody Act 1985 ("the 1985 Act").

Article 1 of the 1980 Hague Convention identifies its objects as follows:

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State."

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Relevant provisions: Abduction

In E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144, Lady Hale and Lord Wilson (giving the judgment of the Court) described the objectives of the 1980 Hague Convention as follows:

"…The first object of the convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there" (§8).

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Relevant provisions: Abduction

The prompt return of children wrongfully removed or retained is one of the objects set out in article 1 of the 1980 Hague Convention, and by article 2 Contracting States are required to take appropriate measures to implement the objectives of the Convention.

The presumption made is that the prompt return of an abducted child promotes the interests of children generally as well as the interests of the individual child.

Article 11 specifies that, if a decision is not reached within six weeks of the commencement of an application, then reasons for the delay can be requested so that the expectation is that an application should be determined within six weeks.

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Relevant provisions: Abduction

However, a child's return should not always be ordered "forthwith": articles 13 and 20 provide for the following exceptions (in relevant part):

"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

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

"Article 20
The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms".

Relevant provisions: Abduction

By section 1(2) of and Schedule 1 to the 1985 Act, the 1980 Hague Convention is largely expressly incorporated and given the force of law in England and Wales.

Although Article 20 has not been incorporated directly into domestic law, s.6 of the Human Rights Act 1998 requires all public authorities to act compatibly with the human rights and fundamental freedoms protected under the ECHR, the substance of Article 20 has been given effect in domestic law too: Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619 at §65; In Re E (Children) (Abduction Custody Appeal) [2011] EWCA Civ 361, [2011] 2 FLR 724 ("Re E") at §112.

Relevant provisions: Immigration law in England and Wales

In England and Wales, the control of immigration (including the grant of asylum) is exercised under:

1. A statutory framework, primarily the Immigration Act 1971;
2. The Immigration Rules made by the Secretary of State and laid before Parliament under section 3(2) of that Act;
3. A number of international treaties and European measures.

Relevant provisions: Refugee Convention 1951

The primary relevant international treaty is the 1951 Geneva Convention.

Although the Convention has not been incorporated into domestic law, there are a number of reasons why the Convention model is applied, including section 2 of the Asylum and Immigration Appeals Act 1993, headed “Primacy of Convention” and stating that

“Nothing in the immigration rules … shall lay down any practice which would be contrary to the Convention” : and see, R (European Roma Rights Centre) v Immigration Officer, Prague Airport [2004] UKHL 55, [2005] 2 AC 1 at §41; EN (Serbia) v SSHD [2009] EWCA Civ 630, [2010] QB 633 at §58

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Refugee Convention 1951

The Refugee Convention defines a refugee as an individual who satisfies the definition set out under Article 1A(2) and is not otherwise excluded by operation of Article 1:

"…[T]he term 'refugee' shall apply to any person who … owing to a 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."

This definition has been adopted by the Qualification Directive (Article 2(c)), the Procedures Directive (Article 2(f)) (both considered below) and domestically (regulation 2 of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006).

Refugee Convention 1951

Under the 1951 Geneva Convention, save for article 32 (which applies only to a refugee recognised as such by the relevant domestic law), these rights apply to a person from when, and for so long as, he or she satisfies the article 1A criteria for a refugee, whether or not refugee status has been recognised.

Refugee Convention: Articles 32 and 33

Articles 32 and 33 of the 1951 Refugee Convention make provision for the protection of refugees from removal by Contracting States:

"Article 32: Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.
2. Each refugee shall be entitled, in accordance with the established law and procedure of the country, to submit evidence to clear himself and to be represented before the competent authority.
3. The Contracting States shall allow such refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

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Article 33: Prohibition of expulsion or return (‘refoulement’)

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

Nationality, Immigration and Asylum Act 2002

Section 77 of the 2002 Act provides:

"(1) While a person's claim for asylum is pending he may not be –

a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section –

a) 'claim for asylum' means a claim by a person that it would be contrary to the United Kingdom's obligations under the [1951 Geneva] Convention to remove him from or require him to leave the United Kingdom, and

b) a person's claim is pending until he is given notice of the Secretary of State's decision on

Nationality, Immigration and Asylum Act 2002

Paragraph 329 of the Immigration Rules provides: “329. 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.”

Section 78 of the 2002 Act provides protection from refoulement whilst an appeal is pending.

Section 104(2) provides that an appeal is not “finally determined” whilst an application for permission to appeal to the Upper Tribunal or the Court of Appeal has been or could be made in time, or permission to appeal has been granted and the appeal awaits determination. Hence, protection from refoulement extends to asylum applicants whose applications are refused but who exercise an in-country right of appeal while the appeal is “pending”, namely is withdrawn, abandoned or “finally determined”.

European Directives

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need protection and the content of the protection granted ("the Qualification Directive").

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status ("the Procedures Directive").

Question arising:

Are these Directives directly effective and do they remain extant in domestic law as "retained EU law" after the United Kingdom's withdrawal from the EU?

The Qualification Directive

Article 21 of the Qualification Directive provides that “Member states shall respect the principle of non-refoulement in accordance with their international obligations” (the relevant international obligation being article 33 of the 1951 Geneva Convention).

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

However, the rights it gives to refugees generally flow from the grant of refugee status by the relevant Member State.

In articles 24-34, it requires Members States to provide a certain level of benefits to those it recognises as having refugee status including (in article 24(1)) a residence permit for at least three years renewable.

The Procedures Directive

The Procedures Directive establishes minimum standards of procedures for granting and withdrawing refugee status (article 1).

It requires that:

1. Asylum applications are appropriately examined, up-to-date information is obtained as to the circumstances prevailing in the applicant's country of origin, and the applicant given an opportunity to obtain appropriate legal advice and for a personal interview on the application (articles 8 and 12-16);

2. There is a proper examination prior to any reconsideration of the validity of current refugee status, including an opportunity for a personal interview (articles 37-38);

3. Member States to ensure that applicants for asylum have an effective remedy before a court or tribunal against (amongst other things) a decision taken on his or her application for asylum. (article 39(1));

4. Although an applicant for asylum has no right to a residence permit merely as a result of his application, he or she must: "… be allowed to remain in the Member State in which the application is made, for the sole purpose of this procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III of the Directive." (article 7).

Relevant provisions: Convention on the Rights of the Child

Article 3(1) of the CRC provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. …"

Article 12 of the CRC provides for children's participation in decisions about matters affecting them:

1. "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Convention on the Rights of the Child

The importance of the voice of the child in the determination of proceedings under the 1980 Hague Convention is recognised by article 11(2) of Council Regulation (EC) No 2201/2003 ("Brussels IIa"):

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

Baroness Hale explained, in In re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619, at para 58, that article 11(2) of Brussels IIa enunciated a principle of "universal application" and was "consistent with our international obligations under article 12" of the UNCRC.

Special position of children

UNHCR 2009 Guidelines on Child Asylum Claims:

Introduction: child claims are often "assessed incorrectly or overlooked altogether"; children "may not be able to articulate their claims … may require special assistance"; need for recognition as "active subject of rights";

Substantive: forms of persecution: street children; under-age recruitment, child trafficking and labour; FGM, domestic violence, social cleansing, disabled children, unconventional family situations (born out of wedlock, in breach of coercive family planning laws) denied medical treatment orostracised;

Agents of persecution may include parents;

Procedure and evidence:

"Children …may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions … fear of persons in power …fear of reprisals"

"If the facts of the case cannot be ascertained and/or the child is incapable of full articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances …".

Facts of G v G [2021] UKSC 9

On 2 March 2020 the mother wrongfully removed G from South Africa to England in breach of G's father's rights of custody under South African law.

The father sought an order returning G to South Africa under the 1980 Hague Convention which is incorporated into domestic law by the Child Abduction and Custody Act 1985.

The mother opposed a return order, relying on two grounds:

i. Article 13(b) (grave risk to the child); and
ii. Article 13(2) (child's own objections).

On arrival in England, the mother made an application to the Secretary of State for the Home Department ("the Secretary of State") for asylum, naming G as a dependant.

Special or important aspects of immigration practice/procedure: Confidentiality

There is an absolute duty of confidentiality for the purposes of examining an asylum claim during its pendency by reason of Article 22 PD, which provides:

"For the purposes of examining individual cases, Member States shall not:
(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;
(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."

Special or important aspects of immigration practice/procedure: Standard of Proof

1. A lower standard of proof applies to refugee status determinations.

2. It is well-established that an applicant has to do no more than prove that he or she has a well-founded fear that there is a "real and substantial risk" or a "reasonable degree of likelihood" of persecution for a Convention reason: RT (Zimbabwe) v SSHD [2013] 1 AC 152 at §55 (citing R v SSHD, ex p Sivakumaran [1988] AC 958).

3. In HJ (Iran) v SSHD [2011] 1 AC 596 at §90. Lord Hope, commenting on the Sivakumaran standard of proof, stated: "Where life or liberty may be threatened, the balance of probabilities is not an appropriate test."

4. However, on the conventional approach, in order to rely on the defence in Article 13(b) of the Hague Convention, the Family Court must be satisfied on the "balance of probabilities" that there is a grave risk that return would expose the child to harm or otherwise place the child in an intolerable situation: Re E (Children) [2012] 1 AC 144 at §32 (EF/1803).

Special considerations: The Secretary of State's investigatory process

1. The Secretary of State's determination of an asylum claim is an essentially investigatory process not limited to assessing the material put before her by the applicant; she must investigate material of which she is or ought to be aware.

2. The PD contains various provisions relating to the personal interview which the determining authority is required to offer asylum applicants under Article 12:

3. Article 13(2) provides that "a personal interview shall take place under conditions which ensure appropriate confidentiality"

4. Article 13(3) provides that "Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner." This includes ensuring "that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability" (Article 13(3)(a)).

5. An application for a return order under the 1980 Hague Convention is an adversarial, private law proceeding before the High Court. As such, it appears inapt for the investigative process which the Secretary of State is required to conduct. Further, as Baroness Hale and Lord Wilson stated in Re E (Children) at §32, "[i]t will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) …"

Special considerations: Training of decision makers

1. In the PD, Article 8(2) imposes an obligation on Member States to ensure that decisions by the determining authority "are taken after an appropriate examination.".

2. This requires that the personnel responsible for examining applications and taking decisions have access to "precise and up-to-date information… from various sources, such as the United Nationals High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum" (Article 8(2)(b)) and that "the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law" (Article 8(2)(c)). The requirements of Article 8(2)(b) and 8(2)(c) PD are reflected in paragraphs 339JA and 339HA of the Immigration Rules respectively.

3. Further, paragraph 339J of the Rules sets out a detailed list of factors that the decision maker should take into account.

Special considerations: If not asylum, what of subsidiary protection?

1. The Qualification Directive provides for status and rights to "persons eligible for subsidiary protection", i.e. for those who do not qualify as refugees, but who would, on return, face a real risk of suffering "serious harm" as defined in article 15 (namely the death penalty or execution, treatment contrary to article 3 of the ECHR, or serious and individual threat by reason of indiscriminate violence in situations of armed conflict) (articles 2, 18 and 24(2)).

2. The Directive covers not only compliance by Member States with their obligations under the 1951 Geneva Convention, but also under articles 2 and 3 of the ECHR.

3. An asylum applicant may not be subject to relevant persecution on return but may be at risk of suffering treatment contrary to articles 2 and/or 3 of the ECHR; and thus, even if not a refugee, be eligible for subsidiary protection

Questions arising in the case of parallel claims

1. The appellant's case in G v G concerned an application with the child named as a dependant which permitted the UKSC to consider the position of both (a) the dependant child application and (b) the position where the child is the named applicant.
2. The facts of that case required consideration to be given to the procedure to be adopted when the abduction case has yet to be determined at the point at which the asylum claim is made. Other cases may involve consideration of the status or enforcement of any return order made in the abduction case in the light of the making of an asylum claim or its determination.
3. The decision in G v G does, however, answer a number of the most common problems.
4. Further unanswered problems will be identified at the conclusion of this talk.

Question 1:
Is the naming of a child as a dependant on an asylum application to be understood as an application by the child?

1. The Court of Appeal (paras 138-140) held that there is no bar to the operation of the 1980 Hague Convention where the taking parent has made an application for asylum with the child named as a dependant in circumstances where there is no separate application by the child on the basis that neither the 1951 Geneva Convention nor the Directives require any such protection.
2. The UKSC disagreed: whilst there is no obligation on the Secretary of State to consider whether an individual is a refugee absent any application article 2(g) of the Qualification Directive only requires there to be a request by a third country national or stateless person for protection who can be understood to seek refugee status (or other international protection). Similarly, article 2(b) of the Procedures Directive only requires there to be an application made by a third country national or stateless person which can be understood as a request for international protection.
3. A request for international protection made by a principal applicant naming a child as a dependant is also an application by the child, if objectively it can be understood as such. What applies to a parent is likely to apply to a child. Equally, a child cannot be prejudiced by a parent's failure to seek protection.
4. Importantly, the court also considered that it would avoid delay where a parent is refused protection and decides to apply separately for the child.

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Question 2:
Is a dependant, objectively understood to have made a request, entitled to protection from refoulement pending the determination of the request so that a return order cannot be implemented?

1. The Qualification Directive and the Procedures Directive are limited in their application to third-country nationals or stateless persons.
2. Article 7 of the Procedures Directive obliges member states to permit those seeking asylum ("applicants") to remain in the relevant State.
3. In 1980 Hague Convention proceedings there is no provision for any personal interview of an asylum seeker by trained decision-makers, nor any requirement to obtain up-to-date information as to the situation in the country of alleged persecution (whether generally or in relation to particular social groups).
4. There is no impediment to the High Court, in considering whether a defence under article 13(b) of the 1980 Hague Convention is made out, to making factual findings in relation to the constituent elements of the risk of refoulement. Such findings do not bring to an end the protection provided by article 7 of the Procedures Directive.
5. 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 1980 Hague Convention proceedings would

Question 2 (continued)

6. A dependant who can objectively be understood as being an applicant is entitled to rely on article 7 of the Procedures Directive which ensures non-refoulement of a refugee who is awaiting a decision so that a return order cannot be implemented pending determination by the Secretary of State. It is a right arising from a Directive which has been recognised by our courts, so the position has not been changed by the United Kingdom's exit from the EU.

7. Such a dependant can rely on paragraph 329 of the Immigration Rules which does relate to the rights of a refugee and is not solely an emanation of the duty to have proper respect for family life.

Question 3:
When is an application for asylum determined?

1. After the Secretary of State's decision, a person still remains an applicant until a final decision has been taken.
2. The domestic provision transposing the right to an effective remedy under article 39 of the Procedures Directive is to be found in section 82(1) of the 2002 Act which provides for a right of appeal to the FtT. If this right is exercised, section 78 of the 2002 Act prevents an applicant from being removed from or required to leave the United Kingdom in accordance with a provision of the Immigration Acts.
3. It is available in cases where the Secretary of State decides that it is not appropriate to certify an asylum claim as clearly unfounded under section 94 of the 2002 Act.
4. The appeal is pending during any period where an appellant has either an undetermined appeal in or below the Court of Appeal, or a right to seek

Question 4:
When does any remedy against a refusal of refugee status no longer have a suspensive effect on the implementation of a return order in 1980 Hague Convention proceedings?

1. Article 39(3)(a) of the Procedures Directive provides that Member States must provide rules dealing with the question as to whether the right to an effective remedy shall have the effect of allowing applicants to remain in the member state concerned pending its outcome. So, it is not always a requirement that the right to an effective remedy requires there to be a suspensive effect on any order to return an applicant pending the final determination of the application.
2. However, there cannot be an effective remedy under an in-country appeal process if in the meantime a child has in fact been returned under the 1980 Hague Convention to the country from which they have sought refuge.
3. The UKSC considered that, due to the time taken by the in-country appeal process this bar is likely to have a devastating impact on 1980 Hague Convention proceedings and requires urgent consideration to a legislative solution.
4. An out-of-country appeal will not act as a bar to the implementation of a return order.

Question 5:
What is the extent of the bar: (1) Determination of the application;
(2) Making the return order; or(3) Implementation?

1. Where issues overlap the court can come to factual conclusions on the overlapping issues so long as the prohibition on determining the claim for international protection is not infringed.
2. The Court of Appeal's conclusion that "any bar applies only to implementation" was plainly right.
3. 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)).

Staying the abduction proceedings

1. The CoA decided that as a general proposition “the High Court should be slow to stay an application prior to any determination”

2. The UKSC agreed:

   a. the general proposition is entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority;

   b. it has the benefit of making available to the Secretary of State a reasoned High Court decision on the evidence available to it, and tested to an extent by an adversarial process, of an application for summary return.

Staying: the relevant factors

The UKSC also endorsed the CoA's list of relevant factors:

i. Potential timings for both the 1980 Hague Convention application and for the asylum claim, and the stage which the asylum claim has reached.

ii. The nature of the alleged risk in the application for return and the asylum application (so far as that is known).

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

iv. In particular, the welfare of the child, including the degree of urgency in determining welfare issues that arise and the ability of the court, within the constraints of a 1980 Hague Convention application, to deal with such issues whilst the application is pending.

v. The human rights of both child and each parent.

UKSC proposed practical steps to allow abduction and asylum Conventions to operate hand in hand

1. The Secretary of State should be requested to intervene in the 1980 Hague Convention proceedings.
2. There should be liaison and a clear line of communication between the courts and the Home Office.
3. The child should be joined as a party to the 1980 Hague Convention proceedings with representation.
4. The papers provided to the Secretary of State in relation to the asylum application should be disclosed to the child's representative.
5. The creation of a specialist asylum team at the Home Office to deal with these cases (proposed by the Home Office after argument, prior to judgment).

UKSC proposed practical steps (continued)

6. The documents in the 1980 Hague Convention proceedings should ordinarily be made available to the Secretary of State.
7. The court should give early consideration to the question as to whether the asylum documents should be disclosed into the 1980 Hague Convention proceedings applying the principles endorsed by the CoA in In the matter of H (A Child) (Disclosure of Asylum Documents) [2020] EWCA Civ 1001.
8. The UKSC endorsed potential standard directions tentatively but leaving such matters ultimately to the High Court.
9. Thought should be given to any asylum appeal being heard by a High Court judge of the Family Division.

Matters left undecided

When the asylum applicant seeks protection from returning to an EU Member State, could the judge in the Hague Convention proceedings:

a. determine that the child is not a refugee (and therefore does not face refoulement contrary to Article 33 of the Refugee Convention) and

b. implement a return under Article 12 of the Hague Convention (subject to appeal to the Court of Appeal)?

The UNHCR submitted that there was no bar in law to this but argued amongst other reasons that, for the sake of uniformity, the same process should apply to all asylum applications.

Matters left undecided

The judgment says little about the exercise of parental responsibility yet the abduction is an abusive exercise of it and the application for asylum, however made (dependent or directly for the child), might be aimed at furthering that misuse of PR.

What, if any, powers does the judge hearing the Hague Convention proceedings have to limit the use of PR, for example:

a. To prevent the abducting parent from applying for asylum for the abducted child?
b. To prevent the abducting parent from naming the child as a dependant on their application for asylum?
c. To prevent the abducting parent from instructing solicitors on behalf of the

Matters left undecided

What is the scope of the abduction court's powers under s.5 of the Child Abduction and Custody Act 1985 to circumscribe the abducting parent's conduct in relation to the asylum application?

Section 5

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

Problems ahead

Delay

1. The UKSC judgment itself recognises the ”devastating impact” [§152] on abduction proceedings given the delays which will arise when a return order cannot be implemented whilst (a) the asylum application is pursued and (b) all permissible routes of in-country appeals are pursued.
2. The suggested solution of a legislative change is unlikely to concertina a sophisticated process of investigation of the asylum claim that much, particularly where there is one or more appeals.
3. In any event, pending legislation, the effect will remain devastating.
4. Applicants, particularly those with sufficient resources, will be well placed to delay the asylum claim, file voluminous material in support of their claim and file further information repeatedly late.
5. Delay may, in and of itself, provide grounds to set aside the return order. In such a case, an unlawful act of abduction, coupled with an unmeritorious claim for asylum will have defeated the aims of the 1980 Hague Convention for a swift remedying of the abduction.

Problems ahead

Repeated applications

1. Although the UKSC judgment anticipates one application on behalf of a child, whether as dependant or in their own right, it is far from clear that it will not be possible for the abducting parent to initiate two consecutive applications when the first fails.

2. Where circumstances permit, an asylum applicant's claim can be refused and certified as "clearly unfounded" by the Secretary of State pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 but that is relatively rare and is still subject to a potential delay from any judicial review application (there being no right of appeal in such a case).

Problems ahead

The role of CAFCASS

1. The suggestion that the child be joined as a party to proceedings to enable there to be an independent review of the asylum material (which is otherwise confidential) by the child's guardian/lawyers was first made in the CoA and was adopted by the UKSC without any representations from CAFCASS.
2. It is far from clear what the guardian is to do once she has seen the confidential asylum material. It is certainly the case that se can assist the court to identify material relevant to the abduction case but she is unlikely to be able to assist with any risks flowing from disclosure (whether to the applicant, the child or third parties) as she will not have the requisite expertise and her lawyers are family not immigration lawyers.
3. In any event, in order to perform her functions fully, the guardian may find herself placed in a position of significant difficulty in dealing fairly with the left-behind parent with whom she can discuss none of the confidential material about their child.
4. Generally speaking, it is undesirable, for example, for two of the three participants (abducting parent and guardian) to know material which is unknown to the third (the left-behind parent) and which is known to the judge.
5. The role might better be performed by the use of special advocates.

Thank you!

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