

THE COURT ORDERED that no one shall publish or reveal the name or address of the child who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the child or of any member of her family in connection with these proceedings.



**Hilary Term
[2021] UKSC 9**

On appeal from: [2020] EWCA Civ 1185

JUDGMENT

G (Appellant) v G (Respondent)

before

**Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens**

JUDGMENT GIVEN ON

19 March 2021

Heard on 25, 26 and 27 January 2021

Appellant
Henry Setright QC
Michael Gration
Jason Pobjoy
Emmeline Plews
(Instructed by A & N Care
Solicitors (Sheffield))

Respondent
Edward Devereux QC
Zane Malik QC
William Tyzack
(Instructed by Dawson Cornwell
(London))

1st Intervener
Alan Payne QC
John Goss
(Instructed by The Government
Legal Department)

2nd Intervener
James Turner QC
Mehvish Chaudhry
Paige Campbell
(Instructed by Bindmans LLP
(London))

3rd Intervener
Richard Harrison QC
Jennifer Perrins
Mark Smith
(Instructed by Brethertons LLP
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4th Intervener
Alex Verdan QC
Dr S Chelvan
Charlotte Baker
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(London))

5th Intervener
Raza Husain QC
Malcolm Birdling
Gayatri Sarathy
(Instructed by Baker & McKenzie
LLP (London))

6th Intervener
Mark Twomey QC
Sarah Tyler
Alexander Laing
(Instructed by Farrer & Co
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Interveners:

- | | | |
|-----|--|--------------------------|
| (1) | Secretary of State for the Home Department | |
| (2) | International Centre for Family Law, Policy and Practice | |
| (3) | Reunite International Child Abduction Centre | written submissions only |
| (4) | Southall Black Sisters | written submissions only |
| (5) | United Nations High Commissioner for Refugees | |
| (6) | International Academy of Family Lawyers | written submissions only |

LORD STEPHENS: (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Burrows agree)

1. Introduction

1. This appeal is brought by the mother of an eight-year-old girl whom I anonymise as G. She was born in South Africa and has been habitually resident there throughout her life. On 2 March 2020 her 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 seeks an order returning G to South Africa under 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”). In opposing a return order, the mother relies upon two grounds, namely articles 13(b) (grave risk to the child) and 13(2) (child’s own objections) of the 1980 Hague Convention. So far that is a description of a standard 1980 Hague Convention case.

2. However, in this case the 1980 Hague Convention proceedings have been complicated by the fact that, 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. That application meant that there were two different sets of proceedings: the 1980 Hague Convention proceedings being determined in the Family Division of the High Court and the asylum application which, on 3 February 2021, and after the hearing in this court, was determined by the Secretary of State. So, this appeal raises important questions as to the interplay between the 1980 Hague Convention on the one hand and asylum law on the other, including the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 (Cmd 9171) and 16 December 1966 (Cmd 3906) (“the 1951 Geneva Convention”) and relevant European Union Directives. That interplay brings into particular focus the relationship between the provisions protecting refugees from refoulement, that is expulsion or return to a country where they may be persecuted, and the requirement to return a child under the 1980 Hague Convention to the country from which the child or the child’s parent has sought refuge.

3. There is a substantial risk that the time taken to determine an asylum application, which even if it is genuine can take months if not years, will frustrate the return of children under the 1980 Hague Convention because, by the time the asylum application concludes, the relationship between a child and the left-behind parent may be harmed beyond repair. In addition, there is a substantial risk of sham

or tactical asylum claims being made by the taking parent with the intention of achieving that very objective.

4. In *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 (“*In re E*”) Baroness Hale of Richmond and Lord Wilson of Culworth, when giving the judgment of the court, stated that “the aim of the [1980 Hague Convention] is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted” (at para 14). It is obvious that the aim of deterring people from wrongfully abducting children will not be achieved if asylum claims can have the effect of frustrating or, worse still, can be exploited by the taking parent to frustrate the 1980 Hague Convention.

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

6. The court was informed that annually there are approximately one hundred 1980 Hague Convention applications in England and Wales though no information was provided as to the number in which there was a related application for asylum. This limited number indicates that even if the two Conventions are not independent of each other there should be no difficulty in implementing practical measures to ensure that they can operate hand in hand. Ultimately that will depend on proactive practical steps being taken to instil further urgency and priority into the asylum proceedings together with practical steps to co-ordinate both sets of proceedings. The parties and those intervening in these proceedings were committed to finding and implementing practical solutions. In particular, after the hearing in this court the Secretary of State has proposed an “Expedited process for determining asylum claims with concurrent Hague Convention proceedings” with “a view to deciding straightforward cases within 30 days from notification of proceedings from the Family Division”. Furthermore, in that document the Home Office “welcomes any support from the Family Division in resolving difficulties” by the exercise of the court’s case management powers. This is a valuable initiative by the Secretary of State, which, whilst focussing on the procedures in the parallel asylum claim, also addresses some elements as to how the two sets of proceedings can be co-ordinated. This judgment contains some further suggestions as to co-ordination which might be considered by others after appropriate consultation.

7. On 5 June 2020 Lieven J, [2020] EWHC 1886 (Fam), who had been misinformed that G had made her own asylum application, stayed the 1980 Hague Convention proceedings pending the determination by the Secretary of State of asylum claims made by the mother and, as the judge understood it, by G.

8. The Court of Appeal (Hickinbottom, Moylan and Peter Jackson LJJ), [2020] EWCA Civ 1185, having been informed that there was no separate application by G for asylum but rather that G had been named as a dependant on her mother's application, lifted the stay on the basis that where G was named as a dependant on her mother's asylum application a return order in respect of G could be both made and implemented in the 1980 Hague Convention proceedings prior to the determination by the Secretary of State of the mother's asylum application. If G had made her own separate application for asylum then the Court of Appeal considered that, whilst a return order could be made, it could not be implemented during the pendency of the application. It can be seen that whether a return order could be implemented depended on whether G had made a separate asylum application rather than being named as a dependant on her mother's application. However, in practical terms, a bar to the implementation of a return order could be achieved by the simple expedient of the mother making an application on behalf of G, as she is entitled to do at any time during the currency of the 1980 Hague Convention proceedings, up until the implementation of any return order.

9. The Court of Appeal also gave detailed guidance as to the discretion to stay the 1980 Hague Convention proceedings in circumstances in which the child and/or the taking parent have applied for or been granted refugee status. As a general proposition the Court of Appeal stated that "the High Court should be slow to stay [a 1980 Hague Convention] application prior to any determination".

10. The mother applied for and by order dated 15 December 2020 was granted permission to appeal to the Supreme Court on three grounds.

11. In relation to ground one, the mother contends in summary that where a child is named as a dependant on the taking parent's asylum application it can be "understood" that this is an application not only by the taking parent but also by the child. On this basis the mother submits that there is a bar to, at least, the implementation of a return order in circumstances where G was named as a dependant on her asylum application. The issue raised by this ground of appeal was formulated as follows:

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

The mother's submissions in relation to this ground were confined to the question as to whether it could be "understood" that a child named as a dependant is making an application for asylum. That is the first question. However, the way in which the

ground is framed also raises three further questions. The second is whether, if a child named as a dependant can be understood to be making an application for asylum, the child is protected from refoulement pending the determination of that application so that a return order cannot be implemented. The third is as to when an application for asylum is determined. The fourth arises if an application is still pending during any appeal period. That question is at what point in time 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.

12. In relation to ground two, the mother contends in summary that the High Court should neither determine the 1980 Hague Convention proceedings nor make a return order in circumstances where there is a pending asylum claim of either the taking parent or the child. The issue raised by ground two was formulated as follows:

“If a child named as a dependant is protected from refoulement pending the determination of the asylum application, does that protection from refoulement act as a bar (i) to the determination by the Family Division of the High Court of an application for a return order under the 1980 Hague Convention seeking the return of a child to the country of their habitual residence where that child has protection from refoulement, or (ii) to the making of a return order, or (iii) only to the implementation of the return order?”

13. In relation to ground three, the mother contends in summary that the Court of Appeal was wrong to give guidance to the effect that, in most cases, the High Court should proceed to determine the 1980 Hague Convention application rather than stay it pending determination of any asylum claim. The issue raised by the third ground of appeal was formulated as follows:

“If there is no bar to the determination of an application under the 1980 Hague Convention, what approach should the Family Division take in relation to the task of deciding that application? In particular, was the Court of Appeal right to hold that the High Court should be slow to stay a 1980 Hague Convention application?”

14. The father has not appealed against the Court of Appeal’s decision that there was a bar to implementation of a return order in circumstances where either the Secretary of State has determined that the child has refugee status or where there is a separate pending asylum application by the child. This aspect of the Court of Appeal’s decision potentially represents a departure from the earlier approach in *In*

re S (Children) (Child Abduction: Asylum Appeal) [2002] EWCA Civ 843; [2002] 1 WLR 2548 (“*In re S 2002*”) that the negative duty not to *refouler* contained in section 15 of the Immigration and Asylum Act 1999 was confined to the context of the administration of immigration law and practice in the United Kingdom and did not act as a bar to the return of a child under the 1980 Hague Convention.

2. *The factual background*

15. The father is a national of a European Union Member State (“EUMS”) who, for over 20 years, has lived and worked in South Africa, where he has permanent residence. In 2006, he met the mother, a South African citizen who describes herself as coming from “a very traditional African family”. They married in 2010; and their only child, G, was born in South Africa in 2012. She has dual EUMS/South African nationality, but has always been habitually resident in South Africa.

16. The mother describes a difficult marriage, in which she says the father was controlling and sexually and racially abusive towards her: allegations which he denies. The mother had some mental health issues which she blames on this alleged behaviour.

17. In 2014, the mother and the father separated, and the father moved to another house, a few kilometres away from the mother’s home. Relations between the parents remained difficult. The mother says that the father continued to be aggressive and abusive towards her. The mother was found to be HIV positive, the source of which was a matter of dispute between them. G continued to reside with her mother, but the father had regular contact. Following a divorce in 2018 and a report by a family counsellor, the South African equivalent of a child arrangements order was made. The father and the mother shared full parental rights and responsibilities in relation to G, who continued to live with the mother but had extensive contact with the father on alternate weekends and for half the school holidays, and he regularly picked up G from school. The father paid the mother maintenance and for items such as school fees.

18. For a child to leave the jurisdiction, South African law requires the written consent of all those with full parental responsibility. In December 2019, with the mother’s consent, the father took G to the EUMS of which they are nationals to spend time with his extended family. During that period, the mother visited the UK, from where she messaged the father to say that she had made contacts and found employment in England, and intended to remain in England. She sought the father’s agreement to the immediate relocation of G to England, suggesting that she could collect G from the EUMS, and take her directly from there to live in England. Alternatively, she also proposed the relocation of G to the EUMS were the father to

agree to move there himself. The father objected to both proposals, pointing out that he had parental rights, he did not think that being schooled in England was in G's best interests, and that the South African courts should make any decisions in relation to G.

19. In the event, the father and G returned to South Africa in January 2020, as planned. The mother appeared to accept that the father did not want G to relocate to England or to the EUMS. She too returned to South Africa, and continued to be G's primary carer. G returned to her school in South Africa and life appeared to resume as normal.

20. In February 2020, the mother told the father that she was going to take G for a long weekend to Sun City near Johannesburg. The father expected to see G when he picked her up from school on 2 March. However, when he got to the school that day, G was not there: in an exchange of texts, the mother said she was running late, and G would be at school the following day. However, she was not there at the end of that school day either. In fact, the mother had removed G from South Africa to England. A few days after the removal, on 8 March 2020, the mother sent further messages which the father points to as demonstrating the reasons behind the mother's desire to relocate, including:

“I gave you a chance to leave [G] in [the EUMS], better future. But you refused. So I'm now making decisions for this child's future without you.”

“I'm no longer your wife, you cannot force me to stay in a job that doesn't pay me well.”

The father also points to part of a message in which the mother stated that they were in California. However, in further messaging, the mother indicated that she had in fact taken G to England where she had enrolled her in a new school. The father was blocked from speaking with either the mother or G.

21. On 11 March 2020, the father made an application to the South African Central Authority for the return of G under the 1980 Hague Convention. That request was transmitted to the English Central Authority, and an application was duly issued in the Family Division of the High Court on 14 April 2020. At the first hearing, before Newton J on 29 April 2020, various disclosure orders were made together with a location order. The mother was served, and the location order executed, the following day. A return date was fixed for 15 May 2020.

22. Under the disclosure orders, on 12 May 2020, the Secretary of State confirmed an address for the mother; and also confirmed that an application for asylum had been made “by or on behalf of” the mother and “by or on behalf of” G on entry into the UK on 2 March 2020. However, it subsequently transpired from the Secretary of State’s skeleton argument in the Court of Appeal that, contrary to the indication in the letter of 12 May 2020, no application for asylum was ever made by G, but only by the mother, naming G as her dependant.

23. In a statement dated 2 June 2020 served in response to the 1980 Hague Convention application, the mother explained that she had always had feelings for women but had been brought up to believe that homosexuality was a sin. However, following her separation from the father, she had told her sister (with whom she shared an apartment) that she was lesbian. The mother asserts that when she came out to her sister, her sister immediately left the apartment and then refused to talk to her. The mother also asserts that, as a result, she had been threatened by members of her family and, in May 2019, subjected to a very painful and frightening “cleansing ceremony” at her family’s home. She states:

“On a Friday at the end of May 2019 I was unexpectedly invited to my family’s home. I was surprised as prior to that no one spoke to me although I believe that the threatening messages were coming from them. When I arrived, I was made to take off my clothes down to my underwear and sit on the floor. There was a healing woman (Sangoma) present who told me that they were going to cleanse me. This is called a cleansing ceremony. They had a sheep, they used a knife to cut the sheep’s throat, killing the sheep in front of me and then poured the blood over my head and rubbed it onto my exposed skin, covering my entire body. They took a collection of herbs (muti) and made them into a potion. The Sangoma then took a razor and made cuts first on my hands, then my ribs, my breasts, my pubic area, the bottom of my feet, my navel, my scalp and my privates (labia of my vagina), and then took the potion and rubbed it in forcefully with her fingers. It was very painful and I was very very scared as I did not know how far they would go. The injuries are still visible on my body. They said this would cleanse me and cure me of being a lesbian. They told me afterward that they are trying to help me to become a woman, remove the curse, correct my lesbianism, attract a new husband to get married again, they told me they wanted me to be normal. They said that this was a private family matter and the ritual was not to be spoken of at all afterward.”

The mother does not state that she sought any medical treatment after this episode or that she reported it to the police. She recounts that, after the episode, she continued to receive threats from her family including death threats, that she reported to the police, but told them that she had not been injured, because she was so scared of what her family would do if she disclosed the torture. She stated that the police did not take the threats seriously and said they could do nothing about them. While she was in England in December 2019, her car in South Africa was vandalised; and, on her return to South Africa in February 2020, someone, whom she believed to have been her brother, tried to force her off the road whilst she was driving, writing off her car in the process. She made an insurance claim but there is no reference in her statement to a report to the police. She believed that this victimisation by her own family was as a consequence of her sexual orientation.

24. As a result, the mother decided to sell the car for scrap, and used the money to buy tickets for herself and G to fly to the UK, which they did on 2 March 2020. The mother says that she did not tell the father because she did not think that he would help but would rather take G away from her. The mother's statement dated 2 June 2020 describes the threat to her because of her sexual orientation but does not suggest that this caused any direct threat to G.

25. On arrival in the UK and at the airport, the mother applied for asylum on the basis of the fear of persecution from her family as a result of her sexual orientation, from which the South African authorities were unwilling or unable to protect her. In her application she named G as a dependant. It is asserted on behalf of the mother that in both her screening interview and in her witness statement in support of the asylum application, she stated her fear that G could be harmed by the acts of violence targeting the mother owing to her sexual orientation. It is also asserted on behalf of the mother that in a letter dated 7 December 2020, the mother's immigration solicitors expressly requested that the Secretary of State consider the risk of harm to G in the mother's asylum application. The mother has not disclosed in relation to the 1980 Hague Convention proceedings any of the documents in the asylum application, so that it has not been possible for this court to independently assess the accuracy of those assertions.

26. The return date of the 1980 Hague Convention application was adjourned by MacDonal J to 22 May and then by Gwynneth Knowles J to 5 June 2020, to allow the mother to obtain legal advice and serve an answer to the application. The order of Gwynneth Knowles J indicated that the purpose of the 5 June hearing was to consider disclosure of the asylum application documents in the 1980 Hague Convention application and vice versa.

27. In her statement (to which I have already referred) and answer, the mother relied upon two grounds in opposing the father's application, namely articles 13(b)

(grave risk to the child) and 13(2) (child's own objections) of the 1980 Hague Convention. The mother did not rely on article 20.

3. *The progress of the asylum application*

28. I set out in Appendix One to this judgment a sequence of events in relation to the asylum application which has been provided by Mr Payne QC, on behalf of the Secretary of State, and to which I have added the sequence of events in relation to the 1980 Hague Convention proceedings, together with various suggestions. I expressly make clear my sympathy for the tasks faced by all those involved, and my support for the dedication and experience of the caseworkers acting on behalf of the Secretary of State. It is clear that all involved in this appeal are committed to finding and implementing practical solutions so as to ensure compliance with the international and domestic legal obligation to determine the 1980 Hague Convention proceedings promptly. I intend any remarks which I make in relation to the sequence of events to be helpful for the future.

4. *The 5 June 2020 judgment of the High Court*

29. The purpose of the 5 June hearing was to consider disclosure of the asylum application documents in the 1980 Hague Convention application and vice versa. No application to stay the 1980 Hague Convention proceedings had been made by either party. However, at the hearing, consideration was also given to a stay, as the Secretary of State had confirmed in the letter of 12 May 2020 that both the mother and G had each made an application for asylum which was outstanding. At para 10 of Lieven J's judgment she recorded an acceptance by both the mother and father that the child could not be returned to South Africa until the asylum application was determined. Further, and again at para 10, even if the asylum application were rejected, the judge doubted whether G could be returned whilst any appeal was pending. On the basis of the likely time involved in the determination of the asylum application the judge considered that "it could be many months, indeed well more than a year, before there is any possibility of this child being returned to South Africa pursuant to the Hague Convention".

30. The judge considered that determination of the 1980 Hague Convention application should be stayed until the Secretary of State had determined G's asylum application, for three reasons:

"11. ... Firstly, if the asylum application is allowed, then the legal position is that the child cannot be returned in any event. Secondly, in my view, the Secretary of State is in a better

position to consider the factual issues than the court in exercising a Hague summary jurisdiction. Under that jurisdiction the court does not generally hear oral evidence, whereas the Secretary of State will undertake through her officers a detailed interview and that is undertaken by officers experienced in dealing with asylum issues and, further, the mother would then have, if there was a refusal, a right of appeal to a First-tier Tribunal [(‘FtT’)] where oral evidence is heard and subject to cross-examination. It is of course correct that the immigration and the [1980] Hague Convention processes and considerations are not the same, and the court will not be bound by any findings made in the immigration system. However, given that the child cannot be sent back to South Africa at the present time, and given there is a detailed investigation of the same factual nexus being undertaken by the [Secretary of State], it is sensible for her to complete at least the first stage of that process before the Family Division devotes its time to determining what might be an academic Hague application.

12. Thirdly, it is, in my view, quite inappropriate for this court to try and carry out some kind of preliminary consideration of the merits of the asylum application. ... The appropriate course is to let the asylum application take its course and then once it has at least reached determination by the Secretary of State stage for the Family Division judge to consider what to do next.”

31. In the circumstances, Lieven J found there would be no benefit to disclosure of the asylum documents in the 1980 Hague Convention proceedings, to which the mother objected: the judge referred to the risks of material being passed to members of her family, and found the balance “plainly” to be in favour of non-disclosure at this stage (see paras 14-15). However, she allowed the father’s application for disclosure of the documents in the 1980 Hague Convention proceedings to the Secretary of State, on the basis that, in determining the asylum application, the Secretary of State might be assisted by those documents (see paras 16-19).

32. Lieven J’s order of 5 June 2020 encouraged the Secretary of State to determine the outstanding asylum claim “with maximum speed”. The judge gave directions including a direction for the Children and Family Court Advisory and Support Service to file and serve a report in respect of G’s wishes and feelings or objections.

5. *The judgment of the Court of Appeal*

33. The Court of Appeal allowed the father's appeal, removing the stay in relation to the 1980 Hague Convention proceedings. The judgment of the Court of Appeal, to which all its members contributed, was given by Hickinbottom LJ.

34. At para 24 of its judgment the Court of Appeal identified the issues raised by the father's appeal as follows:

Issue 1: In the context of an application for a return order under the 1980 Hague Convention and 1985 Act, does the fact that the child and/or the taking parent have refugee status or a pending asylum claim or appeal act as any form of bar to the determination of the application or the making or implementation of any return order?

Issue 2: If so, does it act as a bar (i) to the determination of the application or (ii) to the making of a return order or (iii) only to the implementation of any return order?

Issue 3: If there is no bar to the determination of the application, how should the court go about its task of deciding whether to determine or to stay the application?

Issue 4: What part, if any, should the child play in the application?

Issue 5: 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?"

35. The Court of Appeal also heard some limited submissions on the issue of disclosure of the documents from the asylum claim to the court.

(a) *Issue 1: Asylum Bars to 1980 Hague Convention Proceedings*

36. Issue 1 as raised by the father related to both the child and/or the taking parent. However, as the Court of Appeal stated at para 115 "an order made under

the 1980 Hague Convention will require the return of the child and only the child”. On this basis the Court of Appeal approached issue 1 by reference to four categories of children:

- (1) A child who has had his or her refugee status recognised by the Secretary of State;
- (2) A child who has made an independent application for asylum, pending determination of the application;
- (3) A child who has made an independent application for asylum which has been refused but has appealed, pending determination of the appeal; and
- (4) A child who has not made an independent application for asylum, but who has been named as a dependant by a principal asylum applicant.
 - (i) *Category (1) children: A child who has had his or her refugee status recognised by the Secretary of State*

37. As regards category (1) children whose refugee status has been recognised by the Secretary of State, the Court of Appeal undertook a comprehensive review of the patchwork of international, European and domestic provisions. At para 125 the Court of Appeal held that in relation to a child whose refugee status has been determined by the Secretary of State, article 21 of 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 international protection and the content of the protection granted (“the Qualification Directive”) was a bar to a return order. 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). The Secretary of State submitted, and the Court of Appeal held, that the relevant provisions of the Qualification Directive were directly effective and remain extant in domestic law as “retained EU law” after the United Kingdom’s withdrawal from the EU. The Court of Appeal held at para 127 that “children with refugee status cannot be returned under powers within the 1980 Hague Convention to the country from which they have been given refuge (or to a third country from which they risk being removed to such a country)”.

(ii) *Category (2) children: a child who has made an independent application for asylum, pending determination of the application*

38. As regards a category (2) child the Court of Appeal concluded at para 131 that “where an application for asylum has been made by or on behalf of a child, that operates as a bar to return in 1980 Hague Convention proceedings during the pendency of the application ...”.

39. That conclusion was in essence based on consideration of sections 77 and 78 of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”), the decision of the Court of Appeal in *In re S 2002*, article 7 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status (“the Procedures Directive”), together with the obligation referred to by the Court of Appeal at para 48 “to interpret national law, so far as possible, to achieve the purposes of the Directives and effectively ascribe to those seeking asylum the rights against the state given to them by the Directives, ie they would have to acknowledge the vertical direct effect of the Directives (see *Marleasing SA v La Comercial Internacionale de Alimentación SA* (ECJ Case C-106/89) [1993] BCC 421 (“*Marleasing*”), para 8)”.

40. Article 7 of the Procedures Directive, in so far as relevant provides that “Applicants shall be allowed to remain in the member state, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III”. The Court of Appeal having considered the terms of section 77 of the 2002 Act, which purports to transpose article 7, concluded at para 130 that “we do not consider that it is now possible to construe section 77 as fully transposing article 7”. The Court of Appeal stated that given the form of article 7, it did not give “any room for the exercise of powers of removal or return under any other provision, including the 1980 Hague Convention and 1985 Act”. Furthermore, as it was “a right arising from a Directive which has been recognised by our courts, the position will not be changed by the UK’s exit from the EU”.

41. On this basis the Court of Appeal concluded that if a child has made a separate application for asylum then he or she must be allowed to remain in the United Kingdom given the terms of article 7 of the Procedures Directive.

(iii) Category (3) children: A child who has made an independent application for asylum which has been refused but has appealed, pending determination of the appeal

42. At para 132 the Court of Appeal noted that article 7 of the Procedures Directive only applies “until the determining body [ie here, the Secretary of State] has made a decision on the application” so that the protection under that article of being allowed to remain “does not extend to a child who has had an asylum claim refused but has an appeal pending”. However, at paras 133-134 the Court of Appeal noted the submission on behalf of the Secretary of State that “a child [with a pending asylum appeal] cannot be returned under the 1980 Hague Convention because, by virtue of article 39(1)(a) of the Procedures Directive, a member state must provide an effective remedy against a negative decision on an application for asylum before a court or tribunal”. The Secretary of State submitted that “return under the 1980 Hague Convention of a child with a pending asylum appeal would ... render the appeal ineffective”. The Court of Appeal noted at para 135 four difficulties with these submissions and at para 136 stated that “without having the benefit of full argument, it would not be appropriate to make any observations on whether there is any bar to the return of a child with a pending asylum appeal under the 1980 Hague Convention”.

(iv) Category (4) children: A child who has not made an independent application for asylum, but who has been named as a dependant by a principal asylum applicant

43. At paras 137-140 and para 173(ii) the Court of Appeal concluded that there is no bar to the determination of the 1980 Hague Convention proceedings, to the making of a return order or to the implementation of a return order “where the child is named as a dependant in an application for asylum by a parent, but makes no independent claim for international protection”. In arriving at that conclusion, the Court of Appeal referred at para 81 to article 7(1) of the Procedures Directive which requires member states to allow “applicants” to remain in the state during the pendency of the application. The Court of Appeal considered that “an “applicant” is restrictively defined in article 2(c) [of the Procedures Directive] to mean only a person who has made an application for asylum” and that there was nothing within the Procedures Directive “that prohibits the removal of a dependant of an asylum applicant who has no independent asylum claim of his or her own”. The Court of Appeal added that the “prohibition stems solely from paragraph 329 of the Immigration Rules” which provides that:

“Until an asylum application has been determined by the Secretary of State ... no action will be taken to require the

departure of the asylum applicant or *their dependants* from the United Kingdom.” (Emphasis added)

At para 140 the Court of Appeal, relying on *In re S 2002* concluded that:

“Paragraph 329 of the Immigration Rules (which prohibits the removal of a dependant during the pendency of the principal applicant’s asylum claim) has nothing to do with the status and/or rights of a refugee. In particular, it is not an emanation of the duty not to refoule a refugee, but rather of the duty to have proper respect for family life. As such, on a proper interpretation, it cannot in our view act as a bar to the return of a child under the 1980 Hague Convention which is itself driven by welfare considerations and the principle of family unity.”

On this basis the Court of Appeal held that neither the Procedures Directive nor paragraph 329 of the Immigration Rules prohibited removal under the 1980 Hague Convention “where the child is named as a dependant in an application for asylum by a parent, but makes no independent claim for international protection”.

(b) *Issue 2: What is barred?*

44. The Court of Appeal did not consider the question of what is barred in relation to a child who was named as a dependant on a parent’s application for asylum but who makes no separate claim for international protection, as under issue 1 it had been concluded that there was no bar to the implementation of a return order in respect of such a child. Rather, the question was posed in relation to circumstances where a child had been granted refugee status or where there was a pending independent asylum application by a child. In relation to both situations, the Court of Appeal concluded at para 152 that “any bar applies only to implementation” so that “even where a child cannot be returned under the 1980 Hague Convention because he or she has been granted or has applied for refugee status, the High Court is not prevented from *determining* an application for a return order, or indeed from making a return order; although, if a return order were to be made, it may be required to stay implementation.”

(c) *Issue 3: The discretion to stay the proceedings*

45. At paras 153-161 the Court of Appeal considered how the High Court should go about its task of deciding whether to determine or stay a 1980 Hague Convention application in circumstances in which the child and/or the taking parent have applied

for or been granted refugee status. The Court of Appeal concluded at para 154 that as a general proposition “the High Court should be slow to stay an application prior to any determination” and listed at para 155 six matters which had been taken into account in coming to that conclusion. The Court of Appeal then set out at para 161 the matters which it seemed were relevant matters to be included when determining whether, and, if so, when to grant a stay. Those factors included for instance “potential timings for both the 1980 Hague Convention application and for the asylum claim, and the stage which the asylum claim has reached”.

(d) *Issue 4: The voice of the child*

46. At para 163 the Court of Appeal expressed their view that “when the taking parent has made an asylum claim (and a fortiori when a claim has been made on behalf of the child the subject of the application under the 1980 Hague Convention) the child should be joined as a party to the Convention proceedings”. It was also their view that “[t]his applies equally to circumstances in which the taking parent and/or child have been granted refugee status; and, for these purposes, the grant of rights to the child by the Secretary of State because of the grant of refugee status to the parent”.

(e) *Issue 5: Liaison with the Secretary of State*

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 *in line with her duty to ensure expedition in 1980 Hague Convention applications*” (emphasis added).

6. *The interveners and their submissions in overview*

48. Because of the public importance of the issues, the Secretary of State and five organisations were given permission to participate in the appeal as interveners. All of them had intervened before the Court of Appeal except for the United Nations High Commissioner for Refugees (“UNHCR”) and the International Academy of Family Lawyers (“the IAFL”). Their participation, along with that of counsel for the principal parties, greatly assisted the court. The following is a description of each of the interveners and a short summary of the position each of them adopted.

49. The first intervener is the Secretary of State, on whose behalf Mr Payne and Mr Goss provided two written cases dated respectively 18 January 2021 and 22 January 2021. The second written case took a fundamentally different approach to that adopted before the Court of Appeal and in the first written case. They also provided a note dated 23 January 2021 to explain the reasons for this change in position followed by a post-hearing note dated 10 February 2021. I make no criticism of the change in position but rather consider the willingness and ability to adopt a different position to reflect high professional standards. In the first case and in relation to ground one of the appeal the Secretary of State contended that it was unlawful for an order for the summary return of a child under the 1980 Hague Convention to be implemented whilst a claim for international protection, in relation to which the child has been made a dependant, is pending before the Secretary of State. In relation to ground two it was submitted that the asylum determination process is separate from the 1980 Hague Convention proceedings. As such, the existence of an outstanding claim for asylum does not prevent the Family Division from determining or otherwise progressing an application under the 1980 Hague Convention; save to the extent that any order requiring the return of a dependent child under the 1980 Hague Convention cannot be implemented whilst the claim for asylum in which the child is named as a dependant is pending before the Secretary of State. In relation to ground three it was submitted that it was a matter for the Family Division, on a case by case basis, to consider whether to stay proceedings and/or proceed with determining an application under the 1980 Hague Convention in the light of an asylum claim or of the grant of refugee status by the Secretary of State. However, the Secretary of State agreed with the Court of Appeal that the High Court should be slow to stay 1980 Hague Convention proceedings.

50. The second written case represented a change of position by the Secretary of State in relation to the first ground of appeal. The Secretary of State no longer sought to challenge the Court of Appeal's finding that there is no bar to implementing a return order made under the 1980 Hague Convention in relation to a child who is named as a dependant to a claim for international protection that is pending before the Secretary of State. It was pointed out that it was open to the dependent child to make a claim for international protection in their own right and, if they did so, as the Court of Appeal recognised, they were thereafter protected from refoulement whilst their claim is being determined by the Secretary of State.

51. The second intervener, the International Centre for Family Law, Policy and Practice ("the ICFLPP"), is an organisation associated with the University of Westminster that is involved in family and child law with a particular focus on international aspects including child abduction. The ICFLPP acknowledged that the Secretary of State has the sole power to determine applications for asylum. However, it was submitted that an entitlement to protection from refoulement can be asserted and determined within the process of the 1980 Hague Convention proceedings. That was an issue which had not been raised by the father, so at the

conclusion of the hearing the court invited written submissions from the parties and from all the interveners in relation to it and in particular to the following question:

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

52. The third intervener, Reunite International Child Abduction Centre (“Reunite”), undertakes and publishes research, and provides advice and assistance to individuals and government, statutory and voluntary bodies, in the field of international child abduction. Reunite adverted to the unfairness inherent in the administrative asylum process in which the left-behind parent had no right to participate. It was stated that the asylum process is “undertaken behind closed doors by officials exercising administrative functions” and that “the left behind parent has no right to see, let alone challenge, any evidence submitted as part of an asylum claim”. It was also submitted that the “process is one in which the welfare of the child plays only a peripheral role and where the child may not have a voice”. Reunite supported the proposition that the rights of refugee children must be fully respected so that no child who is in fact a refugee should be returned to a country where they face persecution.

53. However, Reunite also submitted that the 1980 Hague Convention should not be rendered ineffective by an asylum process which was not designed for the resolution of disputes about a child arising from the breakdown of a parental relationship. The solution advanced on behalf of Reunite was that an order of the High Court was not a form of “refoulement” but rather the court was determining whether the child wished to remain in the United Kingdom. In this respect Reunite referred to the wording of article 7 of the Procedures Directive which provides that an asylum applicant must be “... *allowed to remain* in the member state in which the application is made ... until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III of the Directive” (emphasis added). It was stated that the use of permissive language in this context does not mean that an asylum applicant is prohibited from leaving if they choose to do so. It was also submitted that in the case of a child, that freedom of choice will be exercised by those who hold parental responsibility, so that if they cannot agree the court must make the decision as to whether or not they wish to remain in the United Kingdom. If the parents do not agree, the court can stand in their shoes and exercise a form of quasi-parental authority over the child, which is

the function it exercises when making an order under the 1980 Hague Convention. Again, this was not an issue raised by the father.

54. The fourth intervener, Southall Black Sisters (“SBS”), is an organisation which provides advice, resources and advocacy in respect of gender-related violence and discrimination against black and other ethnic minority (mainly migrant) women. SBS supported the proposition that, as a matter of law, a child named as a dependant on a parent’s asylum claim must be afforded the same protection from refoulement as the principal applicant.

55. The fifth intervener, UNHCR, has supervisory responsibility for the 1951 Geneva Convention and its 1967 Protocol. UNHCR submitted that the Court of Appeal erred in finding that a child named as a dependant on a parent’s asylum application has no protection from refoulement to persecution. UNHCR also supported a harmonious application of the 1951 Geneva Convention and the 1980 Hague Convention. In summary it was submitted:

- i) UNHCR fully recognises the importance of the 1980 Hague Convention, emphasising that child abduction is a scourge.
- ii) There was an imperative need for expedition in relation to any request for international protection which expedition would be assisted by the Secretary of State being involved in the 1980 Hague Convention application.
- iii) There was a need for the left-behind parent to be able to participate in the asylum process before the Secretary of State to promote fair and proper determination of the refugee question (i) by permitting the left-behind parent to feed material into the asylum process; and (ii) by facilitating appropriate disclosure of documents from the asylum process into the 1980 Hague Convention proceedings.
- iv) If refugee status was recognised by the Secretary of State then a return order in the 1980 Hague Convention proceedings could not be implemented.
- 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).

56. The sixth intervener, the IAFL, is a worldwide association of practising lawyers seeking to improve the practice of law and the administration of justice in divorce and family law throughout the world. The IAFL emphasised that child abduction is a scourge, by calling in aid the words of Lord Judge in *R v Kayani* [2011] EWCA Crim 2871; [2012] 1 WLR 1927, para 54, that “The abduction of a child from a loving parent is an offence of unspeakable cruelty to the loving parent and to the child or children ...”. The IAFL made submissions in support of the approach adopted by the Court of Appeal that there is no bar to implementing a return order made under the 1980 Hague Convention in relation to a child who is named as a dependant to a claim for international protection that is pending before the Secretary of State.

7. *The legal landscape governing the 1980 Hague Convention and the return of children*

57. The Court of Appeal comprehensively and authoritatively set out at paras 26-43 the legal framework in which 1980 Hague Convention applications are determined. For my own part, and with deference to the members of the Court of Appeal, I endorse all that is contained in those paragraphs. I will set out part of what is contained in those paragraphs and in doing so I draw on what is contained in the judgment of the Court of Appeal. I will add my own conclusions in relation to the requirement to expedite and prioritise the 1980 Hague Convention proceedings and the corresponding obligation to expedite and prioritise any related asylum process.

(a) *Incorporation of the 1980 Hague Convention by the 1985 Act*

58. All of the articles of the 1980 Hague Convention relevant to this case, save for article 20, are expressly incorporated and given the force of law in England and Wales by section 1(2) of and Schedule 1 to the 1985 Act.

(b) *Article 12 of the 1980 Hague Convention*

59. The primary substantive obligation on Contracting States is set out in article 12 of the 1980 Hague Convention, which provides as follows (so far as relevant to this appeal):

“Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or

retention, the authority concerned shall order the return of the child forthwith.”

60. Article 12 is drafted in mandatory terms: the obligation on the Contracting State is to “order the return of the child forthwith”. This is subject only to the settlement provision in article 12 (when the application has been initiated more than one year since the wrongful removal or retention) and/or to one of the exceptions in article 13 and/or to the provisions of article 20. The onus of establishing these grounds is on the taking parent.

(c) *Article 13(b) of the 1980 Hague Convention: grave risk to the child*

61. The focus of article 13(b) is on the risk to the child: if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, then the source of the risk and how it arises are irrelevant (*In re E* at para 34; and *In re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10; [2012] 2 AC 257 (“*In re S 2012*”), para 34 per Lord Wilson, giving the judgment of the court).

62. Although the focus is on the child, it is well established that the child’s situation may be directly or indirectly affected by the taking parent’s situation with the result that the latter can be highly relevant to whether the grave risk referred in article 13(b) has been established. Thus, Hale LJ said in *TB v JB (Abduction: Grave Risk of Harm)* [2000] EWCA Civ 337; [2001] 2 FLR 515, para 44:

“It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the ‘left-behind’ parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it.”

63. A similar point was made by Wall LJ in *In re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, para 49; and in *In re S 2012*, Lord Wilson said (at para 34):

“In the light of these passages we must make clear the effect of what this court said in [*In re E*]. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned.”

64. A recent example of this was *B (A Child) (Abduction: article 13(b))* [2020] EWCA Civ 1057; [2021] 1 WLR 517. I would also refer to the *Guide to Good Practice on Article 13(1)(b)* published by the Permanent Bureau of the Hague Conference in March 2020 which, at para 33, notes that this “exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child”.

(d) *Article 13(2) of the 1980 Hague Convention: Child’s own objections*

65. Article 13(2) provides that “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.”

(e) *Article 20 of the 1980 Hague Convention*

66. Article 20 provides:

“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.”

67. Although this article is not expressly incorporated by the 1985 Act, it has been given domestic effect by section 6 of the Human Rights Act 1998 which makes it unlawful for any public authority to act in a way that is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”), so that a court (as a public authority) is bound to give effect to ECHR rights wherever they appear, including the rights in article 20 (*In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619 (“*In re D*”), para 65).

(f) The obligations of expedition and prioritisation to enable the prompt return of children

68. 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 requirement to implement this objective is based on the presumption that the prompt return of an abducted child promotes the interests of children generally as well as the interests of the individual child. So, what is meant by prompt? The answer is provided by article 11 which 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. In short, the 1980 Hague Convention requires an application to be determined within six weeks.

69. In order to avoid delay and as indicated in para 104 of the 1980 Hague Convention Explanatory Report by Professor Elisa Pérez-Vera, the rapporteur to the 1980 sessions of the Hague Conference which produced the 1980 Hague Convention (“the Pérez-Vera Report”), there is a duty on Contracting States to ensure that applications for the return of a child are, so far as possible, “granted priority treatment”. That obligation means that the courts will, for instance, take other cases out of the list to accommodate the earliest possible date for the determination of a 1980 Hague Convention application. However, the obligation extends not only to the courts but also to all those who are either directly or indirectly involved in the 1980 Hague Convention proceedings. This means that it extends to every step taken by all those involved in the investigation and determination of any related application for asylum. Any delay in either the 1980 Hague Convention proceedings and in any related asylum application is inimical to the obligation imposed on the United Kingdom to determine applications under the 1980 Hague Convention promptly, where necessary by giving priority to any step necessary to determine such an application.

70. The requirement for promptness is not confined to 1980 Hague Convention proceedings. Recital (11) to the Procedures Directive states “It is in the interest of both member states and applicants for asylum to decide as soon as possible on applications for asylum”. Paragraph 333A of the Immigration Rules requires the Secretary of State to ensure that a decision is taken on an application for asylum “as soon as possible, without prejudice to an adequate and complete examination”. The requirement for promptness in the asylum proceedings where there are concurrent 1980 Hague Convention proceedings is informed by the Secretary of State’s duty to ensure expedition in the determination of the 1980 Hague Convention application.

71. The obligation in article 11 of the 1980 Hague Convention on judicial or administrative authorities of the UK to act expeditiously in proceedings for the

return of children has the force of law by virtue of section 1(2) of the 1985 Act. The processing of the asylum application has an impact on the speed of disposal of the 1980 Hague Convention proceedings, so the court has a legal obligation to assist as far as possible in the asylum process. Similarly, the Secretary of State has a corresponding legal obligation to assist in the 1980 Hague Convention proceedings.

72. The Court of Appeal comprehensively addressed at paras 31-34 the legal obligation imposed on Contracting States to act expeditiously. For my part I emphasise that the requirements of urgency and priority apply to all the steps involved in determining the related asylum claim, so that the United Kingdom fulfils its obligations under the 1980 Hague Convention. So far as possible this means that the entire asylum process should take weeks rather than months.

(g) *The voice of the child*

73. Another important aspect of the 1980 Hague Convention, which reflects the interests of the child being “at the forefront of the whole exercise” (*In re E* at para 14), is the voice of the child. The importance of the voice of the child is recognised worldwide by article 12 of the United Nations Convention on the Rights of the Child (“UNCRC”) which provides:

“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.”

74. At a European level, its specific importance in the determination of proceedings under the 1980 Hague Convention is recognised by article 11(2) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels IIa”), which provides:

“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.”

75. The importance of hearing children in proceedings under the 1980 Hague Convention was also emphasised by Baroness Hale in *In re D*, at para 58, when she referred to article 11(2) of Brussels IIa as enunciating a principle of “universal application” and to this being “consistent with our international obligations under article 12” of the UNCRC.

(h) *The High Court’s exclusive jurisdiction in England and Wales*

76. In England and Wales, applications under the 1980 Hague Convention must be made in the High Court, issued in the Principal Registry of the Family Division, and heard by a High Court judge (section 4(a) of the 1985 Act and FPR rule 12.45). The High Court thus has the exclusive statutory power to determine such applications.

8. *The legal landscape governing asylum applications*

77. In the United Kingdom the legal procedures for identifying refugees and protecting refugees from refoulement are derived from a patchwork of different sources including the 1951 Geneva Convention, EU law, domestic legislation, regulations and rules and domestic law incorporating EU and ECHR legal obligations.

78. The 1951 Geneva Convention is the starting point. It has not been incorporated into our domestic law but “It is plain ... that the British regime for handling applications for asylum has been closely assimilated to the [1951 Geneva] Convention model” (*R v Asfaw (United Nations High Comr for Refugees intervening)* [2008] UKHL 31; [2008] AC 1061, para 29 per Lord Bingham of Cornhill). Furthermore, section 2 of the Asylum and Immigration Appeals Act 1993, headed “Primacy of Convention”, provides that nothing in the Immigration Rules (which transpose much of the 1951 Geneva Convention into domestic law) shall lay down any practice which would be contrary to the Convention. By virtue of section 2 the Secretary of State is precluded from adopting an administrative practice or procedure which would be contrary to the 1951 Geneva Convention: see *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630; [2010] QB 633, para 58.

79. Article 1(A)(2) of the 1951 Geneva Convention contains the following definition of a “refugee”:

“[T]he term ‘refugee’ shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

An individual who satisfies the definition of article 1A(2) has, subject to limited exceptions, the right not to be refouled. If G has a well-founded fear of being persecuted by reason of her membership of a particular social group, is outside the country of her nationality and is unable or, owing to such fear, is unwilling to avail herself of the protection of that country then this is highly likely to amount to circumstances equivalent to a grave risk to the child within the meaning of article 13(b) of the 1980 Hague Convention. In this way under the 1951 Geneva Convention G would have a right not to be refouled and under the 1980 Hague Convention, irrespective of whether there is a bar to the implementation of a return order, in the exercise of the court’s discretion either a return order would not be made or if made it would not be implemented.

80. Article 33 of the 1951 Geneva Convention sets out the “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 judgement of a particularly serious crime, constitutes a danger to the community of that country.”

81. Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act. The obligation not to refoule an individual arises by virtue of the fact that their circumstances meet the definition of “refugee”, not by reason of the recognition by a Contracting State that the definition is met. For this reason a refugee is protected from refoulement from the moment they enter the territory of a Contracting State whilst the State considers whether they should be granted refugee status: see *ST (Eritrea) v Secretary of State for the Home Department* [2012] UKSC 12; [2012] 2 AC 135 (“*ST*”), para 61.

82. It is also declaratory under domestic law, for which see *FA (Iraq) v Secretary of State for the Home Department* [2011] UKSC 22; [2011] 4 All ER 503, para 32; *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008; [2002] Imm AR 471, para 12; *R (Kuchiey) v Secretary of State for the Home Department* [2012] EWHC 3596 (Admin), para 31; *Secretary of State for the Home Department v KN (Democratic Republic of Congo)* [2019] EWCA Civ 1665; [2020] Imm AR 241, para 38; and *F v M (Joint Council for the Welfare of Immigrants intervening)* [2017] EWHC 949 (Fam); [2018] Fam 1, para 38.

83. In so far as applicable to the United Kingdom the principal EU measures are (i) the Qualification Directive and (ii) the Procedures Directive (together, “the Directives”).

84. The Secretary of State accepts, for the purposes of this appeal, and I agree, that the relevant provisions of the Directives are directly effective and remain extant in domestic law as “retained EU law” after the United Kingdom’s withdrawal from the EU.

85. Recital (27) to the Qualification Directive states that “Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status”.

86. Article 2(c) of the Qualification Directive sets out the same definition of a “refugee” as provided for in article 1(A)(2) of the 1951 Geneva Convention. Consistently with the 1951 Geneva Convention, recital (14) provides that the recognition of refugee status is declaratory of a pre-existing right. That it is a declaratory act is also evident from the definition in article 2(d) of “refugee status” as meaning “the recognition by a member state of a third country national or a stateless person as a refugee”.

87. Article 2(g) of the Qualification Directive defines an “application for international protection” as a “... request made by a third country national or a

stateless person for protection from a member state, who *can be understood* to seek refugee status or subsidiary status ...” (emphasis added).

88. Article 4 of the Qualification Directive refers to a duty on an “applicant” to submit all elements needed to substantiate the application and to co-operate with the member state in assessing the relevant elements of the application. It provides that “Member states may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In co-operation with the applicant it is the duty of the member state to assess the relevant elements of the application.”

89. Article 21(1) of the Qualification Directive provides that “Member states shall respect the principle of non-refoulement in accordance with their international obligations”. This incorporates the obligation under article 33 of the 1951 Geneva Convention not to refoule a refugee which depends on the person’s status as a refugee rather than on recognition of that status.

90. The Procedures Directive sets out the minimum procedural obligations with which a member state needs to comply in determining claims for international protection.

91. Article 2(b) of the Procedures Directive provides that “For the purposes of this Directive” “‘application’ or ‘application for asylum’ means an application made by a third country national or stateless person which *can be understood* as a request for international protection from a member state under the [1951] Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately” (emphasis added).

92. Article 2(c) of the Procedures Directive provides that “For the purposes of this Directive” “‘applicant’ or ‘applicant for asylum’ means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken”.

93. Under article 4(1) a member state is required to “designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive ...”. By virtue of paragraph 328 of the Immigration Rules the Secretary of State is appointed as the designated “determining authority” with sole responsibility for examining and determining claims for international protection. The Immigration Rules are made in accordance with section 3(2) of the Immigration Act 1971, which includes a requirement that

they are laid before Parliament and are subject to a negative resolution procedure. They “have acquired a status akin to that of law”: see *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719; [2011] QB 376, para 17; and *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, paras 15-18.

94. Protection from refoulement whilst a claim for asylum is being considered by the “determining authority”, that is by the Secretary of State, is provided by article 7(1) of the Procedures Directive:

“Applicants shall be allowed to remain in the member state, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III ...”

This article imposes a positive obligation to allow “applicants” to remain. Article 21 of the Qualification Directive incorporates article 33 of the 1951 Geneva Convention which is expressed as a negative duty not to remove or refoule a “refugee”.

95. Under article 6(3) of the Procedures Directive Member States may provide that an applicant can make an application for international protection on behalf of their dependants. Article 9(3) provides that “For the purposes of article 6(3), and whenever the application is based on the same grounds, member states may take one single decision, covering all dependants”.

96. The transposition of the Directives into domestic law was primarily sought to be achieved through amendments to the Immigration Rules.

97. Paragraph 327 of the Immigration Rules was amended so as to provide the following definition of an asylum applicant:

“Under the Rules an asylum applicant is a person who either;

(a) makes a request to be recognised as a refugee under the Refugee Convention on the basis that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom, or

(b) otherwise makes a request for international protection. ‘Application for asylum’ shall be construed accordingly.”

98. Paragraph 327A of the Immigration Rules was introduced in order to ensure that, in accordance with article 6(2) of the Procedures Directive, every individual has the right to make an application for asylum in their own right. Paragraph 327A provides:

“Every person has the right to make an application for asylum on their own behalf.”

99. Paragraph 349 of the Immigration Rules was amended so as to enable an applicant, as provided for by article 6(3) of the Procedures Directive, to make an application for international protection on behalf of their dependants:

“A spouse, civil partner, unmarried partner, or minor child accompanying a principal applicant may be included in the application for asylum as a dependant, provided, in the case of an adult dependant with legal capacity, the dependant consents to being treated as such at the time the application is lodged. A spouse, civil partner, unmarried partner or minor child may also claim asylum in their own right. If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in their own right will be also considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where they make a claim as a dependant or in their own right.”

100. It appears to have been considered that no action was necessary to transpose article 7(1) of the Procedures Directive on the basis that the necessary protection was already provided to applicants by section 77 of the 2002 Act, and to applicants and to dependants by paragraph 329 of the Immigration Rules.

101. 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 it.”

102. 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.”

103. If the Secretary of State has refused an application for asylum or international protection then in accordance with article 39(1) of the Procedures Directive there has to be an effective remedy before a judicial body in which “the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons”: see *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* (Case C-69/10) EU:C:2011:524; [2012] 1 CMLR 204, paras 56 and 61. Article 39(1) provides that “Member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for asylum ...”. The effective

remedy in the United Kingdom is provided by section 82(1) of the 2002 Act which provides for an appeal to the First-tier Tribunal (“the FtT”). Section 78 of the 2002 Act provides protection from refoulement whilst an appeal is pending. That section, in so far as relevant provides:

“(1) While a person’s appeal under section 82(1) 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 ‘pending’ has the meaning given by section 104.”

104. Section 104(1) of the 2002 Act provides:

“An appeal under section 82(1) is pending during the period -

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).”

The effect of section 104(2) is that an appeal is not “finally determined” whilst an application for permission to appeal to the Upper Tribunal (“the UT”) 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.

105. Section 78 together with section 104 effectively extends protection from refoulement to asylum applicants whose applications are refused but who exercise an in-country right of appeal while the appeal is “pending”, ie until the appeal is withdrawn, abandoned or “finally determined”.

106. The right to refugee status is set out in paragraph 334 of the Immigration Rules which, in so far as relevant, provides that:

“334. An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:

- (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
- (ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom;
- (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the United Kingdom; and
- (v) refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group.”

107. The Secretary of State’s policy and procedures governing the approach to processing and determining claims for asylum are set out in various guidance documents and Asylum Policy Instructions (“APIs”). The objective underlying these procedures is to ensure that the United Kingdom’s obligations under the 1951 Geneva Convention, the Qualification Directive and the Procedures Directive are in practice met. The approach which the Secretary of State takes to dependants named in a claim for international protection is set out in the Dependants and former dependants API. Under section 1.1 this applies “where a principal applicant has one or more family members who are either dependant on the claim or claiming asylum separately in their own right or both”.

108. Section 1.4 of the Dependants and former dependants API provides that “Where an asylum claim involves dependent children caseworkers must consider protection needs and the best interests of each child as an individual and in the context of the family unit”. That procedural obligation arises regardless as to whether a separate application has been made on behalf of the dependent child.

109. Section 5 of the Dependants and former dependants API provides that:

“Relevant issues affecting dependants which may give rise to individual protection needs *can come to light at any point in the asylum process* but are most likely to be identified through evidence provided during a dependant adult’s screening interview, written evidence submitted in a ‘one stop’ section 120 notice or by the principal applicant. It may also be important to gather additional information on key aspects of the claim from dependants where this is necessary to fully consider the claim.” (Emphasis added)

That section continues by providing that:

“Caseworkers should be alert to expressions of a need for protection from dependants that suggest they may have a claim in their own right, independently of the principal applicant. Where evidence comes to light suggesting a dependant who has not claimed in their own right has individual and specific protection needs it may be necessary to interview them if such issues cannot be properly considered without further specific evidence from that individual.”

Again, the instruction that relevant issues affecting dependants “can come to light at any point in the asylum process” and the requirement to be alert to a dependant’s need for protection apply regardless as to whether a separate application has been made on their behalf.

110. Section 5.1 of the Dependants and former dependants API contains an obligation to gather additional evidence from dependants. It states:

“In the majority of cases, the principal applicant should be able to provide details of the asylum claim for the whole family unit. It will not normally be necessary to interview dependants where the principal applicant is able to convey individual and collective protection needs on their dependant’s behalf. *However, caseworkers must be aware that dependants may raise issues independent of the principal applicant which may give rise to a protection claim in their own right.* They may also be able to provide relevant details that are material to the

principal applicant's claim which would not otherwise be available." (Emphasis added)

Section 5.1 continues by stating that:

"Caseworkers must gather and assess all relevant information to fully consider the protection needs of the family unit which may involve interviewing one or more dependants. Where necessary and bearing in mind the need to consider the best interests of the child to avoid putting children through an interview unnecessarily, where the child is of an appropriate age, caseworkers should consider whether hearing from the child is necessary."

111. Another feature of the legal landscape is section 55 of the Borders, Citizenship and Immigration Act 2009. Section 55(1) requires the Secretary of State to discharge any of her functions in relation to immigration, asylum or nationality having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The mother relies on the duty in section 55(1) in support of the proposition that prior to the determination of the asylum process it would not be in G's best interests for a return order to be implemented, in circumstances where objectively it can be understood that G has made a request for international protection.

112. There are several authorities concerning the interface between applications under the 1980 Hague Convention and applications for asylum by the taking parent and/or child. The most significant, for the purposes of this appeal, is *In re S 2002* in which the Court of Appeal (Laws LJ, with whom Rix and Thorpe LJ agreed) considered section 15 of the Immigration and Asylum Act 1999 which was a predecessor of section 77 of the 2002 Act. Section 15 provided as follows:

"During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."

113. Laws LJ held at para 21 "that the language of 'remove' and 'required to leave' are terms of art in the law of immigration" so "that the prohibition in section 15 is directed to the immigration authorities - who are of course part of the executive - and imposes upon them a most important negative duty in the context of their administration of immigration law and practice in the United Kingdom". Laws LJ

continued by stating that “[t]he section is not intended to occupy any wider canvas. It cannot I think sensibly be read as creating a substantial exception or any exception to the obligations arising under article 12 of the Hague Convention or be intended to circumscribe the duty and discretion of a judge exercising the wardship jurisdiction.” In this way section 15 was held not to apply to 1980 Hague Convention proceedings. As the Court of Appeal in this case stated at para 129 “this construction appears subsequently to have been adopted or confirmed by the insertion into what is now section 77, after the reference to removal etc, of the words ‘in accordance with a provision of the Immigration Acts’ ...”. An issue arises in this appeal as to whether section 77 of the 2002 Act does not apply to 1980 Hague Convention proceedings or whether by virtue of article 7 of the Procedures Directive applicants for asylum are protected from the implementation of a return order in the 1980 Hague Convention proceedings until the determining authority, that is the Secretary of State, has made a decision.

114. In *In re S 2002* Laws LJ also considered paragraph 329 of the Immigration Rules which protected the dependants from being required by the executive to leave pending determination of an asylum application by the Secretary of State and to the practice of the Secretary of State not to remove dependants pending an appeal by the principal asylum seeker. At para 27 he stated:

“Dependants are indeed protected by the law when a claim for asylum is made by mother or father. That is done by paragraph 329 in the Immigration Rules, which I have read. As regards the position of such dependants pending an appeal by the principal asylum seeker, it is the practice of the Secretary of State not to remove them and that practice, absent some wholly exceptional justification for a departure from it, would no doubt be protected by the courts either under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, or as a matter of legitimate expectation or both.”

An issue arises in this case as to whether paragraph 329 of the Immigration Rules provides protection for dependants as a consequence of their rights as refugees until a decision is taken by the Secretary of State, or whether Laws LJ had intimated that both paragraph 329 and this practice of the Secretary of State pending an appeal had “nothing to do with the status and/or rights of a refugee” but was rather an emanation of “the duty to have proper respect for family life”.

9. *The first ground of appeal*

115. The first ground of appeal (see para 11 above) raises four questions. The first is whether naming a child as a dependant on an asylum application can be understood to be an application by the child. If so, then the second question is whether the child is entitled to protection from refoulement pending the determination of that application so that a return order cannot be implemented. The third question is: when is an application for asylum determined? If an application is still pending during any appeal period, then the fourth question is at what point in time 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. I will deal with each of those questions in turn.

(a) *Whether naming a child as a dependant on an asylum application can be understood to be an application by the child*

116. The Court of Appeal, for the reasons set out at paras 138-140 of its judgment, 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:

“138. Neither the 1951 Geneva Convention nor the Directives require any such protection, which can only arise from either (i) the parent’s application with the child as a named dependant being treated as a claim for asylum and subsidiary protection by the child himself or herself, or (ii) from considerations of family unity and the right to family life under article 8 of the ECHR.

139. As we have described (paras 86-89 above), whilst we understand that, on an application by a parent, the Secretary of State in fact considers whether a child requires international protection, *the application is not properly construed as - nor is it treated by the Secretary of State as - a form of deemed application for protection by the child.*

140. In our view, as described above and as intimated by Laws LJ in *In re S* (2002) (see paras 80-82 and 100 above), *paragraph 329 of the Immigration Rules (which prohibits the removal of a dependant during the pendency of the principal applicant’s asylum claim) has nothing to do with the status*

and/or rights of a refugee. In particular, it is not an emanation of the duty not to refoule a refugee, but rather of the duty to have proper respect for family life. As such, on a proper interpretation, it cannot in our view act as a bar to the return of a child under the 1980 Hague Convention which is itself driven by welfare considerations and the principle of family unity.”
(Emphasis added)

I depart from the reasoning of the Court of Appeal in respect of those parts of these paragraphs to which I have added emphasis.

117. I agree that there is no obligation on the Secretary of State to consider whether an individual is a refugee absent any application. However, article 2(g) of the Qualification Directive (quoted at para 87 above) 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). Also, article 2(b) of the Procedures Directive (quoted at para 91 above) 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. I consider that a request for international protection made by a principal applicant naming a child as a dependant is also an application by the child, if objectively it can be understood as such. I also consider that, generally speaking, such an application can (and should) objectively be understood as an application by the child, for a combination of two reasons. The first is the inherent likelihood, expressly recognised in recital (27) to the Qualification Directive (quoted at para 85 above), that any grounds which an adult applicant may raise for fearing persecution or serious harm of a relevant kind will also apply, by reason of their relationship, to a child who is a dependant of that adult. The second is that, as pointed out in the Secretary of State’s submissions, in the case of a child, it is the parent applicant who determines, on behalf of their child, whether to make a claim for asylum. An omission by a child to make an application in their own right cannot therefore be regarded as a choice which the child has made (even if he or she has legal capacity to make it). Understanding an application for refugee status or other international protection which names a child as a dependant as including an application by the child accordingly protects the interests of the child by ensuring that the child’s own status is considered. Such separate consideration is necessary not least because, if the principal application is granted, the kind of residence permit for which the child is eligible depends on whether or not the child is a refugee or in need of international protection in his or her own right.

118. I consider that this approach not only reflects the wording of the Qualification and Procedures Directives (and in particular the wording of the interpretative provisions in article 2(g) of the Qualification Directive and article 2(b) of the Procedures Directive) but is also consistent with the objectives of those Directives

and of the 1951 Geneva Convention and the obligation to give those instruments a generous and purposive interpretation bearing in mind their humanitarian aims.

119. I also note that this approach is entirely consistent with the Dependants and former dependants API and was said by the Secretary of State to be required by the Qualification and Procedures Directives in her original written case on this appeal. Although the Secretary of State subsequently resiled from that position (see paras 49-50 above), in my opinion it was correct.

120. There is also an important practical aspect to this question. If an application for international protection made by a parent naming a child as a dependant is not regarded as including an application by the child unless the latter application has been made formally, a refusal of the parent's application would not prevent the parent from at that point making a further application for the child in his or her own right, which would then need to be considered and decided separately. In a case where there are 1980 Hague Convention proceedings pending this would have the potential to introduce an additional layer of delay. If there is a possibility that an asylum claim will be made in the name of the child, it is vital that it should be brought forward and decided at the first opportunity.

121. Accordingly, I consider that a child named as a dependant on the parent's asylum application and who has not made a separate request for international protection generally can and should be understood to be seeking such protection and therefore treated as an applicant. I would allow this aspect of the appeal.

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

122. The Qualification Directive and the Procedures Directive are limited in their application to third-country nationals or stateless persons. Article 2(b) of the Procedures Directive defines "application" or "application for asylum" as "an application made by a third country national or stateless person which can be understood as a request for international protection from a member state under the Geneva Convention". Article 2(f) of the Procedures Directive provides a definition of a refugee by reference to "a third country national or a stateless person". Furthermore, the definition of "refugee" in article 2(c) of the Qualification Directive is also by reference to "a third country national" or "a stateless person".

123. Both Directives apply as G is a third-country national.

124. Article 7 of the Procedures Directive obliges member states to permit those seeking asylum (“applicants”) to remain in the relevant State (here, the United Kingdom) “for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III”. The protection in article 7 continues until the decision at first instance is taken by the Secretary of State which decision must be in accordance with “the procedures at first instance”. Those procedures are set out in Chapter III which is headed “Procedures at First Instance”. Article 23(1), within Chapter III, provides that “Member states shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II”. Amongst the various safeguards set out in Chapter II, are those contained in article 8(2) and article 9. Article 8(2) of Chapter II provides:

“2. Member states shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, member states shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) 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 9 of Chapter II obliges member states, through their determining authority, to provide applicants with written decisions on applications for asylum.

125. The determination of requests for international protection and the examination procedure are both entrusted by Parliament to the Secretary of State.

126. It is submitted on behalf of the Secretary of State, and I agree, that 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).

127. The Secretary of State acknowledges, and I agree, that 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. That is not cutting across or directly interfering in the exercise by the Secretary of State of her exclusive powers with respect to the control of immigration and asylum. The findings in the 1980 Hague Convention proceedings are clearly potentially relevant but they do not discharge the Secretary of State from her statutory obligation to make her own independent assessment nor do they bind the Secretary of State.

128. Since the factual findings made in the 1980 Hague Convention proceedings are neither made by the “determining authority” nor pursuant to a process which complies with the examination procedure in the Procedures Directive, they do not bring to an end the protection provided by article 7 of that Directive. Rather, 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 deny applicants the right to have their claims for asylum determined by the determining authority.

129. The protection in article 7 continues until the Secretary of State has made her determination. The question then becomes whether her determination binds the High Court. On behalf of Reunite it was submitted that a return order was not a form of “refoulement” but rather the court was determining whether the child wished to remain in the United Kingdom. I do not consider such an approach can be correct as it ignores the substantive effect of a return order which is that the child is being returned to the country from which they seek refuge. I consider that the obligation in article 7 binds the State in its entirety so as to preclude any emanation of the State (including the High Court) from implementing a return order so as to require an applicant to leave the United Kingdom whilst their asylum claim is being considered by the “determining authority”.

130. Accordingly, 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.

131. I also consider that 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. I agree that if, on some exceptional basis, naming a child as a dependant cannot objectively be understood to be a request for refugee status for the child then paragraph 329 is an emanation of the duty to have proper respect for family life. However, where an application for international protection can objectively be understood as a request for international protection by a dependant, then I consider that paragraph 329 is an emanation of the duty not to refoule a refugee under article 7 of the Procedures Directive. So, in addition to relying on article 7 of the Procedures Directive a dependant who objectively can be understood to be making a request for international protection is entitled to rely on paragraph 329 which requires that no action will be taken to require his or her departure from the United Kingdom prior to the determination of the application by the Secretary of State.

132. I do not consider that Laws LJ in *In re S 2002* “intimated” that paragraph 329 of the Immigration Rules does not relate to the rights of a refugee. At para 27 (quoted at para 114 above), Laws LJ recognised by reference to paragraph 329 that “Dependants are indeed protected by the law when a claim for asylum is made by mother or father”. Rather, his reference to family life and article 8 of the ECHR was in relation to “the position of such dependants pending an appeal by the principal asylum seeker”.

133. I agree with the Court of Appeal judgment at para 130 that it is not now possible to construe section 77 of the 2002 Act as fully transposing article 7 of the Procedures Directive. Section 77 did adopt the construction of section 15 of the Immigration and Asylum Act 1999 set out in *In re S 2002* by the insertion into section 77, after the reference to removal etc, of the words “in accordance with a provision of the Immigration Acts”. However, asylum applicants are able to rely upon the right within article 7 of the Procedures Directive to be allowed to reside in the UK during the pendency of their application on the basis of the *Marleasing* principle. 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.

134. I consider that an applicant has protection from refoulement pending the determination of that application, so that until the request for international protection is determined by the Secretary of State a return order in the 1980 Hague Convention proceedings cannot be implemented. The two Conventions are not independent of each other but rather must operate hand in hand.

(c) *When is an application for asylum determined?*

135. Article 2(e) of the Procedures Directive, in so far as relevant defines the “determining authority” as meaning “any quasi-judicial or administrative body in a member state responsible for examining applications for asylum and competent to take decisions at *first instance* in such cases ...” (emphasis added). Article 7 of the Procedures Directive also refers to decisions at first instance, providing that “*Applicants* shall be allowed to remain in the member state, for the sole purpose of the procedure, *until the determining authority has made a decision* in accordance with the procedures at *first instance* set out in Chapter III” (emphasis added). So, the decision by the Secretary of State at first instance is not the final determination of the application. After the Secretary of State’s decision, a person still remains an applicant until a *final decision* has been taken. Article 2(c) of the Procedures Directive defines an applicant as meaning “a third country national or stateless person who has made an application for asylum in respect of which *a final decision* has not yet been taken” (emphasis added). Article 2(d) of the Procedures Directive provides that a “final decision” means “a decision on whether the third country national or stateless person be granted refugee status by virtue of [the Qualification Directive] and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the member states concerned pending its outcome, subject to Annex III to this Directive”.

136. The definition of a final decision includes the requirement that it is no longer subject to a remedy within the framework of Chapter V of the Procedures Directive. Article 39(1)(a) in that Chapter provides that “Member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following: “(a) a decision taken on their application for asylum ...”. Article 39(2) provides that “Member states shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1”. Article 39(3) provides that “Member states shall, where appropriate, provide for rules in accordance with their international obligations dealing with: (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the member state concerned pending its outcome”. It can be seen that member states have a margin of appreciation in relation to whether their domestic rules have the effect of allowing applicants to remain in the member state concerned pending the outcome of the effective remedy guaranteed by article 39(1). This is in contrast to article 7 which provides that prior to the first instance decision all applicants shall be allowed to remain in the member state.

137. It is apparent from the provisions of Chapter V that the application for asylum will not have been finally determined until the conclusion of the process for granting

applicants an effective remedy which has been put in place by the United Kingdom in accordance with article 39 of the Procedures Directive.

138. 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. This is known as an in-country right of appeal. 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. In practice, this right of appeal is provided where the Secretary of State, despite refusing the application, decides that there is sufficient merit in a claim for asylum for a remedy, so as to be “effective”, to require an in-country appeal. There are further rights of appeal, in certain circumstances, to the UT, to the Court of Appeal and to this court.

139. Section 104(1) of the 2002 Act defines an appeal as “pending” during the period beginning when it is instituted and ending when it is “finally determined, withdrawn or abandoned” (or when it lapses because the Secretary of State issues a certificate under section 97 of the 2002 Act justifying the person’s exclusion on, in summary, national security grounds). In effect 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 permission to appeal up to the Court of Appeal.

140. I consider that an application for asylum is pending and will not have been determined until the conclusion of the appeal process in accordance with section 104(1) of the 2002 Act.

(d) At what point in time 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?

141. 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. In Chapter III of the Procedures Directive a number of exceptions to the basic principles and guarantees are set out together with various provisions for curtailing or limiting the remedy provided to asylum seekers (see articles 27, 28 and 31). 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.

142. In accordance with article 39(1)(a) and Chapter III of the Procedures Directive the United Kingdom has enacted a range of statutory measures to provide asylum seekers with an effective remedy.

143. At one end of the statutory spectrum is section 82(1) of the 2002 Act which, as indicated, provides an in-country right of appeal to the FtT. At the other end of the spectrum there are various statutory provisions (reflecting the provisions of Chapter V of the Procedures Directive) restricting or otherwise precluding the exercise of appeal rights. For example the Secretary of State can issue a certificate: (i) under sections 94 and 94B of the 2002 Act where a claim is considered to be clearly unfounded (thereby requiring any appeal rights to be exercised from abroad) or (ii) under section 96 of the 2002 Act (which prevents a person from exercising an appeal right under section 82 if the Secretary of State considers that there is no satisfactory reason why a matter relied on in a further application for asylum was not raised during an appeal against a previous refusal).

144. The provision made by the United Kingdom to make rules in accordance with its international obligations dealing with the question of whether an appeal shall have the effect of allowing applicants to remain in the United Kingdom pending its outcome is contained in section 78(1) of the 2002 Act, which provides that:

“While a person’s appeal under section 82(1) 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.*”
(Emphasis added)

That protection only relates to being removed from or being required to leave the United Kingdom “in accordance with provisions of the Immigration Acts”. There is no requirement to read down section 78 to comply with article 7 of the Procedures Directive as the obligation in article 7 only applies until the Secretary of State has made a decision. A return order made under the 1980 Hague Convention does not remove or require a child to leave the United Kingdom in accordance with the provisions of the Immigration Acts. So, the question arises as to whether the protection in section 78 applies to a child pending determination of their in-country appeal in order to comply with the obligation to provide an effective remedy under article 39 of the Procedures Directive.

145. Mr Payne submitted that to implement a return order pending an in-country asylum appeal by a child would encroach on the Secretary of State's exclusive responsibility, as the determining authority, to decide whether the merits of the asylum claim required the appellant to be permitted to remain in the United Kingdom whilst the appeal was determined in order for the appeal to be effective.

146. Mr Payne also submitted that the implementation of a return under the 1980 Hague Convention of a child with a pending asylum appeal would render the appeal process under section 82 of the 2002 Act ineffective. In particular, (i) a child who has been returned to a country where they have nationality cannot meet the definition of "refugee" within article 1A(2) of the 1951 Geneva Convention or article 2(c) of the Qualification Directive, both of which require that they be outside their country of nationality; and (ii) a child who is not in the United Kingdom would not meet the criteria for the grant of refugee status and therefore the asylum claim could not be granted (see paragraphs 334 and 336 of the Immigration Rules). Furthermore, if the appeal were allowed, there would be no means to require the left-behind parent to obtain, or otherwise enforce, the return of the child to the United Kingdom. So, Mr Payne submitted, there cannot be an effective remedy under a pending in-country appeal if in the meantime the child has in fact been returned under the 1980 Hague Convention to the country from which they have sought refuge.

147. The Court of Appeal considered, at para 135, that there were four points which illustrated potential difficulties with Mr Payne's analysis.

148. The first point was that:

“article 7 of the Procedures Directive expressly distinguishes asylum applicants who are awaiting a determination from the ‘determining authority’ (here, the Secretary of State) from those who have had their applications determined even if they have appealed. The article 7 requirement to allow applicants to remain in the territory of the member state is restricted to the former. Consequently, ... that leaves section 78 of the 2002 Act (with its restriction on removals to those ‘in accordance with the Immigration Acts’) more exposed.”

However, article 21 of the Qualification Directive requires member states to respect their international obligations regarding non-refoulement. This protection extends to refugees who are only recognised as such after a decision on appeal, because of the declaratory nature of a grant of refugee status. So, the implementation of a return order in 1980 Hague Convention proceedings in respect of a child with a pending in-country asylum appeal would not respect the United Kingdom's international

obligations in compliance with article 21 of the Qualification Directive if the child was in fact a refugee. To give proper effect to article 21 of the Qualification Directive the protection in section 78 of the 2002 Act cannot be limited to removal “in accordance with the Immigration Acts”. Rather, by virtue of article 21 it also prevents implementation of a return order under the 1980 Hague Convention of a child pending determination of an in-country appeal.

149. The second point was that:

“Despite the terms of article 1A of the 1951 Geneva Convention and paragraphs 334 and 336 of the Immigration Rules, sections 92 and 94 of the 2002 Act ... clearly envisage asylum appeals being made out-of-country.”

However, the provisions for some asylum appeals to be made out-of-country do not assist in determining whether an in-country right of appeal would be ineffective if a return order was implemented in 1980 Hague Convention proceedings. In circumstances where an out-of-country appeal is appropriate then an effective remedy is consistent with the child being returned to the country in question.

150. The third point was that:

“Not all decisions relating to an asylum application are appealable. Appeal rights do not fully satisfy or exhaust the requirements for an effective remedy, because the availability of judicial review to challenge material non-appealable decisions (eg decisions that representations do not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules, or certification under section 94 or 96 of the 2002 Act: again, see para 75 above) is an essential element in satisfying the UK’s obligation to provide an effective remedy under article 39 of the Procedures Directive (see, eg, *TN (Afghanistan) and MN (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1609; [2014] 1 WLR 2095 at para 16 per Maurice Kay LJ with whom Beatson and Briggs LJJ (as he then was) agreed).”

However, where there is no right of appeal, there is no aspect of the asylum process which prevents a return order being implemented after a decision by the Secretary of State has been taken. If there is a judicial review application, then it would be in the discretion of the judge hearing the application whether to grant interim relief by

way of an order suspending removal. This provides no answer to Mr Payne's submission that where the Secretary of State has decided that, in order for the remedy to be effective, an applicant must be allowed to remain in the United Kingdom, they should not be required to leave by implementation of a return order in 1980 Hague Convention proceedings.

151. The fourth point was that:

“An asylum appeal having an automatic and full suspensive effect is not necessarily required to satisfy the obligation to provide an effective remedy: even if the statutory immigration and asylum scheme does not itself directly and automatically bar removal under a return order, it is arguable that the requirements for an effective remedy are fulfilled by the ability to make an interim application in the relevant appeal or judicial review proceedings for an order prohibiting removal pending the outcome of the challenge.”

However, the issue is not whether all asylum appeals have an automatic or suspensive effect. Out-of-country asylum appeals do not have a suspensive effect. Rather, the question is whether a statutory in-country appeal has suspensive effect which in turn depends on whether the suspensive effect is required to provide an effective remedy. Furthermore, applicants are entitled to exercise their statutory right of appeal so that it is not appropriate to require the Secretary of State or an applicant to make an application for an interim order pending the outcome of their appeal.

152. I am of the view, for the reasons given by Mr Payne (see paras 145 and 146 above) that 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. Accordingly, an in-country appeal acts as a bar to the implementation of a return order in 1980 Hague Convention proceedings. 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. I would suggest that this impact should urgently be addressed by consideration being given as to a legislative solution.

153. Mr Payne submitted, and I agree, that an out-of-country appeal would not act as a bar to the implementation of a return order in 1980 Hague Convention proceedings. Implementation of a return order if an out-of-country appeal is pending is consistent with the Procedures Directive and with domestic legislation.

10. *The second ground of appeal*

154. At para 141 the Court of Appeal defined the issues as follows:

“In the circumstances in which the grant of asylum or a pending asylum application is a bar, does it act as a bar to (i) the determination of the application, or (ii) the making of a return order, or (iii) the implementation of the return order?”

At para 142 the Court of Appeal held:

“We consider this issue to be more straightforward. In argument, Mr Payne accepted that the High Court could determine an application for and even order the return of a child who has been granted refugee status, even though he submitted that that order cannot be implemented whilst that status is maintained; and a fortiori where an application for asylum remains outstanding. In our view, he was right to accept that the only bar is to actual return - although the precise course the court should follow in a particular case (including the stage of the proceedings when any stay should be imposed) is a different question which we consider below (paras 157-158). The duty of non-refoulement and the article 7 duty to allow asylum applicants to remain involve a prohibition on returning a person to his or her country of nationality: they do not prohibit either (i) the return of a child to the country of his or her habitual residence which is not the country of nationality; and (ii) the taking of decisions which are preliminary or ancillary to actual return. Nothing in the domestic provisions impose any such prohibitions. Indeed, sections 77 and 78 of the 2002 Act make the line in (ii) clear, by prohibiting any act of removal of an asylum applicant whilst expressly allowing ‘interim or preparatory action’ up to and including the giving of removal directions (see paras 77, 78 and 79(iii) above).”

155. The ground of appeal was in essence based on article 20 of the 1980 Hague Convention which provides:

“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.”

Although this article is not expressly incorporated by the 1985 Act, it has been given domestic effect by section 6 of the Human Rights Act 1998 which makes it unlawful for any public authority to act in a way that is incompatible with the ECHR, so that a court (as a public authority) is bound to give effect to ECHR rights wherever they appear, including the rights in article 20 (*In re D* at para 65). If a taking parent has been subjected to, for instance, abuse by the left-behind parent, or abuse from her own family members, then the issues which could be raised under article 20 are, as the Court of Appeal stated at para 41, amply reflected in the operation of article 13(b). I need only refer to what Lord Wilson said at para 34 of *In re S 2012*:

“The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned.”

The application of article 13(b) ensures that the court is not acting in a way which is incompatible with the ECHR. The 1980 Hague Convention proceedings are focused upon the child, but that focus itself involves consideration of the position of the taking parent. Article 20 is not to be used as a way around the rigours of the other exceptions to return of the child.

156. It was submitted on behalf of the mother that her reliance on article 20 hinges upon determination of her application for asylum, and consideration by the Secretary of State as to whether G should be granted asylum. I disagree. It is clear that no judgment of the court shall be framed in such a way as to appear to determine any question of refugee or subsidiary protection. That is exclusively a matter for the Secretary of State. However, whilst the court does not determine the request for international protection it does determine the 1980 Hague Convention proceedings so that 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. In this way an exclusive focus on the merits of the 1980 Hague Convention proceedings must in certain cases also require consideration of the facts giving rise to the claim for international protection. I consider that the mother’s arguments based on the ECHR properly analysed arise under article 13(b) and they can be addressed in the 1980 Hague Convention proceedings. There is no reason why those proceedings cannot be heard and determined prior to a decision in relation to the requests for international protection.

157. At para 147 the Court of Appeal stated:

“Therefore, although issues may overlap, in our view Lieven J was right when (at para 12 of her judgment, also quoted in para 18 above) she declined to consider the merits of the asylum claims made: a judge tasked with considering an application for a return order has an exclusive focus on the merits of that application in the light of the relevant statutory framework (including article 13(b) of the 1980 Hague Convention) and the evidence properly before the court.”

For my part I consider that the court can consider the merits of the 1980 Hague Convention proceedings even if the factual issues overlap with the asylum claims, so long as the prohibition on determining the claim for international protection is not infringed.

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))*.

159. I consider that the Court of Appeal’s clearly reasoned conclusion that “any bar applies only to implementation” cannot be faulted and was plainly right. This second ground of appeal therefore fails.

11. *The third ground of appeal*

160. The Court of Appeal concluded at para 154 that as a general proposition “the High Court should be slow to stay an application prior to any determination”. As the Court of Appeal acknowledged, that is a general proposition, so that there may be cases where it is appropriate for the court to exercise its discretion to stay the 1980 Hague Convention proceedings pending determination by the Secretary of State of an asylum claim. However, the general proposition is entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority. Also, 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.

161. In this appeal there was no challenge to any of the matters which the Court of Appeal set out at para 161 as being relevant matters which the court should take

into account when determining whether, and, if so, when to grant a stay of the 1980 Hague Convention proceedings. For my part I endorse each of those matters.

162. Again, I consider that the Court of Appeal's clearly reasoned conclusion cannot be faulted and was plainly right. This third ground of appeal therefore fails.

12. Practical points as to the interplay between the two proceedings

163. The starting point is that the Secretary of State has sole responsibility for both examining and determining claims for international protection: see paragraph 328 of the Immigration Rules (referred to at para 93 above). The Secretary of State's responsibilities include examining and determining whether refugee status or subsidiary protection should be revoked: see article 1C of the 1951 Geneva Convention, articles 11, 14, 16 and 19 of the Qualification Directive and paragraphs 338A and 339A of the Immigration Rules. As the Court of Appeal stated at para 123 "the court has been properly sensitive to the fact that decision-making functions have been assigned to particular primary decision-makers by Parliament or under powers emanating from Parliament; and has been clear that the court has no power to review or otherwise interfere with the decision-making of that body except on a statutory appeal or on conventional judicial review grounds". The Court of Appeal also stated at para 124 that "all decisions relating to asylum applications (including decisions to withdraw or revoke asylum status) fall within the exclusive powers of the Secretary of State, no court or tribunal has any power to intervene outside the statutory appeal process set out in the 2002 Act".

164. However, the 1980 Hague Convention proceedings are separate from the asylum process. Frequently, the same factual background forms the basis for both (i) an application for asylum by a child and (ii) a "defence" to an application for a return order under article 13(b) (grave risk to the child). In determining an application for a return order under the 1980 Hague Convention, the court does not impinge in any way upon the Secretary of State's exclusive function in determining refugee status. Rather, information in the 1980 Hague Convention proceedings and the court's decision may inform the determination by the Secretary of State of a person's asylum claim or as to whether the Secretary of State revokes refugee status. Similarly, information available to the Secretary of State such as country background information (though in this case that information is publicly available) and the decision of the Secretary of State may inform the court's decision in the 1980 Hague Convention proceedings.

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.

166. First, as soon as it is appreciated that there are related 1980 Hague Convention proceedings and asylum proceedings it will generally be desirable that the Secretary of State be requested to intervene in the 1980 Hague Convention proceedings. It was suggested in this court that the Secretary of State should be joined as a party. In *In re H (A Child) (International Abduction: Asylum and Welfare)* [2016] EWCA Civ 988; [2017] 2 FLR 527, which also involved a related asylum application, Black LJ (with whom Moore-Bick, Longmore LJJ agreed) posed the question at para 39 as to whether it was necessary for the Secretary of State to be joined in the proceedings, “not least with the intent that the family court’s determination should be binding upon her too?”. That issue, amongst others was remitted to the High Court. However, by the time of the remitted hearing “a very broad level of agreement had been reached between the parties” so this question fell away, see *F v M (Joint Council for the Welfare of Immigrants intervening)*. If joining the Secretary of State as a party to the 1980 Hague Convention proceedings would result in the court’s determination being binding on her then the question arises as to whether this would infringe upon her sole responsibility for both examining and determining claims for international protection. We have not heard submissions on this point so for present purposes I consider that it is sufficient if the Secretary of State ordinarily be requested to intervene so ensuring that the decisions in the 1980 Hague Convention proceedings did not trespass on her responsibilities in the asylum process.

167. Second, other steps which in general it is desirable should be taken as soon as it is appreciated that there are related proceedings include:

- (a) Ensuring that there is liaison and a clear line of communication between the courts and the Home Office;
- (b) Joining the child as party to the 1980 Hague Convention proceedings with representation; and
- (c) Directing that 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: see para 164 of the Court of Appeal’s judgment.

168. Third, I endorse the steps which the Home Office has taken post-hearing towards establishing a specialist asylum team to which this small group of cases

would be assigned as soon as it is appreciated that there is an overlap with 1980 Hague Convention proceedings. This would replicate the approach in the courts in that all 1980 Hague Convention cases are heard in the Family Division of the High Court.

169. Fourth, the documents in the 1980 Hague Convention proceedings should ordinarily be made available to the Secretary of State.

170. Fifth, the court should give early consideration to the question as to whether the asylum documents should be disclosed in the 1980 Hague Convention proceedings. Article 22 of the Procedures Directive provides that:

“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.” (Emphasis added)

In *R v McGeough* [2015] UKSC 62; [2016] NI 280; [2015] 1 WLR 4612, para 23 Lord Kerr of Tonaghmore, giving the judgment of the court stated that “the stipulation [in article 22] is that it should not be disclosed to alleged actors of persecution *and the injunction against its disclosure is specifically related to the process of examination of individual cases*. The appellant’s case had been examined and his application had been refused. *The trigger for such confidentiality as article 22 provides for was simply not present*” (emphasis added). Paragraph 3391A of the Immigration Rules transposes article 22 into domestic law. That paragraph has a similar trigger containing the same limitation “For the purposes of examining individual applications ...”. The preliminary words of both article 22 and the paragraph qualify the prohibitions confining confidentiality of the asylum documents to the asylum process. The provisions of article 22 and paragraph 3391A are intended to give instructions as to how to deal with the information when considering applications for asylum. They do not prevent a court from ordering disclosure nor is it necessary to postpone disclosure until the asylum process has concluded. The Court of Appeal *In the matter of H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001, para 68(3), relying on *R v McGeough* stated that “Absolute confidentiality only applies during the process of examination of the

asylum application”. However, that confidentiality only applies for the purposes of examining individual cases within the asylum process. The article 22 trigger does not apply to the 1980 Hague Convention proceedings. There will be other aspects of confidentiality which are set out in *In the matter of H (A Child) (Disclosure of Asylum Documents)*. Therefore, 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, applying the balancing exercise set out in *In the matter of H (A Child) (Disclosure of Asylum Documents)*.

171. In carrying out the balancing exercise a relevant factor will be whether the left-behind parent in the 1980 Hague Convention proceedings is “the alleged [actor] of persecution of the applicant for asylum”.

172. Furthermore, in carrying out the balancing exercise it will ordinarily be appropriate to identify the information contained in the asylum application which is distinct from and additional to the information that the taking-parent has already disclosed in the 1980 Hague Convention proceedings (“the additional information”). There is an obligation on the legal representatives in the 1980 Hague Convention proceedings to consider the asylum documents to identify the additional information and ordinarily it is the confidentiality of the additional information that must be balanced.

173. UNHCR in its written submissions dated 10 February 2021 referred to “the vital importance of confidentiality in the asylum process” explaining by reference to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued in 2019) at para 200 that “[i]t will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence, it is, of course, of the utmost importance that the applicant’s statements will be treated as confidential and that he be so informed.” UNHCR considered and I agree that any disclosure exercise conducted in the 1980 Hague Convention proceedings would need to balance the systemic importance of maintaining confidentiality in the asylum process, together with the applicant parent’s and the child’s particular right to confidentiality in that process against the left-behind parent’s rights under articles 6 and 8 ECHR and the child’s rights under article 8 ECHR.

174. Sixth, as submitted on behalf of the Secretary of State “... the difficulty that arises relates to harmonising, in so far as possible, the speed of the decision-making processes under the respective Conventions ...”. All the parties and interveners in this case recognised the need for mechanisms to enable the court and the Secretary of State to co-ordinate their respective proceedings, to secure expedition in both.

Prompted by this uniform recognition this court invited the parties and the interveners to suggest standard directions in the 1980 Hague Convention proceedings where there is a parallel asylum claim. Extensive work was undertaken by counsel in relation to suggestions for standard directions. Furthermore, on behalf of the Secretary of State an “Expedited process for determining asylum claims with concurrent Hague Convention proceedings” was devised with such asylum claims being allocated to “a specific decision-making team who will hold responsibility for expedited cases (the Expedited Team)”. However, whilst there was a measure of agreement as to standard directions there has been no wider consultation and matters of practice and procedure are not for this court. It is for the High Court to determine its own procedures, which no doubt will take into consideration the matters set out by the Court of Appeal at paras 164 and 166. However, the exercise in this court identified (as set out in Appendix Two) some problem areas which might be considered together with some purely tentative suggestions in those areas for consideration by others.

175. Seventh, in cases linked to 1980 Hague Convention proceedings consideration should be given to ensuring that any asylum appeal or any asylum judicial review will normally be assigned, in England and Wales and Northern Ireland, to a Family Division High Court judge (though not the same judge with conduct of the 1980 Hague Convention proceedings). I make an equivalent recommendation in respect of Scotland that would mean that any asylum appeal or any asylum judicial review in cases linked to 1980 Hague Convention proceedings be normally assigned to a judge from the Court of Session with experience of family cases.

176. It should be possible to implement such an appeal procedure using existing statutory provisions. By virtue of section 6(1)(c) of the Tribunals, Courts and Enforcement Act 2007 (the “2007 Act”) a judge of the Court of Session and by virtue of section 6(1)(d) a puisne judge of the High Court in England and Wales or Northern Ireland are also judges of both the FtT and of the UT. Furthermore, a High Court judge or a judge of the Court of Session may act as a judge of the FtT if requested to do so by the Senior President of Tribunals: see paragraph 6(2), Schedule 2 of the 2007 Act. The request must be made with the concurrence of the Lord Chief Justice of England and Wales: paragraph 6(3)(a), Schedule 2 of the 2007 Act (or the concurrence of the Lord President of the Court of Session for a judge of the Court of Session: paragraph 6(3)(b), Schedule 2 of the 2007 Act or the Lord Chief Justice of Northern Ireland, for a High Court judge in NI: paragraph 6(3)(c), Schedule 2 of the 2007 Act). As the legislation does not distinguish between High Court judges of particular divisions the need for a Family Division judge would simply be reflected in the particular High Court judge whom the Senior President of Tribunals requests to sit with the concurrence of the Lord Chief Justice in England and Wales, or of the Lord President of the Court of Session, or of the Lord Chief Justice of Northern Ireland.

177. Eighth, it is desirable that the High Court should have oversight over and be in a position to co-ordinate both proceedings until both have been concluded. For instance, if the Secretary of State refuses a child refugee status and if the child appeals to the FtT then it will be a matter for the High Court judge to bring the matter urgently to the attention of the Senior President of Tribunals and of the Lord Chief Justice requesting that a Family Division High Court judge acts in the FtT.

13. Disposal of the appeal

178. In relation to the first ground of appeal, for the reasons I have given I would allow the appeal to the extent that a child named as a dependant on her parent's asylum request who can objectively be understood to have made a request for international protection has protection from refoulement pending the determination of that application so that until then a return order in the 1980 Hague Convention proceedings cannot be implemented.

179. I would dismiss the appeal in relation to the second and third grounds of appeal.

180. I would therefore maintain the order of the Court of Appeal setting aside the stay imposed by Lieven J and remitting the case to the Family Division for further consideration of the 1980 Hague Convention application.

Appendix One (see para 28)

Sequence of events since March 2020

1. 2 March 2020. The mother arrived in the UK and claimed asylum with G as a dependant. A pause was imposed on processing asylum claims in response to Covid-19 restrictions.
2. 11 March 2020. The father made an application to the South African Central Authority for the return of G under the 1980 Hague Convention.
3. 14 April 2020. Father's application under the 1980 Hague Convention issued in the Family Division of the High Court.
4. 29 April 2020. Hearing before Newton J. Orders made seeking information about the mother and child's whereabouts.
5. 4 May 2020. Further orders for disclosure made on paper by Newton J.
6. 12 May 2020. Home Office confirms the address for the mother and child, stating that an application for asylum had been made "by or on behalf of" the mother and "by or on behalf of" G.
7. 13 May 2020. Location order executed and mother served with proceedings. Hearing listed on 15 May adjourned by order of Macdonald J.
8. 22 May 2020. Adjourned hearing listed. Mother has instructed solicitors but has not yet obtained public funding. Parties agree a consent order which makes provision for the disclosure of the mother's asylum application. Gwynneth Knowles J makes an order on paper adjourning the issue of disclosure to a further hearing on 5 June 2020. I would suggest that as soon as it becomes apparent that there is a related asylum claim the court should ordinarily consider (i) informing the Secretary of State of the 1980 Hague Convention proceedings so that she is aware of the need for expedition and priority in relation to the asylum process; (ii) requesting the Secretary of State to intervene in the 1980 Hague Convention proceedings so that there can be co-ordination with the asylum process; (iii) setting a review date and requesting the Secretary of State by her representative to attend at that review; (iv) indicating that at the review consideration will be given to making available to the Secretary of State all the 1980 Hague Convention proceedings

documents and that consideration will also be given as to whether the asylum documentation should be released to the 1980 Hague Convention proceedings; (v) requesting the Secretary of State to keep the court informed as to each stage of the asylum process; (vi) informing the Secretary of State of the court's objective to keep her informed as to each stage of the 1980 Hague Convention proceedings; (vii) informing the Secretary of State that if appropriate the court will assist by using its case management powers in order to advance the asylum process by, for instance, giving directions in relation to any medical report that may inform both the 1980 Hague Convention proceedings and the asylum process.

9. 5 June 2020. Hearing before Lieven J. The mother's legal representatives in relation to the asylum request are not present. I suggest that ordinarily consideration might be given as to whether they ought to attend. Lieven J made an order staying the father's 1980 Hague Convention application pending determination of the asylum claim. Lieven J requested the Secretary of State to determine the outstanding asylum claim "with maximum speed". I would suggest that any request for "maximum speed" is accompanied by setting a review date to be attended by the parties including any legal representative of the mother in relation to the asylum application with a request that the Secretary of State attends by her representative to inform the court as to progress and of any difficulties in the asylum process. For instance, consideration at such a review hearing could have been given by all those attending to an immediate remote interview of the mother by the case-working team, arrangements for a medical examination of the mother for the purposes of the asylum claim and arrangements for biometrics.

10. 12 June 2020. Father submits appellant's notice to the Court of Appeal.

11. 30 June 2020. Mother's response to the application for permission to appeal is filed with the Court of Appeal.

12. 2 July 2020. Order of Moylan LJ granting permission to appeal.

13. 9 July 2020. The Home Office Litigation Operations team responds to the request of 5 June 2020 for "maximum speed" by requesting a case update from the case-working team on progress of the asylum claim.

14. 10 July 2020. Order of Moylan LJ granting disclosure to the Secretary of State.

15. 16 July 2020. Order of Moylan LJ granting the Secretary of State permission to intervene.

16. 7 August 2020. The case-working team provides the update requested on 9 July 2020. The team confirms they have restarted some interviews after pausing due to Covid-19 restrictions allowing the asylum process to proceed. They also confirm that they would contact the mother to establish whether she could attend interview (and arrange appropriate childcare).

17. 10 August 2020. Letter sent from the case-working team to the mother about the possibility of arranging childcare to allow an interview to be arranged. Hearing before the Court of Appeal.

18. 18 August 2020. Response received from the mother confirming the availability of childcare and agreeing to interview. Interview booked for 26 August.

19. 26 August 2020. Substantive asylum interview completed which was 19 days from when asylum interviews restarted.

20. 28 August 2020. Case-working team receive correspondence from the mother's legal representatives requesting time to finalise their medical evidence, noting an appointment had been booked for 4 November. Extension agreed by the case-working team to 9 November. I would suggest that if there had been review hearings before a judge attended by representatives of the Secretary of State the need for a medical report would have been identified by 5 June 2020 and thereafter an appointment would have been arranged on a priority basis. Even if that had not occurred, I suggest that the High Court should have been informed of this delay so that consideration could have been given to using case management tools to arrange an early appointment.

21. 15 September 2020. Judgment in the Court of Appeal.

22. 25 October 2020. The mother's application for permission to appeal made to the UK Supreme Court.

23. 9 November 2020. The mother's legal representatives confirm follow-up medical appointment had been arranged. Extension agreed by the case-working team to 23 November for medical evidence to be finalised and provided to the Home Office. I suggest that the High Court should be kept informed in relation to these requests.

24. 25 November 2020. Mother's legal representatives requested a further extension to 30 November to finalise their evidence.

25. 8 December 2020. Case-working team receives letter from the mother's representatives dated 7 December 2020 enclosing the mother's medical report and amendments to interview record. I suggest that the High Court should be informed that these documents have been received so that consideration can be given by the court as to whether they should be disclosed in the 1980 Hague Convention proceedings.

26. 11 December 2020. Case-working team sends invitation to enrol the biometrics of the mother and G. I would suggest that if there had been review hearings before a judge attended by representatives of the Secretary of State the need for biometrics would have been identified by 5 June 2020 and thereafter would have been arranged on a priority basis.

27. 15 December 2020. Permission to appeal granted by the UK Supreme Court (Lady Black, Lady Arden and Lord Stephens).

28. 19 January 2021. Case-working team confirm that biometrics are enrolled and that the case had been forwarded for urgent allocation to progress the decision.

29. 22 January 2021. Noted that, because of the medico-legal report, the case will need to be assigned to a specially trained decision-maker.

30. 25 January 2021. Claim allocated to Non-Suspensive Appeal Hub.

31. 27 January 2021. Claim allocated to an appropriate decision-maker who prioritised the case.

32. 4 February 2021. The court is informed that the Secretary of State has decided on the asylum application. On behalf of the mother the court is informed that the outcome of the application is a refusal. It is indicated that after the mother has received advice on the appropriateness of redactions, she will also disclose the reasons for refusal.

33. 10 February 2021. The mother discloses the Home Office letter dated 3 February 2021 giving reasons for refusing the asylum application. Redactions have been made to para 44 of that letter but without any explanation as to why those redactions were necessary.

Appendix Two (see para 174)

Standard directions: problem areas and suggestions

1. The taking parent or the child may have different legal representatives in the 1980 Hague Convention proceedings and in the asylum proceedings. A suggestion is that a parent or a child making an asylum application should ordinarily be directed to:

(i) provide to the court the name and contact details of any legal representative retained by them in the asylum application;

(ii) attend any review hearing with both their legal representatives in the summary return proceedings and with their legal representatives in the asylum application; and

(iii) indicate in writing to the court what further steps need to be taken by the parent in relation to the asylum application.

2. The need for co-ordination with the Secretary of State. It is suggested that this might be assisted by a request from the court to the Secretary of State to:

(i) intervene in the 1980 Hague Convention proceedings;

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

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

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

(v) keep the court informed of the progress of the asylum application(s) and/or appeal(s) and of any reconsideration of refugee status and in particular to promptly inform the court of any delays in, or requests for extensions of time in respect of, the asylum application;

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

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

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

(ix) request that the Secretary of State attend all hearings by a representative; and

(x) inform the court of the outcome of any asylum application including any certification by the Secretary of State pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002.

3. The court should inform the Secretary of State either that the court has listed the hearing of the 1980 Hague Convention proceedings or has granted a stay, and that if it has listed the proceedings for hearing, that the court will provide the Secretary of State with the court's judgment.

4. The need for expedition and prioritisation in any asylum appeal or judicial review. It is suggested that this might be assisted by directions from the court that:

a. If the claim for asylum is refused by the Secretary of State, and the asylum applicant exercises his or her right of appeal, then at the same time as lodging the appeal the appellant lodges a request that its listing be prioritised so that, if possible, it is listed to be heard not later than ... days thereafter.

b. In the event that the asylum applicant's claim is refused and certified as "clearly unfounded" by the Secretary of State pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 and a child intends to lodge a judicial review application, then at the same time as lodging the judicial review application they lodge a request that the listing of the application be prioritised so that, if possible, the application for permission and the substantive hearing should be rolled-up and heard ... days thereafter.