

40th Anniversary Webinar

Amicus Committee and 1980 Hague Convention Committee

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The Interplay between the Abduction and Asylum Conventions

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Initial considerations - S (Children), Re [2002] EWCA Civ 843 (28 May 2002), [2002] 1 WLR 2548

- Re S involved an application made by a father for the return of two children to India. It was not a 1980 Hague Convention case. The mother had removed the children from India to England, then claimed asylum for herself. No claim had been made on behalf of the children. The mother's asylum claim was based on allegations of domestic abuse that she made against the father.
- The mother's asylum claim was refused. She was then granted 'exceptional leave' to remain in England for four years, with the children granted similar. She appealed the refusal of her asylum claim.
- The Judge (Bennett J) considered it to be in the best interests of the children to return to India. The mother had asserted that her asylum appeal was a barrier to the Family Division of the High Court ordering return. Bennett J rejected that argument.
- The judgment in Re S sets out the immigration law as it was at that time at paragraphs 10 – 20.



Initial considerations - S (Children), Re [2002] EWCA Civ 843 (28 May 2002), [2002] 1 WLR 2548 (continued)

- At para. 21 of the judgment, Laws LJ concluded that, where the relevant immigration law used the terms “remove” and “required to leave”, they were using terms of art in the law of immigration, and as such the restrictions that existed upon the removal of applicants for asylum (or upon requiring them to leave, to use the alternative language) applied to the immigration authorities rather than generally to other arms of State (e.g. the Family Division of the High Court)
- The Court of Appeal also rejected an argument that Article 33 of the Refugee Convention presented, in its general prohibition upon refoulement, a barrier to the Family Division of the High Court making an order for the return of an asylum applicant to a country from which they sought protection (para. 24).
- To further dismiss the Appellant’s claim, the Court of Appeal further held that any prohibition upon removal did not extend to those whose claim for asylum had been refused and was subject to an appeal (para. 26) and that as no asylum claim had been made for the children, the court was not prevented from ordering their return in any event (para. 27).



The development of the law thereafter...

- UK immigration law was fundamentally changed by the passing, in 2004 and 2005 respectively, 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”) and 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”)
- The Qualifications Directive provided, at Art 21, 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 Procedures Directive provided, at Art 7, 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



G v G [2021] UKSC 9 (19 March 2021), [2021] 2 WLR 705

- G v G involved an application made by a father following the removal, by her mother, of an 8 year old girl (G) from South Africa. M then made an application for asylum in the UK, naming G as her dependant (but not making a separate asylum claim in relation to her). The mother's asylum claim was based upon her having told her sister that she was a lesbian, which resulted in her being threatened by members of her family, subjected to a very painful and frightening 'cleansing ceremony' at her family's home, receiving death threats and, in due course, being forced off the road whilst driving by someone that she believed to have been her brother. Following that incident she resolved to leave South Africa. She had informed the UK authorities that she considered G also to be at risk of violence at the hands of her family, whether directly or indirectly (through being caught up in violence against her mother)
- On 5 June 2020, the application came before Lieven J. She stayed the 1980 Hague Convention proceedings pending determination of the mother's asylum claim. The father appealed.
- On appeal the Court of Appeal removed the stay. The Court of Appeal also addressed the issues of principle which arose where there were concurrent asylum and 1980 Hague Convention claims.



G v G [2021] UKSC 9 (19 March 2021), [2021] 2 WLR 705 (continued)

- The mother appealed the decision of the Court of Appeal to the UK Supreme Court. The issue of principle upon which the mother appealed was the Court of Appeal's decision that a child who has not made an asylum claim, but who has been named as a dependant on an asylum claim made by their parent, could be returned to the country from which protection was sought under the 1980 Hague Convention. In reaching that conclusion, the Court of Appeal held that neither Article 7 of the Procedures Directive nor the relevant paragraph (para. 329) of the Immigration Rules prohibited the removal of a child in such circumstances.
- The IAFL Amicus Committee submitted written submissions to the Supreme Court. The position advanced by the IAFL was 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."



G v G [2021] UKSC 9 (19 March 2021), [2021] 2 WLR 705 (continued)

- The Supreme Court held that the Court of Appeal was wrong to hold that a child who had not made an asylum claim, but who was named as a dependant on an asylum claim made by another person, would be returned to the State from which protection was sought (see para. 116 onwards of the Supreme Court judgment). That was because Art 2(g) of the Qualification Directive only required there to be a request by a person for protection *who can be understood to seek refugee status* (para. 117). The Court considered 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 objective it can be understood as such*” and that “*...generally speaking, such an application can (and should) objective be understood a an application by the child*”. Accordingly, the same protections afforded to an applicant would be afforded to a child named as that applicant’s dependant.
- At para. 118, the Court held 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.*”



G v G [2021] UKSC 9 (19 March 2021), [2021] 2 WLR 705 (continued)

- The Supreme Court recognised the difficulties that could be caused by such an interpretation, which would prevent the implementation of a return order pending determination of an asylum claim and, if appeals were pursued, the appeal process up to a certain point. To try to ameliorate those difficulties, the Supreme Court proposed a number of ‘practical points’ at para 163 onwards. Generally speaking (particularly where it is proposed that there be proactive and effective communication and liaison between the Family Division of the High Court and the Tribunal system, experience suggests that they have not been effective.



G v G [2021] - the fundamental problem with the decision

- G v G was decided at the time when the UK was leaving the EU. The hearing before the Court of Appeal took place during the 'transition period', after the UK had left the EU (on 31 January 2020) but whilst EU law remained in force.
- The provisions of the UK – EU Withdrawal Agreement were complicated. Under the European Union (Withdrawal) Act 2018, European Law was generally to cease to be applicable after 31 December 2020. There was, however, provision for retained EU law. The Court of Appeal described (at para 50) how *"rights conferred by a Directive will be retained if they have been either transposed or in any event recognised... by the domestic courts prior to the IP completion date"*.
- In G v G, before both the Court of Appeal and the Supreme Court, the Secretary of State for the Home Department advanced the position that both the Qualification and Procedures Directives were retained EU law that would continue to apply following the end of the transition period. Unfortunately, that concession was incorrectly made and the proposition underlying it was wrong – see R (AAA (Syria)) v Home Secretary [2023] UKSC 42 at para 148.

What has happened since?

- The 'practical suggestions' put forward by the Supreme Court to try to resolve the inevitable delays in securing a return that result from the principles established in that judgment seem largely to have been unsuccessful. Whilst decision making on asylum claims by the Home Office (which has now set up a specialist team to decide asylum claims where there are linked 1980 Hague Convention cases) seems to have sped up, the Tribunal system remains very slow. There have been cases where it has taken around 18 months for an appeal of a refused asylum claim to be determined.
- It seems to be difficult to secure effective liaison between the Family Division of the High Court and the Tribunal system. That is not for want of trying on the part of the Family Division judges...
- As such, the restrictions upon implementing return established by the Supreme Court in *G v G* have been questioned. There are now a number of cases where Judges have suggested that, because the relevant EU law no longer applies, the basis of the decision in *G v G* has been fundamentally undermined.

Some examples

- AB (A Minor), In the Matter Of [2023] NICA 37 (02 June 2023) – a 1980 Hague Convention case decided in Northern Ireland. Return was sought to Switzerland, where the mother had refugee status. Protection had, however, been sought from Eritrea. It was held that, as refoulement to Eritrea was not presented as a risk at any stage of the proceedings, there was no barrier to ordering and implementing return to Switzerland.
- A Local Authority v A [2024] EWFC 110 (Fam) – not a 1980 Hague Convention case, and the country to which return was sought (Austria) was not the country from which asylum was sought (Syria). Knowles J applied the approach taken in AB (A Minor) (above).
- HR (Parallel Child Abduction and Asylum Proceedings), Re [2024] EWHC 1626 (Fam) (28 June 2024) – the then President, Sir Andrew McFarlane, ‘recognised the force’ of the conclusions reached by Knowles J (and so by extension those reached in AB) but did not rule on the point.
- C (A Child), Re (Abduction: Grave Risk: Asylum Claim: Child's Objections) [2025] EWHC 3461 (Fam) – a 1980 Hague Convention case involving an application for return to the USA. Mr Justice Harrison ordered and implemented return to the USA notwithstanding an extant asylum claim made by the mother. He held (in agreement with Garrido J in Re K (Children) (Application for return orders: Concurrent asylum claims) [2025] EWHC 450 (Fam), that immigration and asylum law as it now is does not prevent the ordering and implementation of a return, providing that the general principle of non-refoulement is upheld.

Where next?

- It seems inevitable that the principles in *G v G* will eventually be challenged on appeal. The difficulty is that there have, so far, been few cases in which: a) asylum is claimed from the State to which the child would be returned under the 1980 Hague Convention; and b) an asylum claim has been made also by the child, rather than by a parent with the child as their dependant.
- *Re C* (above) was an example of such a case but that was not (to my astonishment...) appealed.
- Generally, where the principles in *G v G* have been challenged, Judges have said that they no longer apply. There has been one case (*EN v RN & Anor* [2026] EWHC 21 (Fam) (15 January 2026)) where the Judge (MacDonald J) seemed to accept that the Supreme Court judgment in *G v G* was not, where it established principles, based entirely upon the European Directives and so could not be distinguished solely because the EU law no longer applies. Within that judgment, MacDonald J seems to accept that the only court that can overturn *G v G* is the Supreme Court itself...