WHEN OUR PATHS CROSS AGAIN: THE SUPREME COURT'S MANAGEMENT OF RELATED ASYLUM AND CHILD ABDUCTION CLAIMS IN *G v G*

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ABSTRACT

This case note examines how the Supreme Court approached the complex problem of overlapping legal proceedings involving asylum claims and child abduction. It analyses the purposive approach taken by the Supreme Court to the determination of how a child, who has not independently claimed asylum, should be understood to have done so, and the ramifications of this for the child's legal status in any claim for their return under the Hague Convention on Child Abduction. It further seeks to address the novel approach by which the Supreme Court dealt with this problem. By formulating draft standard directions for the handling of such cases, the Court brought into focus questions about the limits of the judicial function of promoting good governance.

INTRODUCTION

The UK Supreme Court decision in *G v G* finally resolves a fundamental conflict in case law concerning the rights of children and abducting parents:[1] Does an asylum application submitted by an abducting parent prevent the return of a child in child abduction proceedings? The answer is now, effectively, yes.

[1] *G v G* [2021] UKSC 9.

The Supreme Court has ruled that in cases where a parent has applied for refugee status but the child has not, if the child is listed as a dependent on the parent's asylum claim, then the child can be 'objectively understood' as having sought asylum as well.[2] Given that a person who has sought asylum cannot be returned to their home state where they fear persecution (refoulement), until their asylum claim has been determined, it follows that their dependent child could not be refouled either. In such circumstances, enforcing a return order for an abducted child via Hague Convention proceedings would violate the non-refoulement rule. Yet in making this decision, the Court also had to wrestle with practical problems involving the procedural overlap between the concurrent child abduction and asylum claims. Its approach to this problem represents the Supreme Court's new-found expansive understanding of its role, thereby providing further proof of an ongoing shift in the UK constitutional order.

This decision begged the question as to whether or not an asylum claim poses a bar to the hearing, determination, or implementation of return orders arising from child abduction proceedings. The Supreme Court has now confirmed that while the determination of such proceedings is not barred, the implementation of any order for the return of the child is so barred.[3] Child abduction law operates on the basis that, unless exceptional circumstances apply, a child should be promptly returned to the country of their habitual residence.[4] This is because courts in that country-of-origin are deemed to be usually better suited to resolving any dispute about the welfare of the child.[5] Consequently, Article 11 imposes an effective six-week time limit on child abduction proceedings. By contrast, Asylum proceedings can last much longer; initial determinations from the Secretary of State for the Home

[2] ibid [117].

[3] ibid [130].

[4] Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII, Article 12.

[5] E. Perez-Vera, E*xplanatory Report on the 1980 HCCH Child Abduction Convention*, [16] - [19].

Department (SSHD) often take more than six months.[6] If an asylum application could act as a bar to proceeding with a Hague case, the spectre of delay caused by tactical asylum claims would thereby be raised. This would effectively defeat a left behind parent's claim for the immediate return of the child, and could potentially harm the child's best interests by depriving them of the care of the left behind parent.[7] It would also undermine the effective operation of the Hague Convention itself.

The decision in *G v G* is important not only for how it reconciles the conflicts between two parallel sets of legal procedures but for the way in which the Supreme Court attempts to prevent future difficulties in similar proceedings. In the course of its judgment, the Court produced draft guidance which would apply to both the High Court and the SSHD on the management of intersecting Hague and asylum cases. Following an outline of the Court's decision, this note will, therefore, first analyse the implications of *G v G* to the initial legal problems presented by the fact that a child is subject to two, potentially incompatible, sets of legal proceedings. It will then examine the method the Supreme Court used to pre-empt future disputes and what that shows about the Supreme Court's own view of its own role.

CASE BACKGROUND AND EARLY PROCEEDINGS

The Hague Convention proceedings in *G v G* concerned an eight year old South African girl who was taken from South Africa to the UK by her mother without the consent of her father. On arrival in the UK in March 2020, the mother promptly made a claim for refugee status to the SSHD claiming that if she were returned to South Africa, she would be subjected to persecution due to her sexual orientation.[8]

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[6] G. Sturge, *House of Commons Library Briefing Paper: Asylum Statistics* (Number SN01403, 25 March 2021) 13.

[7] *G* (n 1) [3].

[8] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (adopted 14 December 1950, entered into force 22 April 1954) and UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (adopted 31 January 1967, entered into force 4 October 1967). Although it has not been directly incorporated into UK law, domestic immigration and asylum law is modelled

She stated that, after her separation from her husband, she told friends that she was a lesbian, following which she was subjected to a campaign of vilification by her family including having to undergo a 'cleansing ceremony',[9] her property vandalised, receiving death threats and being run off the road while driving. She reported the threats to the police but felt that she was not taken seriously, as the police claimed that there was nothing that they could do.[10]

Under South African law, the father's consent for the removal of the child was required. As a result, there was a *prima facie* interference with the father's rights of custody as understood by the Hague Convention on the Civil Aspects of Child Abduction, meaning that, by failing to obtain his consent, the child had been wrongfully removed from South Africa by the mother. Article 12 of the Hague Convention requires the prompt return of the child unless the mother could establish grounds for one of the exceptions to return to apply. Following the father's application for the return of the child, the mother claimed that two of these exceptions applied – the fact that the child objected to the return to the place of her habitual residence and that returning the child would pose a grave risk of harm, or otherwise place her in an intolerable situation.[11] It is the second of these exceptions which was foregrounded in the present disputes, due to the mother's concurrent asylum application.

When the matter was heard in the High Court, Lieven J was mistakenly under the impression that separate asylum applications had been submitted in respect of both the child and her mother.[12] As a result of this belief, Lieven J held that the child could not in any circumstances be returned to South Africa while the asylum claims were pending, and potentially not be returned pending any appeal. This was because sections 77 and 78 of the Nationality, Immigration and Asylum Act 2002 prevent the

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on the Convention ((*R v Asfaw (United Nations High Comr for Refugees intervening)* [2008] UKHL 31, [2008] AC 1061) and it enjoys 'primacy' in UK law (Asylum and Immigration Appeals Act 1993, s 2).

[9] Details of which are provided at *G* (n 1), [23].

[10] *G v G* [2020] EWCA Civ 1185, [13]; *G* (n 1) ibid.

[11] Hague Convention (n 4), Article 13(1)(b). There was also a related claim under Article 20.

[12] *G* (n 10), [17]; *G* (n 1), [7]-[8]. It should be noted that there does not appear to be any available judgment of the High Court decision, but it was quoted extensively in later appeal proceedings.

removal of an asylum seeker in accordance with the Immigration Acts. Lieven J also placed a stay on the Hague proceedings until the SSHD had reached a determination on the asylum matter.[13]

The father appealed this stay, and other aspects of the judgment, to the Court of Appeal. By the time the matter came before that Court, the true situation regarding the asylum application had come to light, as it became clear that the mother had named her child as a dependent in her asylum application but the child had not submitted an independent asylum claim. This new information thereby widened the scope of the appeal. As the child was not themselves an asylum seeker, the statutory prohibition against refoulement did not apply. Paragraph 329 of the Immigration Rules instead became relevant, as these state that the SSHD would not take any action to remove an asylum seeker or their dependents from the UK pending the determination of the claim.[14] The Court of Appeal therefore sought to decide whether an asylum application by a parent and their named dependent child barred the High Court from determining Hague Convention proceedings, or from any return order being made or implemented.

It appeared from this decision that a practice had emerged at the Home Office which described non-applicant dependent children accompanying asylum-seeking parents as having 'refugee status' but this casual usage did not mean that the SSHD considered that these dependents had met the legal criteria of refugee status in their own right.[15] This loose usage of such a specific legal term had been previously considered in *Re JS (Uganda)* where it was accepted that, in circumstances where the term had been used by the Home Office in this colloquial sense, this did not make the child a refugee under the Convention.[16] Though the SSHD stated they do not, as a matter of practice, remove dependant children due to respect for their family life,[17] there is nonetheless the risk that the SSHD could, at their own

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[13] *G* (n 10), [18].

[14] Home Office, *Immigration Rules* (Part 11), https://www.gov.uk/guidance/immigration-rules (last visited 19th May 2021). Note the Immigration Rules were last updated on the 6th May 2021.

[15] *G* (n 10), [92]-[94].

[16] *Re JS (Uganda) v Secretary of State for the Home Department* [2019] EWCA Civ 1670, [2020] 1 WLR 43

[17] *G* (n 10), [82].

discretion, strip a dependent child of this so-called 'refugee status', leaving the child open to the possibility of removal, regardless of the refugee status of their parent. However, the Court of Appeal in *G v G* took some solace in what it understood to be the Immigration Rules' respect for family life.

The Court of Appeal held that, if the situation had been that the child had lodged an asylum claim in her own right, this would not have barred the determination of the 1980 Hague Convention application, but would have barred the implementation of any return order made. In the circumstances as they actually stood, there was no bar to either determination of the application or making any return order, although it may be necessary to stay implementation of the order.[18] Furthermore, the Court of Appeal held that the High Court had erred in ordering the stay of the Hague matter until the asylum claim had concluded because that would breach Article 11 of the Hague Convention which requires the abduction proceedings to be conducted expeditiously.

The Court of Appeal determined that the SSHD's policy regarding the non-return of a dependant child accompanying an asylum seeker, found in the Immigration Rules, was based on respect for family life and 'has nothing to do with the status and/or rights of a refugee' (i.e. non-refoulement).[19] Therefore, as the Hague Convention also promotes welfare principles and family unity, an asylum claim could not act as an absolute bar to Hague return proceedings.[20] The High Court could, therefore, determine and even issue a return order, regardless of the asylum matter being ongoing.[21] The Court of Appeal did hold, however, that the High Court had discretion to stay Hague proceedings, and should consider five factors when exercising this discretion, including the likely length of time that each process will take (bearing in mind that Hague proceedings typically conclude much more quickly than asylum claims), the nature of the alleged risk and any delays in obtaining evidence of the risk, the adverse impact on the

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[18] *G* (n 10), [152], [184].

[19] *G* (n 10), [140]. The Court of Appeal drew on the case of *Re S (Child Abduction: Asylum Appeal)* [2002] EWCA Civ 843, [2002] 1 WLR 2548 in its reasoning.

[20] ibid.

[21] ibid [152].

child of separation from both of its parents, the wider best interests of the child, and the rights of the parents.[22] The Court of Appeal also highlighted some potential steps that the High Court could take to ensure that the SSHD was informed of the progress of the Hague matter, including the disclosure of papers in the abduction proceedings to the SSHD (but not *vice versa*) and keeping the SSHD informed regarding any stay issued by the High Court.[23] The mother appealed the Court of Appeal decision to the Supreme Court.

Supreme Court Decision

The Supreme Court unanimously held that the child should 'objectively be understood' as having made an asylum application because she is the accompanying dependent child of the asylum applicant parent.[24] This in turn created a bar to returning the child by way of the implementation of a return order under the Hague Convention until their refugee status was determined. While the Supreme Court held that there was no bar to determining the Hague matter, by expanding the understanding of who has applied for asylum, the Supreme Court has strengthened the protection against refoulement for dependent family members involved in the asylum process.

The Supreme Court took a fundamentally different view to the Court of Appeal on the issue of dependent children of asylum applicants, and on the level of discretion conferred on the SSHD to remove them from the state.[25] It recognised that a claim by a parent should also be understood as a claim by the child if it can be objectively understood as such. This position was supported by two reasons; first, 'the inherent likelihood, … that any grounds which an adult applicant may raise for fearing persecution or serious harm … will also apply, by reason of their relationship, to a child who is a

[22] ibid [161].

[23] ibid [166].

[24] *G* (n 1), [178].

[25] See text accompanying n 15-17 above.

dependant of that adult',[26] and secondly, 'an omission by a child to make an independent claim cannot in reality be understood as a decision made by that child, given that it is the parent who decides whether and how any asylum claim should be made'.[27] The Hague proceedings were thus remitted to the High Court for determination.[28] After the hearing, but prior to the Supreme Court handing down its judgment, the mother's application for asylum was refused. Given the possibility of appeal or judicial review, the matter may not yet be concluded.

In allowing the first ground of appeal, the Supreme Court considered that four questions needed to be addressed. First, does a child named as a dependent on a parent's asylum application can be understood to also be an asylum application by the child? The Supreme Court answered in the affirmative, for the reasons stated above.[29] Additionally, this approach 'protects the interests of the child by ensuring that the child's own status is considered' from the time the parent made the initial asylum application.[30] Secondly, if the answer to the first question is yes, then is that child entitled to non-refoulement during the determination of the asylum application, meaning that any return order in abduction proceedings cannot be implemented? The Supreme Court answered in the affirmative because there was no impediment to the High Court determining the Hague matter and that although '[t]he findings in the 1980 Hague Convention proceedings are clearly potentially relevant […] they do not discharge the [SSHD] from her statutory obligation to make her own independent [asylum] assessment nor do they

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[26] *G* (n 1), [117], as recognised in recital (27) to 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').

[27] *G* (n 1), [117].

[28] *G* (n 1), [180].

[29] Namely Art. 2(g) of the Qualification Directive (n 26); Art. 2(b) 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 1951 Geneva Convention (n 8), see *G* (n 10), [139]-[140].

[30] *G* (n 1), [117].

bind the [SSHD]'.[31] However, the Supreme Court made clear that, should the SSHD determine that a dependant child was a refugee then that would 'preclude any emanation of the State (including the High Court) from implementing a return order' as per the Procedures Directive,[32] as a Hague return of an acknowledged refugee would amount to refoulement.

Thirdly, when is an asylum application deemed to be 'determined'? The Supreme Court held that it would not consider an asylum application to be determined 'until the conclusion of the appeal process' laid out in the 2002 Act.[33] At the conclusion of such an appeal process,[34] the asylum applicant would thus have exhausted their 'effective remedies' within the meaning of the Procedures Directive and corresponding domestic legislation. On the other hand, any request to allow the child to remain in the jurisdiction pending the determination of an out-of-country appeal or judicial review of the asylum decision cannot be determined by the Court by reference to any statutory embodiment of the non-refoulement rule, but could be decided by the High Court judge hearing that appeal or review as a matter of discretion.

Fourthly, when does a challenge to an asylum application refusal cease to have suspensive effect on the implementation of a Hague return order?[35] Here the Supreme Court held that only 'an in-country appeal acts as a bar to implementation of a [Hague] return order', and only at the conclusion of this statutory process did the suspensory effect end.[36] This was because any other decision would both render the

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[31] *G* (n 1), [127]. The Supreme Court disagreed with the Court of Appeal in that the basis for this was in reliance on paragraph 329 of the Immigration Rules (as an emanation of Art. 7 Procedures Directive (n 29)) rather than based on respect for family life (as indicated by the Court of Appeal, *G* (n 10)[140]).

[32] *G* (n 1), [128], pursuant to Art. 7 Procedures Directive (n 29), which may be relied upon on the basis of the *Marleasing SA v La Comercial Internacionale de Alimentación SA* (ECJ Case C-106/89) [1993] BCC 421.

[33] *G* (n 1), [140].

[34] Via an in-country right of appeal under the Nationality, Immigration and Asylum Act 2002 e.g. appeal to the First tier Tribunal (s. 82), Upper Tribunal, Court of Appeal, or Supreme Court.

[35] *G* (n 1), [115].

[36] *G* (n 1), [152].

appeal ineffective and encroach on the exclusive responsibility of the SSHD to determine whether an individual could remain within the jurisdiction while their appeal was determined. However, the Court also acknowledged that the inevitable delays that would be involved in an in-country appeal process would likely 'have a devastating impact' on any concurrent Hague proceedings. The Supreme Court therefore invited the legislature to consider this issue further.

In reaching its conclusion to dismiss the second ground of appeal,[37] the Supreme Court agreed with the Court of Appeal's decision that 'any bar applies only to implementation' of a return order.[38] The Supreme Court reasoned that, as long as it did not impinge on the exclusive powers vested in the SSHD relating to determining claims for international protection, the High Court could consider the merits of the Hague application, including considering any facts which overlap with the asylum claim.[39] The Supreme Court also rejected submissions that the mother's reliance on Article 20 of the Hague Convention necessitated the prior determination of her application for asylum.[40] These submissions could instead be dealt with by the High Court under the Article 13(b) exception to return in Hague proceedings.[41]

In reaching its conclusion to dismiss the final ground of appeal,[42] the Supreme Court endorsed, as a general proposition, the Court of Appeal position regarding Hague proceedings, that 'the High Court should be slow to stay an application prior to any [asylum] determination'.[43] The Supreme Court

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[37] *G* (n 1), [179].

[38] *G* (n 10), [152].

[39] *G* (n 1), [157].

[40] *G* (n 1), [156]. Though not incorporated specifically into domestic law the Supreme Court deemed (as had the Court of Appeal, *G* (n 10), [39]) that Art. 20 has been given domestic effect by way of S. 6 Human Rights Act 1998, and also relying on *In re D (a child)* [2006] UKHL 51, [2007] 1 AC 619, see *G* (n 1), [67].

[41] *G* (n 1), [156].

[42] *G* (n 1), [179].

[43] *G* (n 10), [154].

considered that, although exceptions may occur, this position was 'entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority'.[44]

One of the most novel features of the judgment was the opportunity the Supreme Court took to help establish new systems and processes for future concurrent asylum/Hague proceedings. This initiative stemmed from the obligation contained in Article 11 to act expeditiously. The Supreme Court considered that this obligation extended beyond the courts to 'all those who are directly or indirectly involved' in Hague proceedings, including the SSHD in the priority they accorded to any related asylum application.[45] Furthermore, the Court found that there was a parallel duty, under the Procedures Directive, on the SSHD to ensure expedition of asylum proceedings.[46] The Supreme Court went on to highlight that there was a set of reciprocal assistance obligations which flowed from Article 11 - a legal obligation on the courts to assist the SSHD as far as possible in the asylum process, while the SSHD was similarly obliged to assist in Hague matters.[47]

Whilst Lord Stephens echoed the Court of Appeal's statement that 'all decisions relating to asylum applications … fall within the exclusive powers of the [SSHD],[48] he nonetheless acknowledged the potential difficulties and delays which could easily occur when Hague proceedings and an asylum claim run parallel. He recognised that '[f]or these two Conventions to operate hand in hand … there are various practical steps which should ordinarily be taken, aimed at enhancing decision making in both

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[44] *G* (n 1), [160].

[45] *G* (n 1), [69].

[46] *G* (n 1), [70]. The SSHD had accepted and the Court of Appeal held that, for the purposes of this appeal, the relevant provisions of EU asylum Directives were directly effective and remained extant in domestic law as "retained EU law" after the United Kingdom's withdrawal from the EU (*G* (n 10), [46-50]) and as they were taken into account in the judgement. The Supreme Court likewise agreed with this interpretation (*G* (n 1) [84]).

[47] *G* (n 1), [71].

[48] *G* (n 10), [124].

sets of proceedings, where they are related'.[49] The Court emphasized the advantages of 'harmonising, in so far as possible, the speed of the decision-making processes under the respective Conventions'.[50]

Therefore, to fulfil the Article 11 obligations and achieve a properly sequenced determination between such concurrent proceedings the Court considered the benefits of eight practical steps.[51] Among the steps ultimately recommended were the possibility of requesting that the SSHD be joined as a party to the Hague proceedings, the joining of the child to the Hague proceedings, the disclosure of information relating to the asylum application to the child's legal representative and the establishment of a liaison between the courts and the SSHD. Disclosure of documents in the Hague proceedings should also be ordinarily disclosed to the SSHD. Consideration should be given to the disclosure of documents relating to the asylum claim in the Hague proceedings, and thereby to the left behind parent, applying a balancing exercise which took into account the rights of the various interested parties, the welfare of the child, the nature of the documents concerned and public confidence in the asylum process. The Court also made suggestions for the judicial staffing of cases dealing with these matters.

Commentary

Interaction of Hague and asylum law for children

G v G represents the first time that the Supreme Court, and indeed the Court of Appeal, have determined the relationship between asylum and Hague Convention proceedings; earlier cases concerned non-Hague countries, and so examined the relationship between asylum and the wardship jurisdiction.[52] At its core, the question in *G* appears to be relatively straightforward: can a child involved in an asylum claim be returned to their country-of-origin if the left behind parent seeks their return in child abduction

[49] *G* (n 1), [165].

[50] *G* (n 1), [174].

[51] *G* (n 1), [163]-[177], which include the rationale behind these recommendations. These suggested standard directions were compiled at the invitation of the Court from parties and interveners in the instant case, [174].

[52] See, for example, Re S (n 19).

proceedings? However, the apparent simplicity of this question is deceptive, for it requires significant unpacking. Does it make a difference if the child claims asylum in their own right instead of being the dependent of an asylum seeker? Would the approach of other jurisdictions to these questions present workable solutions? What approach is consistent with international human rights law?

As outlined above, the Supreme Court held that a child who was named as a dependent in a parent's asylum claim should nevertheless be understood as having applied for asylum in their own right. This represents a radical departure from the Court of Appeal decision, and indeed from earlier case law. In *Re S*, the Court of Appeal held that two boys, who had not claimed asylum but whose mother had, could not be understood as 'persons' to whom the protection against refoulement applied.[53] This was because they had no independent asylum claim, and any concerns the Court had were addressed by the SSHD's commitment in the Immigration Rules that no dependent would be removed until the parents' asylum claim had been determined.

In *Re H*, the child was ordered to return to Pakistan despite the SSHD having already granted the mother refugee status prior to the abduction proceedings.[54] The mother was thus placed in an appallingly difficult position – either to allow her child to return alone, or to accompany him to the state she had been granted refuge from. This incredibly troubling decision was justified on the basis of protective measures being available and undertakings given by the father, assurances which were largely taken at face value. Yet since *Re H* was decided, child abduction cases have taken a more stringent approach to these issues.[55] While the interaction between protective measures and risk of harm can sometimes be

[53] ibid.

[54] In *Re H (Child Abduction: Mother's Asylum)* [2003] EWHC 1820 (Fam), [2003] 2 FLR 1105, the child was not named as a dependent in her (successful) asylum claim because the child was not in her custody until much later.

[55] *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. For recent applications of the *Re E* approach, see *B v P* [2017] EWHC 3577 (Fam), *In the Matter of C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834 and *S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352.

unclear,[56] the effectiveness of protective measures at addressing future risk must now be assessed and not simply taken for granted. The approach in *Re H*, therefore, is out of step with contemporary approaches in child abduction law. This stricter approach to protective measures, combined with the Supreme Court's decision in *G* to treat a dependent child as if they had made their own asylum claim, likely prevents an outcome similar to that in *Re H* from reoccurring.

Other jurisdictions which have grappled with this problem have, as in *Re H*, seen the non-refoulement rule eroded by return orders. US and Canadian case-law demonstrates some tensions that can arise, both from the perspective of judicial handling of simultaneous asylum/abduction matters but also between different arms of the state over the execution of orders. In the United States, courts have been unwilling to give asylum claims or refugee status any significant weight in abduction proceedings. *Sanchez v RGL* saw children who had claimed asylum, and indeed were later granted refugee status, returned to Mexico on foot of Hague proceedings.[57] The proceedings in both District and Circuit federal courts merely 'noted' the existence of the asylum claims, and flatly rejected the argument that the granting of refugee status took priority over an application for return simply because the proceedings in the Hague application were not binding on immigration authorities.

Applications for stays to Hague determinations are also routinely rejected. In one case, the court refused to grant a stay on the abduction case for 20 days until the asylum claim was determined on the basis that the outcome of that claim was uncertain.[58] In another, the application for a stay was considered as if the case were ordinary civil litigation; this led the court, when requested by a mother to stay a return order, to absurdly hold that the potential harm which would be caused to the children by waiving their

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[56] K. Trimmings, O. Momoh and I. Callander, 'Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction UK National Report' (University of Aberdeen) at https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf (last visited 13 May 2021).

[57] *Sanchez v RGL* 761 F.3d 495 (5th Cir. 2014).

[58] *Hernandez v Pena*, No. 15-3235, 2016 WL 8275092 (E.D. L.A. July 20, 2016); *Hernandez v. Garcia Pena*, 820 F.3d 782 (5th Cir. La. 2016).

asylum rights was not a type of 'irreparable injury', as any potential harm caused by denying the stay would be sustained by the mother, not the children.[59] The logical, if extreme, consequence of these decisions is the non-acceptance of return orders by immigration enforcement authorities. In *Navarro v Carranza*, an order for return was made in a case where children had ongoing asylum claims. The Border Patrol officials simply refused to let the children leave US jurisdiction because of their ongoing asylum matter.[60] The Canadian courts have similarly wrestled with this problem, preferring to adopt the position that a grant of refugee status creates a rebuttable presumption against return.[61] However, problems have arisen for women who seek asylum fleeing from domestic violence when the left behind father seeks the return of the child. In several cases, the fact that a return order has been made has been used to deny the mother refugee status due to the prior finding of child abduction.[62]

The Supreme Court's view would also appear to be preferable to that of the Court of Appeal in light of the approach taken in international refugee law relating to children. This increasingly requires that children should be the subject of protection, rather than being passive objects who have been subsumed within their parents' application.[63] The Refugee Convention requires that a refugee must have both a 'subjective fear and objective risk of prospective harm'.[64] This poses particular problems for children

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[59] *Mendoza v Esquivel*, 2016 WL 2757551 (S.D. Ohio E.D. 2016), noted in J.D. Garbolino, 'Intersecting issues involving asylum in the United States and cases arising under the 1980 Hague Convention on Civil Aspects of Child Abduction' (2019) 57(2) *Family Court Review* 159.

[60] *Navarro v Carranza*, Riverside Superior Court case SWD1700024, noted by Garbolino ibid.

[61] *AMRI v KER* [2011] ONCA 417. See also *Borisovs v Kubiles* [2013] ONCJ 85.

[62] K.T. Shelley, 'The Exclusion Trap for Women Refugee Claimants Who Escape Domestic Violence with Children' (2018) 55 *Osgoode Hall Law Journa*l 756.

[63] S. Arnold, *Children's Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (Abingdon: Routledge 2017), J. McAdam, 'Seeking asylum under the Convention on the Rights of the Child: A case for complementary protection' (2006) 14 *International Journal of Children's Rights* 251.

[64] J. Pobjoy, 'Article 22: Refugee Children' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press 2019) 827.

who may have difficulty demonstrating one or both of these factors in an independent asylum claim.[65] One approach to mitigate this difficulty is to impute the parent's fear and risk of harm to the child.[66] Another approach is to dispense with the subjective element of the child's fear altogether; both approaches receive support from the UNHCR.[67] Children must, of course, face or risk facing persecution in order to qualify as a refugee. Persecution in this context means the 'sustained or systematic violation of basic human rights demonstrative of a failure of state protection.'[68] Failure by a State to protect the child-specific rights recognised in the UN Convention on the Rights of the Child (UNCRC),[69] such as the failure to protect children from domestic violence, can objectively amount to persecution for the purposes of refugee law. The entire management of asylum claims involving children must, therefore, be interpreted and applied in a child-sensitive fashion.[70]

Article 22(1) UNCRC makes clear that these protections do not only apply to refugee children, but also to children seeking refugee status, whether or not they are accompanied by an asylum seeking adult. Importantly, the UN Committee on the Rights of the Child has made clear that if facts become known 'which indicate that the child may have a well-founded fear or, even if unable to explicitly articulate a concrete fear, the child may objectively be at risk of persecution … such a child should be referred to

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[65] J.C. Hathaway and W.S. Hicks "Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"?' (2004) 26 *Michigan Journal of International Law* 505.

[66] *Canada (Minister of Citizenship and Immigration) v Patel* [2008] FC 747, [2009] 2 FCR 196.

[67] UNHCR, 'Guidelines on international protection: child asylum claims under Art 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol relating to the status of refugees' (2009) HCR/GIP/09/08, [11].

[68] J.C. Hathaway, *The Law of Refugee Status* (London: Butterworths 1991) 104-105.

[69] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990).

[70] *Kim v Canada (Minister for Citizenship and Immigration)* [2011] 2 FCR 448. See the examples cited by Pobjoy (n 64) 829.

the asylum procedure and/or, where relevant, to mechanisms providing complementary protection.'[71] Consequently, there is a need to consider the protection against refoulement in a child sensitive way, and in a way that does not discriminate against a dependent child because of their status.[72] In effect, they must be given the same opportunity to enjoy the full spectrum of children's rights as a refugee child, including the right of non-refoulement. This is especially so in light of the UK's withdrawal of a reservation to the UNCRC which had sought to give immigration and nationality law priority over the provisions of the UNCRC.[73] Therefore, it made sense for the Supreme Court in the context of abduction proceedings to insist that a child who has not made an independent asylum claim be treated as if they had, because it is helps to comply with the UNCRC's obligations of non-discrimination and promoting the child's best interests, while also securing compliance with international refugee law.

The Supreme Court's standard directions and its constitutional role

A surprising aspect of the Supreme Court's decision was its desire to take the lead in developing standard directions for the procedural management of cases such as *G*. As mentioned above,[74] the Court devoted significant time in the judgment, and in Appendix Two, to setting out the approach that should be adopted by the various actors involved. Frequently, the facts grounding an asylum claim on behalf of a taking parent and/or a child will overlap significantly with those grounding the use of the grave risk of harm or human rights-based 'defence' available to the taking parent in Hague Convention proceedings. This gives rise to the possibility, recognised expressly by the Court,[75] of each proceeding

[71] UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, [66].

[72] Committee on Migrant Workers and UN Committee on the Rights of the Child, Joint General Comment No. 3 of the CMW and No. 22 of the CRC (2017) in the context of International Migration: General principles CMW/C/GC/3-CRC/C/GC/22, [11], [21] and [22].

[73] R. Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) 19(4) *Human Right Law Review* 753.

[74] See text accompanying n 46 to n 51.

[75] *G* (n 1), [164].

informing the other; the determination of Hague proceedings may inform the SSHD's exercise of its discretionary functions while information held by the SSHD could inform the credibility of a defence in a Hague case. To that end, the Court was minded to develop 'practical steps … aimed at enhancing decision making in both sets of proceedings.'[76] It did so after the Home Office explicitly 'welcome[d] any support from the Family Division in resolving difficulties by the exercise of the court's case management powers'.[77] The Supreme Court interpreted this initiative by the SSHD, as well as its legal obligation to prioritise the Hague proceedings under Article 11, as an opportunity to better coordinate and expedite such linked asylum-Hague proceedings.

What is noteworthy about Appendix Two is not so much the content of these proposed standard directions, but that they were made at all. In the course of its judgment, the Supreme Court pointed out that these suggestions had not been developed as part of a wider consultation, and that 'matters of practice and procedure are not for this court'.[78] Nevertheless, these practical steps were developed at the behest of the Court itself. In response to arguments by counsel for the father that cases such as this were subject to inordinate delay caused by the SSHD, Lord Lloyd-Jones posited that the Court would be greatly assisted in its decision if counsel for both parents could develop standard directions for similar cases.[79] During oral argument, Lord Stephens pointed out that he was eager to ensure at 'the very first [Hague] hearing, a guardian is appointed, that a direction is given that the guardian has access to the immigration file, that the [SSHD] appoints the case to a specialist team'.[80] These directions include the possible joinder of the SSHD, timescales for decision-making, and the appointment of be a liaison officer between the SSHD and High Court. So why, then, despite making these suggestions on

[76] ibid, [165].

[77] ibid, [6].

[78] ibid, [174].

[79] No transcript is publicly available, but the video of hearing can be accessed at the Supreme Court website, Case Details, Tuesday afternoon session at https://www.supremecourt.uk/watch/uksc-2020-0191/260121-pm.html (last visited 13 May 2021). The relevant comments can be found approximately between 09:20 and 13:30.

[80] ibid.

practice and procedure, did the Court also state quite unequivocally that matters of practice and procedure were not within its remit? Why did the Supreme Court deviate so wildly from its stated position and thereby draw attention to potential self-contradiction?

As outlined earlier, the Supreme Court found that Article 11 of the Hague Convention created a series of obligations linked to the expedient processing of abduction claims. Therefore, it gave the Court the freedom to deviate from its traditional role as the final arbiter of the interpretation of points of law and establish a new one aimed at assisting other governmental agencies in the fulfilment of their Hague obligations. This approach mirrors the overall development of the Supreme Court's own view of its role in the constitutional architecture of the UK.

Much of the early debate about the creation of the Supreme Court focused on how different it would be from its predecessor, the Appellate Committee of the House of Lords,[81] given that the primary justification offered for the reform at the time was that the intertwining of the judiciary and legislature was inappropriate for a modern democratic state given separation of powers concerns.[82] Nonetheless, the Court was certainly created in some haste, and in less than transparent circumstances.[83] This led to significant doubt over what role the new Supreme Court would play in the constitutional governance of the UK, how it and other constitutional actors would and should see its role, and whether, in becoming more assertive, it may begin to overreach itself by becoming too prominent in political governance. This brings into sharp relief the question of whether the UK Supreme Court is a constitutional court in

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[81] See generally, A. Le Sueur "From Appellate Committee to Supreme Court: a Narrative" in L. Blom-Cooper, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

[82] See Department for Constitutional Affairs Constitutional Reform, *A Supreme Court for the United Kingdom* (London: DCA 2003), [2].

[83] A. Le Sueur, 'The Conception of the UK's New Supreme Court' in A. Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford: Oxford University Press, 2004) 5-6, and G. Drewry, 'The UK Supreme Court – A Fine New Vintage, or Just a Smart New Label on a Dusty Old Bottle?' (2011) 3(2) *International Journal of Court Administration* 20.

the manner of some other jurisdictions' final appellate courts.[84] Yet, as Malleson has pointed out,[85] it was not the change of name which caused the UK's highest court to engage with constitutional questions and values. Rather it was a range of factors including the development of administrative law and judicial review from the 1960s onwards, the ongoing process of devolution, and the passage of the Human Rights Act in 1998 that caused this shift in focus.

Nonetheless, few could argue that the last few years have not witnessed the development of an extraordinary constitutional jurisprudence by the Court. The boundaries and exercise of judicial power have sparked comment beyond the narrow world of public lawyers. While cases such as *Miller*,[86] and *Miller/Cherry* have attracted headlines,[87] other cases such as *Osborn v Parole Board* saw the court develop an expansive approach to the judicial function.[88] Not only did that decision highlight the importance of what have come be known as common law constitutional rights,[89] it saw Lord Reed take the (ultimately successful) appellants' arguments to task for underselling the importance of domestic administrative law. In *Evans*, the Supreme Court constrained the possibility of the exercise of an executive veto to such an extent as to confine it to almost fanciful circumstances;[90] this effective removal of a statutorily grounded veto power by a court has been equated to engaging in overreach.[91] In *Unison*, the Court not only reaffirmed the central importance of the rule of law as a core constitutional

[84] See the discussion in Le Sueur, ibid, in the text accompanying footnotes 19 and 20 and the sources cited therein.

[85] K. Malleson, The Evolving Role of the Supreme Court' [2011] *Public Law* 754.

[86] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[87] *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41.

[88] *Osborn v Parole Board* [2013] UKSC 61.

[89] See generally M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart Publishing 2020).

[90] *R (Evans) v Attorney General* [2015] UKSC 21.

[91] R. Ekins and C. Forsyth, *Judging in the public interest: The rule of law vs the rule of courts* (London: Policy Exchange 2015).

value but utilised the principle of legality in order to unearth Parliament's intentions.[92] What emerges from this necessarily brief sketch of key constitutional cases of the last decade is a picture of the Supreme Court putting flesh on the bones of the statement made by Lord Steyn in *Jackson v Attorney General*: 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution.'[93]

But *G v G* was not a constitutional case in the classic sense of the term. Nevertheless, it does raise important constitutional questions about the role and extent of judicial power. The traditional view articulated by Jennings was that courts were 'free to act … only within a sphere of small diameter, for the possibility of interpretation is limited by the legislation passed.'[94] Elliott further posits that the traditional approach to judicial review served to marginalise the courts' 'role in relation to the supervision of the administrative branch'.[95]

It is the de-marginalisation of this supervisory jurisdiction which lies at the heart of the novelty of *G*. In an ordinary civil appeal, not a judicial review, the Supreme Court purported to assist in the future processing of linked abduction/asylum claims by urging the crafting of draft rules of court procedure and guidelines for the SSHD, carefully framed as hypotheticals. Given that the SSHD is the authority empowered by Parliament to determine asylum matters, some might read these hypothetical guidelines for the SSHD as amounting to judicial overreach. Yet the SSHD made no objections to this during the hearing, and indicated a willingness to accept assistance from the courts in dealing with problem cases like this. This was just as well, as the Supreme Court lacks statutorily based jurisdiction to exercise such a function. The jurisdiction of the Supreme Court is established by section 40 of the Constitutional

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[92] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

[93] *Jackson v Attorney General* [2005] UKHL 56, [102], emphasis in original.

[94] I. Jennings, *The Law and the Constitution* (London: University of London Press, 5th edn, 1959) 254.

[95] M. Elliott, 'Judicial power and the United Kingdom's changing constitution' (2017) 36(2) *University of Queensland Law Journal* 273.

Reform Act 2005; section 40(5) in particular states that: 'The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment.' It was clearly not necessary for the Court to develop procedural guidance in order to answer the legal questions put before it. No provisions of the Child Abduction Act 1985 or of the Immigration Acts under consideration give the courts any similar powers. Power to make rules of court are conferred on different bodies by sections 84 and 85 of the Senior Courts Act 1981. Neither do these provisions give any court power to utilise judgments to 'road test' draft rules.

That is not to say that the draft guidance is not welcome; far from it. The suggestions made by the Court will likely be welcomed by practitioners, as well as court and SSHD staff working on these cases. The new guidelines are a clear statement that such related matters will be expedited by the Courts and the SSHD, that all relevant and necessary information will be exchanged between various agencies and parties if it is safe to do so, and that the child will be independently represented. The thought given to managing the appeals process within the existing statutory framework is a triumph of judicial ingenuity and pragmatism. Overall, these standard directions represent a means by which similar tensions may be prevented in future.

The attempt to end eminently resolvable frictions about case priority by means of a novel judicial process can also be read as an example of an institutional mission to contribute to good governance.[96] Judges in a modern administrative state cannot afford to stay within Jennings' sphere of small diameter, but must use whatever powers are at their disposal to engage in the efficient monitoring of a bureaucratic and regulatory State that is ever expanding, complex and juridified.[97] This judicialisation need not be

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[96] M. Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (2015) 33 *Buffalo University International Law Journal* 169.

[97] R. Hirschl, 'The judicialization of politics' in R.E. Goodin (ed), *Oxford Handbook of Political Science* (Oxford University Press 2011). See also S. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press 2002).

read as judicial overreach.[98] Political and administrative branches of the state defer to increased judicial empowerment because it need not be seen as a threat to their own politically hegemonic status.[99] It can instead be seen as the logical consequence of the UK's constitutional flexibility. Given the lack of a fixed constitutional framework which allocates governmental powers in a rigid way, institutions of governance, including courts, need to engage in acts of dialogue and tacit understanding in order to achieve a solution that is at least temporarily workable.[100]

CONCLUSION

The result in *G v G* was a welcome surprise. By deciding that a dependent child who had not made an independent asylum claim can, and should, be 'objectively understood' as having made such a claim, the protection of the non-refoulement rule has been extended to cover a new category of children. In doing so, not only were children newly seen as subjects of the law rather than mere objects, earlier Court of Appeal decisions involving the interaction of asylum and child abduction law were effectively overturned. Yet it is not just the outcome which was remarkable; the role undertaken by the Supreme Court in drawing up draft guidance for the coordinated management of future cases represents a novel, but extremely welcome, extension of the judicial role. Courts, and especially apex courts of last resort, are constitutional actors with a role in promoting good governance. By rejecting an institutionally straitjacketed conception of its own role based on traditionalist approaches to the separation of powers, the Supreme Court will have made a real and tangible difference to those families who find themselves tangled in the webs of two separate but related parts of the legal system.

[98] On judicialization generally, see T. Vallander, 'The Judicialization of Politics: A World-Wide Phenomenon' (1994) 15(2) *International Political Science Review* 91.

[99] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press 2007) 38-49.

[100] Elliott (n 95) 282.