EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 52
F85/20

Lord Malcolm
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

by

ZA and MN

Pursuers and Reclaimers

against

(FIRST) B; (SECOND) A; (THIRD) ADVOCATE GENERAL FOR SCOTLAND

Defenders and Respondents

and

M

First Party Minuter, Fourth Defender and Respondent

and

AI

Second Party Minuter, Fifth Defender and Respondent

Pursuers: Scott QC; Drummond Miller LLP, (for JK Laws, Solicitors, Glasgow)
First and Second Defenders: Crawford QC, Kiddie; Balfour and Manson LLP
Third Defender: Pugh; Anderson Strathern LLP
Fourth Defender: Aitken; Clan Childlaw
Fifth Defender: Brabender QC, Harvey; Morton Fraser LLP

5 October 2021

Introduction

[1] The pursuers and their four daughters, the first ("B"), second ("A"), fourth ("M"), and fifth ("AI") defenders, are Qatari nationals. B, A and AI are adults aged 23, 22 and 20 respectively. M is a child. She was born in October 2008. The pursuers also have four sons, all of whom are over the age of 16. Until 12 January 2020 the pursuers and their children lived together in the family home in Doha. On 12 January 2020 B, A and AI left Qatar and travelled to the United Kingdom. They took M with them. B, A and AI kept their plan to leave a secret from the pursuers. After their arrival in the United Kingdom B, A and AI claimed asylum. They maintained, *inter alia*, that they and M had been subjected to physical ill-treatment by their parents and by an adult male sibling, and that the Qatari authorities did not and would not protect them against such ill-treatment.

[2] It took the pursuers several months to ascertain that their daughters were in Glasgow. They raised the present action in December 2020. The first conclusion seeks a specific issue order for the return of M to their care in Qatar and for delivery of her to them. There are other conclusions, including one for contact with M, which we need not narrate. AI and M were not initially parties to the action, but they were sisted as additional defenders following separate minutes to sist at their instance. On 16 April 2021 the court appointed a proof to proceed on 10 August 2021 and the following three days.

[3] On 28 May 2021 the Secretary of State for the Home Department ("the Secretary of State") granted B, A and AI asylum. She also granted M asylum as a dependent on B's application. Thereafter, M claimed asylum in her own right, and on 8 July 2021 she was granted asylum.

[4] At a pre-proof hearing on 17 June 2021 AI moved a motion at the bar of the court for the dismissal of the first conclusion. The motion was continued until 5 July 2021, on which date it was further continued until 26 July 2021. B, A and M associated themselves with AI's motion. On 26 July 2021 the Lord Ordinary heard the parties' submissions in relation to the motion. He continued consideration of the motion until 29 July 2021, on which date he granted the motion and dismissed the first conclusion. He also discharged the diet of proof.

The Lord Ordinary's Note

[5] The Lord Ordinary proceeded on the basis that it was common ground that because M had been granted asylum the court could not order that she be returned to Qatar, nor could it order that she be delivered to anyone who would facilitate her return to Qatar. The most that the court could do would be to make findings, which findings the Lord Ordinary considered would be likely to be of a declaratory nature. In those circumstances he found that the pursuers' persistence in the first conclusion was for an ulterior purpose - to seek to persuade the Secretary of State to review her decision to grant asylum to M. However, that was something which was "more properly addressed by avenues open to the pursuers in procedures available before the Secretary of State" (para [4]). In the Lord Ordinary's view the cases of *G* v *G* [2021] 2 WLR 705 and *F* v *M* [2018] Fam 1 were distinguishable from the present case. *G* v *G* had involved (i) a petition for return in terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980, and (ii) a pending asylum application on behalf of a dependant minor. By contrast, here M had been granted asylum in her own right and the pursuers' application for her return was a private law claim. *F* v *M* had concerned a pending asylum claim and wardship proceedings. These distinguishing features meant that *G* v *G* and *F* v *M* were "of little assistance". The Lord Ordinary

concluded that the first conclusion had no practical purpose, and that therefore it should be dismissed. The pursuers' Article 8 ECHR rights did not give them a right to pursue proceedings which had no practical purpose. The continuance of proceedings which had no practical purpose would not be in the best interests of M.

Relevant statutory provisions

[6] Section 11 of the Children (Scotland) Act 1995 provides:

> **"11.— Court orders relating to parental responsibilities etc.**
>
> (1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—
>
> (a) parental responsibilities;
> (b) parental rights;
> …
>
> (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—
>
> (a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;
>
> (b) an order—
>
> (i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and
> (ii) giving that person such rights;
>
> (c) an order regulating the arrangements as to—
>
> (i) with whom; or
> (ii) if with different persons alternately or periodically, with whom during what periods,
>
> a child under the age of sixteen years is to live (any such order being known as a 'residence order');

(d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a 'contact order');

(e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as a 'specific issue order');

…

(2A) An order doing any of the things mentioned in subsection (2) is to be regarded as an order in relation to at least one of the matters mentioned in subsection (1);

…

(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity, shall so far as practicable—

(i) give him an opportunity to indicate whether he wishes to express his views;
(ii) if he does so wish, give him an opportunity to express them; and
(iii) have regard to such views as he may express;

…

(10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above.

…"

[7] Section 55 of the Borders, Citizenship and Immigration Act 2009 states:

> "**55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, …
>
> …
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> …
>
> (6) In this section—
>
> 'children' means persons who are under the age of 18
>
> …"

The reclaiming motion

The pursuers' submissions

[8] While it was correct that orders for return and delivery of M to the pursuers in Qatar could not be implemented while she had asylum, the Lord Ordinary had erred in thinking that the proceedings had no practical purpose. The proceedings were not hypothetical or academic. The court could determine what was in the best interests of M. It could make findings about the alleged ill-treatment of M in Qatar and whether she would be at risk if

she were to be returned to the pursuers. It could explore her welfare needs and whether they would be better served by remaining in the UK with her sisters or by being with her parents and her other siblings in Doha. There were very real issues in relation to M's welfare. She had been removed from her home. She had had no notion of what was happening to her. The information available to the court indicated that she was experiencing difficulties with her education and development in Scotland, and that she required psychological support (which she was not getting). There would be a practical purpose to the court making findings. *G* v *G* and *F* v *M* supported that view. Those cases did not envisage that the procedure discussed in them ought to be confined to Hague Convention cases and wardship cases. It was intended to be of wider application. Whether to grant asylum was an administrative law decision for the Secretary of State, but if the court's findings were favourable to the pursuers it would be the Secretary of State's duty to consider whether to review her decision to grant M asylum. Reference was made to *F* v *M*, paragraphs 45-46; and to *G* v *G*, judgment of the Court of Appeal delivered by Hickinbottom LJ paragraphs 175-176. While the pursuers could seek to lay material before the Secretary of State now rather than pursue the remedy in the first conclusion, the material would be *ex parte* and, unlike the court, the Secretary of State would not be able to make a judicial determination in respect of the relevant issues. Even if she decided that she should revoke the grant of asylum to M, the present proceedings would still be necessary to enable the pursuers to obtain M's return.

[9] Finally, it was submitted that AI did not have title and interest to move the motion for dismissal. It was disputed whether she shared *de facto* control of M with B and A. The pursuers' position was that she had no *locus*, in other words no standing, to make the motion.

AI's submissions

[10] The grant of asylum to M meant that the court could not order that she be returned or delivered to the pursuers. In those circumstances the Lord Ordinary had been entitled to conclude that the first conclusion had no practical purpose. The suggested purpose - to obtain findings from the court on welfare issues which the pursuers could then ask the Secretary of State to consider - was an ulterior purpose. It was also a speculative purpose. It was not an immediate practical purpose because, even if the Secretary of State decided to revoke the grant of asylum, M could not be returned until the appeal process was exhausted, which could take years. During that period M would be growing older, and increasing weight would require to be given to her views. In just over three years' time she would cease to be a child. It was not in M's best interests that proceedings in respect of the first conclusion should continue because there was no real prospect of an order for her return being made. Reference was made to section 11(7) of the Children (Scotland) Act 1995. Moreover, the pursuers had a more direct remedy. They could ask the Secretary of State to review the grant of asylum to M now in light of any evidence and representations which they might wish to submit for her consideration. If the Secretary of State declined to review the grant, or having reviewed it she decided not to revoke it, the pursuers could seek judicial review. The procedure envisaged in *G* v *G* concerned Hague Convention applications where there was a presumption of expeditious return to the country of the child's habitual residence so that the court there could determine the dispute (*In re J* [2006] 1 AC 80, Lady Hale paragraphs 20 and 25). There was no such presumption here.

[11] AI had title and interest to move the motion. She was one of M's *de facto* carers. The title and interest challenge was without merit. In any case it was a highly technical

objection. The motion had been supported by B, A and M, and it was not suggested that they lacked title and interest in relation to it.

B and A's submissions

[12] The submissions for AI were adopted. The Lord Ordinary had been correct to hold that the first conclusion no longer had a practical purpose. The court required to look to the reality and immediacy of the issue which was said to arise (*Macnaughton* v *Macnaughton's Trustees* 1953 SC 387, Lord Justice-Clerk (Thomson) at p392). The reality was that M could not be returned to Qatar. The pursuers had an available remedy of making an application to the Secretary of State to review her decision. It was unnecessary to continue with these proceedings to obtain findings, particularly as the Secretary of State would not be bound by any such findings. Even if the court made findings and if the Secretary of State was persuaded because of them that she should revoke M's grant of asylum, M's return would be very far from immediate. M would be likely to appeal. She might present a fresh claim. The appeal process etc would mean that even if ultimately M was unsuccessful, the process would be lengthy. M might no longer be a child by the time it was completed. *G* v *G* and *F* v *M* were distinguishable. They both involved summary return. It was not in M's best interests that proceedings relating to the first conclusion should continue where there was no real prospect of an order for her return being made.

The third defender's submissions

[13] The third defender adopted a neutral stance. Counsel confirmed that the Secretary of State's position on revocation was as stated in *F* v *M* at paragraph 46:

"46. In their written submissions, [counsel for the Secretary of State] recognise that, in addition to the requirements set out by the Rules, the Secretary of State must ensure that her decisions and the procedures that underpin them comply with the tenets of administrative law. These principles have evolved considerably over the past two decades and cannot easily be condensed. It suffices to say that for the Secretary of State's position to be lawful, it must be both 'reasonable' and 'rational'. Thus it will not permit her, for example, to give manifestly inappropriate weight to any particular factor. It will not permit inconsistent, arbitrary or uncertain conclusions. This is reflected in the submission on the Secretary of State's behalf:

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

[14] Counsel for the third defender did not take issue with the observations of the Court of Appeal in *G* v *G* at paragraph 155:

"155 …

(iv) Just as a reasoned decision on an asylum claim, if available to the High Court, will be relevant in the subsequent determination of an application for a return order, a reasoned High Court decision on the evidence available to it (which will very likely be different from that available to the Secretary of State, for the reasons we have explained: see para 144(iv) above), and tested to an extent by the adversarial process not available in the assessment of an asylum claim, could be expected to assist the Secretary of State in determining an outstanding application for asylum by either the parent and/or the child. Whilst not creating any form of presumption, depending on the nature of the respective applications and defences, the earlier decision may not

> only be relevant, but possibly of some considerable weight. That may particularly be so where the risk being assessed in each exercise is similar in nature.
>
> (v) The Secretary of State is under an obligation to determine an asylum application in accordance with the Immigration Rules. Where that status has been granted but the court has determined that a return order should be made, before us, the Secretary of State through Mr Payne (in our view, rightly) acknowledged that (as a result of paragraph 339J(iii) of the Immigration Rules, if nothing else), she would be under an obligation to reconsider refugee status. The Secretary of State also confirmed that, where requested to do so by the High Court and recognising the state's duty to expedite 1980 Hague Convention process, whilst always acting consistently with her substantive and procedural obligations to apply anxious scrutiny, she would use her best efforts to prioritise consideration of a pending asylum application or whether to revoke a grant of asylum in light of the High Court decision and any material obtained during the 1980 Hague Convention proceedings. In those circumstances, the determination of an application for a return order by the High Court will usually have some real point, even where the relevant child currently has refugee status."

[15] Counsel indicated that if the pursuers decided to apply now to the Secretary of State to revoke M's asylum and lodged affidavits, and the Secretary of State also sought representations from M, the Secretary of State would make a decision on the papers. She would have regard to the ECHR rights of the pursuers and M, and to her duty in terms of section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of M when discharging her asylum functions.

M's submissions

[16] M aligned herself with the submissions advanced by B, A and AI. It was submitted that the issue of whether the first conclusion should be dismissed had engaged section 11 of the Children (Scotland) Act 1995. In that regard the observations of Lord Reed in *NJDB* v *JEG* 2012 SC (UKSC) 293 at paragraph 31 were relevant:

> "31 … When the court is requested to exercise its discretion to make an order under sec 11 of the 1995 Act, it is required, as I have explained, to regard the welfare of the child as its paramount consideration, and it must not make any order unless it considers that it would be better for the child that the order be made than that none

> should be made at all (sec 11(7)(a)). The central issue in such a case is therefore the effect of an order upon the welfare of the child. In carrying out the duties imposed by sec 11(7)(a), the court is required to have regard to a number of specified matters, including the need to protect the child from any abuse (defined as including any conduct likely to give rise to distress), and the need for the child's parents to co-operate with one another (sec 11(7A)–(7E)). In addition to the matters specified in the Act, the court will also require to consider any other matters which bear directly upon the issues focused in sec 11(7)(a), such as the child's needs and any harm which the child is at risk of suffering. The court is also required to have regard to the views of the child, so far as those may be ascertainable (sec 11(7)(b)) ..."

[17] M's current views are clear. She does not wish to be returned to her parents in Qatar. She wants to remain in Scotland with her sisters. The Lord Ordinary had been correct to find that there would be no practical purpose in the court having a proof in relation to the first conclusion. The reality was that the grant of asylum meant that M could not be returned. Any prospect of review of the grant was speculative and very far from immediate. Even if there was a review and the pursuers obtained a successful outcome, M would appeal and/or lodge a fresh claim. The asylum proceedings would not be likely to be finally determined for years, by which time M would be significantly older and she might well have reached the age of 16.

Decision and reasons

[18] In our view this is a very unusual case. In January 2020, when she was aged 11, M was removed from her parents and taken from Qatar to the United Kingdom. At that time she had no real understanding of what was happening to her. Since then her parents have attempted to trace her. Ultimately, they raised the present action. Until July 2021 the pursuers did not obtain contact with M. Since then the first pursuer has had video-conference contact with M on a few occasions.

[19] The Secretary of State has granted M asylum. While the grant of asylum subsists M cannot be returned.

[20] The pursuers had no opportunity to make representations to the Secretary of State before she made the asylum decision. In the present action they maintain that it is in M's best interests that she be returned to them in Qatar. While they do not dispute some elements of what is said by B, A, AI and M about their lives in Qatar with the pursuers, the pursuers say that the picture painted by their daughters does not fairly represent the position. They argue that they have a loving relationship with M; and that her welfare would be best served if she was looked after by them.

[21] We turn then to the Lord Ordinary's decision. In our view its essence is that the first conclusion is incompetent because it is academic; and that it is academic because it has no practical purpose.

[22] It is convenient to deal first with the argument that the question whether or not to dismiss the first conclusion engaged section 11(7)(a) of the Children (Scotland) Act 1995. It is common ground that the order sought in the first conclusion is a specific issue order (section 11(2)(e)). If the question before the Lord Ordinary had been whether or not to make an order giving effect to the conclusion, that would have engaged section 11(7)(a). He would have required to treat the welfare of M as the paramount consideration, and he could not have made the order unless he considered that it would be better for M that the order be made than that none should be made at all. However, the question before the Lord Ordinary was not whether or not to make the specific issue order, but whether or not the first conclusion was competent. In our opinion determination of that issue did not engage section 11(7)(a).

[23] The competency issue is a stark one. It turns on whether the making of the order would have any practical effect. Its resolution does not involve the exercise of discretion by the Lord Ordinary.

[24] We are mindful that the asylum claim and the present proceedings address different issues, and that different standards of proof apply in each process (*G* v *G*, judgment of the Court of Appeal at paras 144-146; Lord Stephens JSC at paras 154-157). In the asylum claim the Secretary of State's official made an administrative decision on the papers on the basis of the material put before her by M and her sisters. The issue for the Secretary of State was whether M had a well-founded fear of persecution for a Refugee Convention reason if she were to be returned to Qatar. The standard of proof was a low one - whether there was a reasonable possibility that M's allegations were well-founded. In determining the claim the Secretary of State required to comply with her duty in terms of section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of M. The focus of, and the process in, the present proceedings would be different. The inquiry would concentrate on M's best interests. Section 11(7)(a) of the 1995 Act would be engaged. The court would require to treat the welfare of M as the paramount consideration. It would not be able to pronounce the order sought unless it considers that it would be better for M that the order be made than that none should be made at all. The standard of proof would be the normal civil standard requiring proof on the balance of probabilities.

[25] In our opinion the Lord Ordinary was wrong to conclude that an inquiry in relation to the issues raised by the first conclusion could have no practical effect. Although an order for the return and delivery of M pronounced by the court could not be implemented while the grant of asylum was extant, it would be a matter which the Secretary of State would be

likely to have regard to. Equally, if the court made findings which tended to indicate that it would be in M's best interests to be in her parents' care, the Secretary of State would be likely to have regard to those findings. Of course, she would not be bound by the court's order or findings. However, she would have the benefit of a reasoned decision by a judge of the Court of Session on evidence which had been tested by an adversarial process (cf *G* v *G*, Lord Stephens JSC at para 160). The order or findings would be matters which would be likely to lead her to consider reviewing the grant of asylum (*G* v *G*, judgment of the Court of Appeal at para 155 (iv) and (v); *F* v *M*, para 46); and they would be matters to which she might be expected to attach significant weight (*G* v *G*, judgment of the Court of Appeal at para 155 (iv) and (v)).

[26] While we accept that *G* v *G* concerned a Hague Convention application, and that *F* v *M* involved wardship proceedings, in our opinion the points made in both of those cases about the continuing importance of court proceedings where there is an asylum claim or an asylum grant are also cogent where the proceedings are not Hague Convention applications or wardship proceedings. Unlike the Lord Ordinary, we consider that those cases do provide material assistance in the present context.

[27] Nor are we persuaded that those points are academic because the petitioners could make a submission now to the Secretary of State to review M's grant of asylum. Such an application would provide the Secretary of State with material which would be *ex parte*. It would not have been tested in the course of adversarial proceedings before the court. There would be no judicial determination or findings. The Secretary of State would be likely to accord considerably less weight to such material than she would accord to the determination or findings of the court.

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

[29] Finally, since we have decided that the Lord Ordinary ought to have refused the motion it is unnecessary to deal with the pursuers' submission that AI lacked title and interest to move it. However, we think it right to say that we found the submission unattractive, not least because it does not appear to have been advanced when the motion was argued. Had it been, it seems likely that one or more of B, A and M would have made a similar motion rather than simply supporting AI's motion. Ultimately, we did not understand the pursuers to press the submission. In the whole circumstances we prefer to say no more about it.

Disposal

[30] We shall allow the reclaiming motion, recall the Lord Ordinary's interlocutor of 29 July 2021 in so far as it dismissed the first conclusion, and remit to a different Lord Ordinary to proceed as accords. We shall reserve meantime all questions of expenses.