



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

19 March 2021

PRESS SUMMARY

G (Appellant) v G (Respondent)

[2021] UKSC 9

On appeal from: [2020] EWCA Civ 1185

JUSTICES: Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt, Lord Burrows, Lord Stephens

BACKGROUND TO THE APPEAL

This appeal concerns the relationship of the 1980 Hague Convention (the “1980 HC”) to asylum law. The 1980 HC is an international agreement incorporated into UK law which enables the prompt return of a wrongfully abducted child to his or her country of habitual residence.

The parties are the parents of an eight-year-old girl (“G”). G was born in South Africa, where she has been habitually resident all her life. In March 2020, G’s mother, the appellant, wrongfully removed G from South Africa to England, in breach of G’s father’s rights of custody. G’s father, the respondent, applied for an order under the 1980 HC for G’s return to South Africa. The mother opposes his application on the ground, in particular, that there is a grave risk that return would expose G to physical or psychological harm or otherwise place her in an intolerable situation.

The mother identifies as lesbian. She alleges that after separating from the respondent and coming out, her family subjected her to death threats and violence. On her arrival in England she applied for asylum on the basis of her fear of persecution by her family. She listed G as a dependant on her asylum application. G has not made an asylum application in her own right. A core principle of asylum law is that refugees are protected from being returned to the country in which they have a well-founded fear of persecution. The unlawful return of a refugee is known as “refoulement”.

The central question in this appeal is whether G is protected from refoulement as a result of being listed as a dependant on her mother’s asylum application, such that she cannot be returned to South Africa pursuant to the 1980 HC proceedings until the asylum application is determined. If so, this raises the further question of how the 1980 HC proceedings and the asylum claim can be coordinated. An asylum claim can take months, if not years, to resolve, and the 1980 HC requires the prompt determination of an application for the return of an abducted child (which means, in this context, within six weeks). There is therefore a real risk that by the time the asylum claim has been determined, the relationship between the child and the left-behind parent will be harmed beyond repair. There is also a real risk in cases of this type that the taking parent will seek to achieve that objective by making a sham or tactical asylum claim.

The Court of Appeal held that a child listed as a dependant on an asylum application has no protection from refoulement, but that if G had made an application in her own right, she could not be returned prior to the determination of her application. The Court of Appeal concluded that there was no bar to ordering G’s return to South Africa. The mother appeals against that decision.

JUDGMENT

The Supreme Court substantially allows the mother's appeal and holds that a child who can objectively be understood to be an applicant for asylum cannot be returned to the country from which he or she has sought refuge before the final determination of the asylum claim. The case is remitted to the High Court for reconsideration of the 1980 HC application on that basis. Lord Stephens gives the only judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

UK asylum law is derived from a patchwork of international, EU and domestic law sources [77], which provide that an individual who is a refugee (because, in short, they have a well-founded fear of persecution in their country of nationality) has a right not to be refouled, subject to limited exceptions. That right does not depend on whether they have been granted status as a refugee [79]-[81]. An individual who *can be understood* to be seeking refugee status is therefore protected from refoulement. An asylum application which lists a child as a dependant is also an asylum claim by that child if objectively it can be understood as such. That will normally be the case: the adult's grounds for fearing persecution are likely to apply to their child, and an omission by the child to make an application in their own right cannot be determinative if it is the parent who would anyway have to make the application on the child's behalf [117]-[121].

The protection from refoulement of a child who can objectively be understood to be an applicant for asylum applies during the determination of their application by the Home Secretary. The effect of implementing a return order in 1980 HC proceedings in respect of a child asylum applicant is to return the child to the country from which they seek refuge. While the High Court can *decide* whether to make a return order, the return order cannot be implemented until the Home Secretary has determined the asylum claim [124]-[134]. The mother's first ground of appeal therefore succeeds. There is no bar to the High Court deciding the 1980 HC application prior to the determination of the asylum claim, however, and it should be slow to stay 1980 HC proceedings. A reasoned judgment on whether the child should be returned, on the basis of evidence which will often overlap with the asylum claim and which has been tested by an adversarial process, may assist the prompt determination of the asylum claim by the Home Secretary. The High Court has power to set aside its decision if the asylum claim is successful. The mother's second and third grounds of appeal therefore fail [154]-[162].

An asylum claim is not "determined" until the conclusion of any appeal [135]-[140]. Asylum law distinguishes between asylum seekers who have the right to appeal from within the UK, and those who must appeal from outside the UK. The implementation of a return order in 1980 HC proceedings in respect of a child with a pending in-country appeal would render the appeal process ineffective. A pending in-country appeal must therefore bar the implementation of a return order. Because the time taken by the in-country appeal process is likely to have a devastating impact on 1980 HC proceedings, urgent consideration should be given to a legislative solution [141]-[153].

All those involved in the 1980 HC proceedings, including the Home Secretary in determining any related application for asylum, must act promptly if the UK is to fulfil its obligations under the 1980 HC [68]-[72]. Various steps are proposed to coordinate related 1980 HC and asylum proceedings with a view to their prompt determination. These include requesting that the Home Secretary intervene in 1980 HC proceedings; consideration by the High Court of whether to make documents in those proceedings available to the Home Secretary, and whether to order disclosure of the documents in the asylum claim to the 1980 HC proceedings; joining the child as a party with independent representation; and assigning any asylum appeal to a High Court Family Division judge [163]-[177]. The Home Secretary has also proposed an expedited process for determining asylum claims with concurrent 1980 HC proceedings, which is a welcome initiative [6].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>