Neutral Citation Number: [2024] EWHC 1626 (Fam)

Case No: FD23P00148

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 June 2024

Before :

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

AND

MR V MANDALIA (UPPER TRIBUNAL JUDGE SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

A	**Applicant**
- and –	
B	**First Respondent**
-and-	
C and D (by their Children's Guardian)	**Second and Third Respondents**

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Richard Harrison KC and **James Mulholland** (instructed by **Creighton and Partners**) for the **Applicant**
Mark Jarman KC and **Indu Kumar** (instructed by **Wilson Solicitors LLP**) for the **Respondent**
Sarah Tyler (instructed by **Cafcass Legal**) for the **Second and Third Respondents**

Hearing dates: 11-13th June 2024

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Approved Judgment

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and

legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. This is the judgment of the court to which both members have contributed.

2. The proceedings, which have been brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention) and the Child Abduction and Custody Act 1985, relate to two boys, A and B, who are now aged 11½ years and 9½ years respectively. The children's parents, who married in 2010, are both American citizens. The mother also has Bahamian nationality. The family home has always been in America and, until their mother unilaterally brought the boys to England on 4 August 2022, none of the family members had any connection with the UK whatsoever.

3. By an application made on 17 March 2023, the children's father seeks a summary order for their return to the USA. The mother accepts that, by bringing the children to the UK without the knowledge of the father and in breach of his custody rights, they were wrongfully removed from the state of their habitual residence under Art 3 of the Convention. She nevertheless resists a return order on the basis that:

    a) There is a grave risk that a return to the USA would expose each of the boys to physical or psychological harm or otherwise place them in an intolerable situation, relying upon Art 13(b) of the Convention; and/or

    b) Each of the boys objects to returning to the USA and they have attained an age and degree of maturity at which it is appropriate to take account of their views.

4. On arrival in the UK, the mother immediately claimed asylum on behalf of herself and her sons. Judge Mandalia is a judge of the Upper Tribunal Immigration and

Asylum Chamber [UTIAC], who also has authorisation to sit as a deputy High Court judge in the Family Division. The present constitution has been arranged so that, in addition to determining the issues in the present case, the court may make some general observations upon the approach to 1980 Hague Convention cases where there is a parallel claim for asylum.

The factual context prior to abduction

5. The parents separated a year or so after the birth of the younger child. Divorce proceedings were commenced in 2016. An agreement was made for joint legal custody, with physical custody being granted to the mother and partial physical custody granted to the father. The divorce was granted in 2018. Thereafter, in 2019 and 2020 there were some difficulties over the contact arrangements. In July 2020 the father applied to modify the custody order. A temporary custody order was made essentially maintaining the previous arrangements. In March 2021 Child and Youth Services [‘the CYS’] investigated an allegation of abuse by father regarding the eldest boy, but determined that the allegation was “unfounded”.

6. All contact between the boys and their father was stopped by the mother in June 2021 and he has not seen them in the ensuing three years since that date. At the same time the mother raised with the CYS an allegation of suspected sexual abuse of A by the father. Applications were made for temporary Sexual Violence Protection Orders. In August 2021 the CYS completed its investigation and determined that the allegations of sexual abuse, which by then had extended to both boys, were “unfounded”.

7. In April 2022 the father issued an emergency petition for custody. On 6 July 2022 the mother's allegations of sexual abuse against the father, and the father's application relating to the custody arrangements were heard at a one day hearing before Judge

Love in the Court of Common Pleas Delaware County, Pennsylvania. During the hearing the judge considered the available evidence, heard oral evidence from each parent, and conducted a process in which she heard evidence from each of the two boys in the presence of the lawyers, but in the absence of their parents. The children had been tendered by the mother as witnesses.

8. This court has a full transcript of the hearing before Judge Love. The judgment makes plain that the burden of proof with respect to the sexual abuse allegations was upon the mother "pursuant to the PFA statute" ['Protection from Abuse']. Judge Love considered whether the allegations made by the mother "can be proven with clear and convincing evidence". The case advanced on behalf of the mother and accepted by the First-tier Tribunal ("FtT") in her appeal against the decision of the Secretary of State to refuse the claims for international protection was that the standard applied was an intermediate standard which was higher than 'a reasonable degree of likelihood' and 'a balance of probabilities'. For the purposes of these proceedings, the parties have instructed a joint expert, Mr Patrick Scanlon, who has provided an opinion based on his education and experience over several years practice in criminal law, both as a prosecutor and defence attorney in the USA. In an email he has confirmed the standard of proof for proving abuse in a PFA claim in Delaware County as in the rest of Pennsylvania is the "preponderance of the evidence". That is, 'more likely than not'. Judge Love said:

> "So the court really looked very carefully and very closely, as it is required to do, to determine, one, on the PFA whether petitioners burden of proof has been met pursuant to the PFA statute, and on the custody, what's in the best interests of the children. …
>
> So this court had to make credibility determinations and determine for the PFA whether or not, ma'am, you have sustained your burden of proof for the entry of a final protection order. And I'm finding that, based upon all of the evidence

> presented, that you have not sustained that burden of proof. Therefore, I'm vacating the temporary order and dismissing the PFA."

The judge went on to reinstate the former joint custody order "in full force and effect". She directed reunification counselling for the children and their father.

9. Court orders reflecting the judge's judgment were issued on 7 July 2022. On that very same day the mother launched a further allegation of child sexual abuse by the father with respect to both boys, apparently based upon exactly the same evidence, with the CYS. The CYS wrote on 5 August confirming that their investigation was complete and that, once again, the allegations were determined to be "unfounded". However, the previous day, 4th August, the mother had travelled to England with the children. The father had no communication from the mother and had no idea where in the world she had gone, there being no reason to suspect that she might choose the UK as her destination.

The factual context post-arrival in UK

10. The day after her arrival in this jurisdiction the mother applied for asylum on behalf of herself and the children as dependents. Following an interview with the Home Office in November, a formal decision letter was sent on 10 February 2023 refusing the asylum claim.

11. In the meantime, in the US, a court order was made on 25 October 2022 granting the father sole legal and physical custody of the boys. Investigations reported in mid-January 2023 that the mother had flown to Heathrow the previous August and, on 17 March 2023, the father issued his application for summary return in this jurisdiction under the 1980 Hague Convention. By mid-April the mother had been located and she made her first appearance before this court on 25 April 2023.

12. It is to be noted that, in stark contravention to the policy of the 1980 Hague Convention, this matter has not come before the court for an effective final hearing until some 15 months after the father made his initial application. We will turn in due course to give a short procedural account of the various reasons for delay and make observations that are intended to lead to the swifter dispatch of all similar applications in future cases.

13. Although no precise date has been given, the mother issued an appeal from the Home Office decision to the FtT sometime shortly prior to the father's Hague application. Her appeal to the FtT was supported by expert reports from a psychotherapist, an independent social worker and an expert in American family law. The hearing before the FtT took place over the course of two days and the decision of the two judges was promulgated on 25 March 2024. In the course of a judgment which runs to 20 pages, the FtT undertook a careful and detailed analysis of the allegations of domestic abuse to the mother (which were accepted), and sexual abuse to the two boys said to have been perpetrated by the father. While the burden of proving matters was upon the applicant mother, the standard of proof applied by the FtT was lower than the balance of probabilities and lower than that applied by Judge Love in America. The FtT commenced by making their findings on "the lower standard of a reasonable degree of likelihood".

14. The FtT stated its overall conclusion as follows:

> "77. Standing back, having considered the entirety of the evidence, which is vast, we are not persuaded, even on the lower standard that the evidence presented shows a history of repeated physical abuse as claimed. …
>
> 78. The evidence before this Tribunal discloses that [Mother] developed a theory that [her sons] have been sexually abused by their father, this we find is a subjectively entrenched belief. .. [Mother] accepts in her witness statement that she was seeking the evidence to prove her theory, this we find damaging. The

evidence before this Tribunal contained inconsistencies as outlined in our findings above. Accordingly, we do not find [Mother] credible.

79. We have carefully considered [A's] account of abuse and find the repeated mantra used is damaging as it is indicative of a rehearsed narrative. We have also carefully considered [B's] account of abuse and are not persuaded to the lower standard of proof of the same. The timing of his disclosures to [the ISW] is consistent with providing a coached account and a keenness to help out his mother. …

79. Overall and after careful assessment of all of the evidence before us, we are unable to accept the evidence of [the boys] to be reliable and thus credible, even on the lower standard. Accordingly on the lower standard, we do not accept that [A and B] have been sexually abused by their father."

15. The decision of the FtT was therefore to dismiss the asylum claim, a related humanitarian protection claim and a claim made under ECHR, Article 3. The mother's subsequent applications to the FtT and UTIAC for permission to appeal have been refused. She has therefore exhausted her domestic remedies with respect to gaining lawful permission to remain in this jurisdiction. She is liable to removal to the USA by the Home Office. In his submissions before us, Mr Jarman submitted, initially, that it may be open to the mother to make a further claim for asylum, but on reflection, he submitted it would be open to her to make an application for leave to remain on human rights grounds, outside the immigration rules, inviting the Secretary of State to exercise discretion in favour of the mother and children to regularise their stay in the UK in the event that we decline to make a return order.

16. Since her arrival in the UK, the mother and the children have been accommodated by the Home Office. They currently live together in a one room bedsit. The children have attended school since their arrival, and are said to be doing well there. Although her various claims have been dismissed, the Home Office has confirmed that, for so long as she remains living in the UK, she will continue to receive a subsistence allowance and accommodation until the youngest boy is 18 years old. Although the mother has a

medical qualification in Podiatry, and had her own seemingly successful practice in America before her departure with the children, she is not entitled to work here.

17. Mr Jarman submitted that the precarious nature of the mother and children's position in the UK, now that their international protection claims have been determined and they have exhausted their rights of appeal, could be addressed by yet a further application for discretionary leave to remain in the UK. He submitted that the effect of that would be that the current 'unlawful presence' of the mother and children could be regularised with a grant of leave to remain. The approach that we have taken to that submission is that an application under the 1980 Hague Convention must be determined on its own merits without the temptation to infer that some future application made to the Secretary of State on some unknown basis might result in the Secretary of State exercising his or her discretion to permit a parent and child who otherwise has no lawful basis to be in the UK, to remain. As with any claim for international protection, the Secretary of State for the Home Department has sole responsibility for immigration control and the Family Court should not in any way seek to trespass upon or influence matters that fall within the exclusive powers of the Secretary of State.

Representation of the children

18. The children were joined as parties to these proceedings by a court order made on 23 May 2023. They have been represented by CAFCASS Legal and counsel, who have taken their instructions from Ms Baker, the children's guardian. At the start of the hearing, an application was made on behalf of their mother for the proceedings to be adjourned so that the children might meet an independent solicitor and, if assessed to be of sufficient competence to give direct instructions, for that solicitor to act on their

behalf. In presenting the mother's application, Mr Jarman submitted, in circumstances where the children are clearly objecting to any return to the USA, but where their guardian and lawyers would be arguing in favour of a return, that the voice of the children would not be effectively heard in the court process. In addition, Mr Jarman questioned how the children's current solicitor could be in a position to assess the children's capacity to give direct instructions when that solicitor had never met them and where the guardian had only conducted one in-depth discussion with the boys over a year ago. Finally, Mr Jarman predicted that, if the court were to order the return of the children then the children may instruct their own solicitor to apply to set aside the return order.

19. The application was robustly opposed by Ms Tyler for the children and by Mr Harrison for the father. They pointed to the very substantial delay that has already occurred; this being the fourth final hearing that has been listed. It was submitted that the children had already been adversely affected by meeting a number of professionals and the solicitor had been justified in relying upon Ms Baker's account of their maturity. Further, in circumstances where the allegations of past abuse have been firmly rejected by the court in the US and by the FtT in this jurisdiction, and yet the children firmly hold to their belief that they have indeed been abused by their father, it was suggested that they may be harmed by being drawn further into this court process and that the children might be less capable of having a separate voice.

20. We refused the application for reasons given in an extempore judgment at that time. In summary our reasons were:

    a) There is no indication that the children were joined as parties for any reason other than, in accordance with guidance given in *G v G* [2021]

UKSC 9 and by the President of the Family Division in March 2023, where there are concurrent Hague and asylum proceedings, children should normally be joined as parties.

b) Prior to the start of the final hearing, no party had made any suggestion that the children might need separate representation.

c) Now that the asylum process had concluded, the justification for joining the children as parties had evaporated and was no longer an active factor in the case.

d) The guardian, from the CAFCASS High Court team, had assessed capacity. She and the experienced solicitor do not consider that either child has capacity to give direct instructions. Whilst it is unusual for a solicitor not to have met their child client, in the circumstances described to the court, this was an acceptable course to take in the present case.

e) There is no evidence that the children have asked for separate representation or otherwise raised the issue themselves.

f) In circumstances where the proceedings had already taken 15 months to reach their fourth listed final hearing, there was a pressing need to avoid any further delay.

g) The children's objections are before the court in very clear and unambiguous terms and the fact that the children object is accepted by the father and those acting for the children.

h) If a solicitor were appointed to act as their guardian in the proceedings, that solicitor could not give evidence to the court as to their welfare. The solicitor's role, would be limited to communicating the children's instructions and opinions to the court and to arguing the case on their behalf.

21. Our overall conclusion was that, there no longer being a need for joinder due to a parallel asylum process, and where there was no positive evidence that either child had sufficient understanding to give instructions, but where an adjournment to assess their capacity to do so would be wholly contrary to the need for a summary process avoiding delay, the application should be refused.

The mother's case in opposition to a return order

22. In circumstances where it is accepted that the children were wrongfully removed from the USA by their mother to the UK on 4 August 2022, the mother resists the making of an order for the return of the children to their home jurisdiction under Art 13(b) and/or on the basis of the children's objections under Art 13(2). We will take the case with respect to each of these exceptions in turn.

The case under Article 13(b)

(i) Allegations of sexual abuse

23. Under Art 13(b), the court 'is not bound to order the return of the child' if the mother, in this case, establishes that 'there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

24. In the skeleton argument prepared for this hearing by Mr Jarman KC and Ms Kumar on behalf of the children's mother, the case under Art 13(b) is limited to the assertion that a return to the US 'would plainly amount to an intolerable situation' for the children. No reference is made in the skeleton to any case based on risk of physical or psychological harm. The focus on the 'intolerable situation' limb was replicated during Mr Jarman's oral submissions. Thus, whilst serious complaints are made on behalf of the mother over the procedure and approach adopted by Judge Love in determining that the allegations of sexual abuse were not made out, the mother's case before this court is not being prosecuted on the basis that the evidence establishes a grave risk of physical or psychological harm to the children as a result of alleged abusive behaviour by their father, and the court was not taken to any of the detailed material with respect to the allegations.

25. Whilst, as her case before the FtT demonstrates, the mother continues to hold firmly to her belief that the children were indeed sexually abused by their father, the decision not to run that case before this court is understandable. Where, in a Hague case, there are disputed issues of fact in relation to Art 13(b), the conventional approach is that described by Baroness Hale at paragraph [36] of *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, so that the court will consider whether, if the allegations were true, they would establish a grave risk under Art 13(b). If so, then the court will go on to look at how the child may be protected from that risk and, if the protective measures are not sufficient, the court may have to do the best that it can to resolve the disputed issues. It has, however, been held that a court is not bound to follow the *Re E* approach in every case. In *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720, Black LJ (as she then was) considered the *Re E* process and concluded (at paragraph [53]):

> "I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk."

26. In *Re A (Children) (Abduction Article 13(b))* [2021] EWCA (Civ) 939, Moylan LJ reviewed the approach to be taken in the light, in part, of Black LJ's approach in *Re K*. Moylan LJ explained:

> "I would emphasise that Black LJ was referring to discounting the *possibility* that the allegations would *give rise* to an Art 13(b) *risk*. She was not otherwise diverging from the approach set out in Re E. It is also clear that she was referring to the end of the spectrum, namely when the court was able *confidently* to discount the possibility that the allegations gave rise to an Art 13(b) risk." [emphasis as original]

27. In relation to the sexual abuse allegations raised by the mother, it is the case that the competent court in the children's home jurisdiction has already determined that they are not proved. Whilst Mr Jarman raised what the mother considers to be substantial criticism as to the soundness of the process conducted by Judge Love, her findings are the findings of the relevant US court and there has been no appeal. This court is in no manner an appeal court from Judge Love, and issues of comity strongly suggest that the findings, and process, of the US court are to be respected in this jurisdiction. We do not, however, approach the issue on the basis of concepts of issue estoppel or strict comity. There is no need to do so for, in addition to Judge Love's clear determination, the mother's allegations have been held to be 'unfounded' on a number of occasions by the child protection agency, the CYS, in the US and by the FtT in this jurisdiction adopting a process that is not criticised in any way.

28. It is clear that the FtT conducted a thorough forensic analysis of the material relied upon by the mother and found that the evidence did not even meet the lower standard of proof that the Tribunal applied, namely a reasonable degree of likelihood; *See Lord Keith of Kinkel in R v SSHD ex p. Sivakumaran* (1998) AC 958. Thus, in terms of the

confidence with which this court may discount the possibility of the mother's allegations giving rise to an Art 13(b) risk in the present case, we are at the end of the spectrum described by Moylan LJ in *Re A*. In the circumstances, there is no need to give further consideration to the sexual or other allegations of abuse made against the father as they can play no part in establishing a grave risk of physical or psychological harm to the children in the context of Art 13(b).

(ii) Intolerable situation

29. The mother's case under Art 13(b) is firmly put on the basis that there is a grave risk that a return order will place the children in an 'intolerable situation'. In making good his submissions under this head, Mr Jarman referred to the following elements which are likely to be in play if an order is made for the children to return to the US. The mother's case is that collectively, and, for some, individually, these elements make it clear that there is a grave risk that on return the children would be placed in an intolerable situation.

    a) The father made a criminal complaint in the USA against the mother and she has been charged with two counts of interference with custody of children and two counts of endangering the welfare of children.

    b) On 8 October 2022, the US court made orders changing the custody arrangements so that the children are now placed in the sole legal and physical custody of the father, the mother's custody rights have been suspended and she has been held to be in contempt of court.

    c) The father has not taken any steps to discharge or modify the custody order over the past two years.

d) The US criminal law joint expert instructed in these proceedings advised that the mother would 'probably' be arrested on arrival in the US and it is 'possible' that the children would be delivered into their father's custody. If convicted the mother is likely to be sentenced to a 3 to 12 month minimum term of imprisonment. Whilst the father, as a victim, may have some influence over the criminal process (particularly sentence), that does not apply to the initial arrest which is purely a matter for the authorities. The US expert instructed in the asylum claim differed in that he advised that the mother 'must' be arrested upon re-entering Pennsylvania and that upon her arrest the children would be handed over to their father.

e) The independent social worker instructed in the asylum claim, who spent a number of hours with the children, advised that it would be 'emotionally and psychologically devastating to these two boys if they were separated from their mother, placed in the sole care of their father and with the likelihood that their mother will be imprisoned'.

f) Dr Ratnam, a consultant psychiatrist jointly instructed in these proceedings, noted that the mother had a history of depression, and that her current symptoms of depression and post traumatic stress disorder had been exacerbated by the present proceedings. The symptoms are likely to be further exacerbated by a return order, and compounded if she were to be arrested and if the children were to be placed in the care of their father. If there were a deterioration in the mother's mental health, this would impact upon the children as she will become remote

to them and find it difficult to attend to their day to day activities. Given evidence of some past suicidal ideation, this will require monitoring.

g) The children are likely to be separated from their mother and placed into foster care.

30. Mr Jarman, who relies upon the well-known passage in *Re E* where, at paragraph [34], Baroness Hale and Lord Wilson held that 'intolerable' was 'a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate"', submitted that the relevant principles were correctly summarised by Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123 at paragraph 47:

> "47. The relevant principles are, in summary, as follows.
>
> (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
>
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
>
> (3) The separation of the child from the abducting parent can establish the required grave risk.
>
> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
>
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

48. In his judgment in the recent case of *Re A (A Child) (Article 13(b))* [2021] EWCA Civ 939 Moylan LJ (at paragraph 97) gave this warning about the failure to follow the approach set out above in paragraph (4):

> "if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *Re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."

In that case, this Court concluded that the judge had indeed fallen between two stools."

31. For completeness, it is right to record that in *Re A* Moylan LJ endorsed the words of MacDonald J in *Uhd v McKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam) at paragraph 70, namely that 'the assumptions made [by the court] with respect to the *maximum level of risk* must be reasoned and reasonable assumptions' [Moylan LJ's emphasis]. Moylan LJ continued: 'If they are not 'reasoned and reasonable', I would suggest that the court can confidently discount the possibility that they give rise to an Art 13(b) risk'.

32. With respect to the relevance of the impact on the children of a decline in the mother's mental health, Mr Jarman drew particular attention to the judgment of Lord Wilson in *Re S* [2021] UKSC 10 at paragraph 34:

> 'The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.'

33. Mr Jarman drew attention to the helpful summary in the judgment of Cobb J in *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415 on the approach to be taken to protective measures. The court must examine what is proposed 'in concrete terms' and take into account the extent to which the measures are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance. Cobb J spelled matters out by saying that 'protective measures need to be what they say they are, namely, protective. To be protective, they need to be effective.'

34. Mr Jarman submitted that the protective measures offered by the father are deficient:

a) The father's initial statements were on the basis that the children would be returned to his care.

b) His subsequent acceptance that they should remain in their mother's care, if not immediately removed following arrest, is limited to the period prior to the first court hearing.

c) The father has only recently attempted to make contact with the local police and prosecution agencies (to no effect).

d) The father does not agree to the majority of the measures requested by the mother with regard to her support and accommodation should she return to the US with the children.

35. During the oral hearing, whilst the potential for the children to be transferred to the care of their father on arrival in the US in the event of their mother's arrest remained, the focus of submissions moved to placement in foster care as being the more likely plan, given the children's extreme reluctance to contemplate having any contact with their father and given the father's acceptance that, at least in the initial stages, he accepts that they should not come to him.

36. In the circumstances Mr Jarman submitted that the children would indeed be placed in an intolerable situation on arrival in the US, with their mother arrested on landing, separation from their mother, removal by authorities and placement into a foster home (or even placement with their father). Given the vulnerability in her mental health identified by Dr Ratnam, the mother would be likely to demonstrate distress and this, too, would adversely affect the children.

37. Mr Jarman was plain that the court was only to be concerned with the situation on return to the US and whether there was a grave risk that that would be 'intolerable'. The court should not, he submitted, consider the situation were the children to remain in the UK. On that basis it was submitted that the mother's case under Art 13(b) was made out.

38. In response, Mr Richard Harrison KC, for the father, invited the court to keep sight of the bigger picture in this case which includes a father, who has not caused any harm to the children, has had a good relationship with them in earlier times and who had an order for joint custody, by consent, with two overnight stays each week. The current situation has only arisen because of the mother's false claims of abuse and her subsequent extreme reaction to the US court and authorities' rejection of those claims. He submitted that the mother has perpetrated a very serious form of psychological harm on these two boys, which was to be measured at the top end of the scale. Her act of abduction and arrival in a totally foreign country will have been completely bewildering to the children and will have magnified the harm. Mr Harrison drew attention to the evidence of Ms Baker, the children's guardian, that serious long-term consequences would ensue for the children if this harm is not addressed. It is the father's case that if the children remain in the UK, the harm will simply be perpetuated. There will be delay in accessing therapy that has any prospect of succeeding during a time when the children will, in effect, be left entirely under the influence of their mother, estranged from their father, under a false narrative. In those circumstances, Mr Harrison submitted that 'it would be almost topsy turvy' to say that it is 'intolerable' to remove the children from this source of continuing harm and place them with their father, to whom no blame in terms of harm attaches.

39. Mr Harrison's submissions are clearly at odds, in terms of the approach in law, to those of Mr Jarman on the issue of whether or not the court should consider the children's situation as a whole, including the situation in the UK, when determining whether a return to the US established a grave risk of an intolerable situation. In any event, it is the father's case that the short-term disruption around the time of return was necessary to safeguard the children's medium to long-term interests.

40. Separately, but with the same aim, Mr Harrison submitted that when looking to see if there is a 'grave risk', the whole situation must be considered. It could not be right, he said, that the safer course (namely return to the US) can satisfy Art 13(b).

41. The approach advocated for by Mr Harrison was supported by Ms Tyler for the children's guardian who urged the court to look at the present circumstances of the children as part of the overall evaluation of whether there was a grave risk that a return to the US would place them in an intolerable situation. They are at risk of harm whether they stay here or are returned, but a return to the US is the less intolerable option. There would be short term upset, but with the prospect of resolution.

42. In terms of protective measures, the guardian, both in her own evidence and in the submissions of her counsel, continued to hope that the mother would identify a friend or relative, who was known to the children, who could offer them a temporary home in the event that she is arrested on arrival. So far the mother has not put forward any alternative plan. However, if the current working plan, namely that the children may have to go into foster care for a time, is the reality then the guardian does not consider that that establishes an intolerable situation. Ms Tyler pointed out, without contradiction, that in the event of a return order the mother could apply to the Home

Office for additional financial assistance of up to £3,000 to cover immediate resettlement costs.

(iii) Intolerable situation: discussion and conclusion

43. There is clear disagreement between Mr Harrison and Mr Jarman over the scope of the 'situation' that a court must review under Art 13(b), with the former submitting that the court should look at the whole picture, taking in the situation in the UK and on return to the USA, but the latter arguing that the focus must be limited to the return to the home state. It is right to record that this issue of law only opened up and developed during the course of the oral hearing, and was not trailed in the parties' skeleton arguments. It is also of note that neither side was able to draw attention to any previous authority on the point. Both of these aspects of the debate should lead a court to be cautious about deciding the point. In a field of law which has been so heavily tilled by lawyers and judges over the past 40 years, it is striking that, if the point is well made, there is no extant authority.

44. For reasons to which we will turn shortly, it is not necessary to decide the point and we expressly do not do so. We would, however, offer the following observations.

45. Firstly, the express focus of Art 13(b) is on the grave risk to which the child would be exposed is on 'his or her return'. Mr Harrison therefore gets no support for his submission from the wording of the Convention, and Mr Jarman is right to stress that, in the course of his summary in *Re IG*, Baker LJ, at (2) was clear that 'the issue is the risk to the child in the event of his or her return'.

46. Secondly, it is well established that, in determining whether an exception under Art 13(b) is established, the court is not undertaking a welfare evaluation. If the

assessment of the intolerability of a child's situation on return was expanded to include a comparison with the situation were they not to return, the court would inevitably be drawn towards reaching a welfare determination, being required to balance the pros and cons, in welfare terms, between the two options, in a way which is wholly contrary to approach to be taken under the Convention.

47. Thirdly, Mr Harrison's submissions were founded on the basis that it is established that these two boys are suffering very serious harm 'at the top end of the spectrum'. A court hearing an application under the 1980 Hague Convention should be cautious and clear over what is, and what is not, established within convention proceedings. It is one thing to hold, as we have done, that the mother in this case has failed to establish a grave risk of harm to the children under Art 13(b), but it does not follow, as night follows day, that the court has therefore found that the children must have suffered, be suffering and be likely to suffer harm as a result of the actions of their mother. Although part of the reasoning of the FtT includes a conclusion that the mother has pursued her theory of abuse in a manner which has been damaging to the children, it was no part of the FtT's role to make a finding of abuse by her. The FtT judgment, like that of Judge Love, evaluated the mother's case to determine whether her allegations against the father are made out on the evidence, which included the evidence of the mother, tested in cross-examination. Whilst, in the context of the children's objections, this court will have to consider exercising its discretion to order a return to the USA, and that will necessarily involve a comparison between staying in the UK or going back to the home state, for the court to hold, as the father's case on this point requires, that remaining here is more intolerable than going to the States, would require a positive finding against the mother which the court in Hague proceedings is not in a position to make.

48. We have therefore not accepted Mr Harrison's invitation to determine the intolerability of the children's situation should they return to the US by making a comparison with the situation should they remain here.

49. Turning, therefore, to an evaluation of 'intolerable situation' by focusing solely on the children having to return to the USA, it is undoubtedly the case, and is accepted by the father and the children's guardian, that the experience for the children of going back across the Atlantic with their profoundly reluctant mother will be traumatic to a significant degree. We accept that it is probable that she will be arrested on arrival. We understand that this is likely to involve officers boarding the plane and removing her prior to the other passengers disembarking, and that the children will then be taken into the care of social workers. We do not accept that it is likely that the children will be passed into the care of their father at that stage. Given their response to the guardian when they, erroneously, thought that he might be in the UK, they are likely to display extreme reluctance to see him, let alone be placed in his care. We accept that he intends to suspend the current custody order in his favour, and that he will make it clear to the CYS and other authorities that he does not seek the interim care of the children, but we will require him to do so before any return order takes effect. We join with the guardian in expecting the children's mother to identify a friend or other trusted member of the community in Pennsylvania who can take on the short-term care of the children on their arrival in the US, but we have decided this issue on the basis that the default position, namely short-term foster care will be provided for them.

50. Moving on, we accept that the mother is likely to be kept in custody for a time. She has no accommodation readily available to her in the US, and no immediate income.

We do, however, accept the assertion made on behalf of the guardian that the mother is entitled to apply to the UK Home Office for provision of a resettlement grant to her to provide the wherewithal for her to rent short term accommodation. As a failed asylum seeker, on voluntary return, provision of help with reintegration costs with support from £1500, depending on individual circumstances is in the experience of UTJ Mandalia, available to support an assisted departure by an application to the Voluntary Returns Service. We accept that the criminal process will be likely to run its course in the US and that there is a likelihood that the mother will receive a short term of imprisonment, however this may be mitigated by the father making it clear, as he has committed to do, that he does not want the mother to be imprisoned, nor would he initiate any criminal proceedings against the mother in respect of the abduction.

51. Looking beyond the first 2 or 3 months, it is likely that the Family court in the US will be seized of the case and will make its own determination as to the children's future arrangements.

52. We have also taken some supportive account of the fact that, in contrast to a case where a grave risk of physical or psychological harm is established on the basis that the children are returning to a situation which will bring them back into contact with an abusive parent, no aspect of what is said to be intolerable in the children's situation arises from any action or risk of harm relating to their father. The difficult situation that the children are currently in has been entirely generated by their mother's actions.

53. On that basis, the children's situation will be traumatic, stressful and upsetting for them on their return to the US. This will be acutely so on the day of return itself and is likely to remain so, to a lesser degree, for some weeks before medium to long term arrangements can be made. To a degree, there will be upset and even trauma involved

in the repatriation of any children who have been abducted and kept away from their home country by a parent who resists a return order. The extent of upset and trauma here is greater because of the likelihood that their mother will be arrested and kept in custody on arrival, with the children moving to foster care, but such circumstances are not without precedent.

54. It is a regular aspect of the work of social workers and the decisions made by Family judges, that children are placed in foster care when they do not want to go there. Whilst unwelcome and upsetting, to be placed in foster care for a short period, in our view, falls well short of being placed in an intolerable situation – namely one that these children should not be expected to tolerate in the circumstances of this case.

55. We therefore rely upon and share the guardian's analysis that the default plan, including foster care before the medium-term arrangements are settled, is not intolerable for these two children. Thereafter, the US court will be seized of the case and will determine the outcome that best meets the children's detailed needs. On that basis, we hold that the mother's case under Art 13(b) based on 'intolerable situation' fails.

Article 13(2): Children's Objections

56. Under Art 13(2) of the Convention 'the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

57. It is accepted on behalf of the father and the children's guardian that both boys object to being returned to the USA and that each has attained an age and degree of maturity

that justifies taking account of their views. We agree and therefore find that the two 'gateway' provisions under Art 13(2) are satisfied. Those two findings move the focus on to the final stage, in which the court has a discretion whether to 'refuse to order the return of the child'.

58. The law on the exercise of discretion is well settled. The leading authority is *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55. The test does not require a finding of exceptionality. It is different from an ordinary 'welfare test', where the welfare of the child is the paramount consideration; welfare is a factor, but not paramount. Regard must be had to the policy of the convention. The range of factors to be considered may be even wider than in other exceptions to the making of a return order.

59. Mr Jarman helpfully drew attention to a summary in the judgment of Peter Jackson LJ in *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139:

> "41. To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare."

60. In his turn, Mr Harrison, who did not disagree with Mr Jarman's description of the approach to the exercise of discretion, drew attention to a summary of the approach given by Williams J in *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at paragraph 50: …

> 'v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the

> Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
>
> vi) Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations.'

61. Mr Jarman relied heavily on the list of adverse factors related to a return to the US which are summarised at paragraph [29] above. He submits that with the passage of time, this is not one of those cases in which the overall ethos of the 1980 Hague Convention can be fulfilled. On return, the traumatic experience for the children on the day of arrival, with their mother being arrested and their placement in foster care, are likely to be compounded by the lack of any provision for the mother and children to establish a home back in America as the father's evidence to this court is completely silent on any proposals for her support. In opposing the exercise of discretion in favour of a return, Mr Jarman maintained his submission that a return would place the children in an intolerable situation and the court should refuse the application.

62. In his submissions, Mr Harrison repeated the points relied upon in characterising the children's position in the UK as being more intolerable than a return. In addition to those matters relating to potential harm arising from their mother's care and her adherence to the accounts of abuse, Mr Harrison pointed out that, now that their asylum claims have been dismissed and there is no further appeal, the mother and children are at risk of removal by the Home Office back to the US. It would be, he submitted, better for the children to go back in a more ordered process following an order of this court, than waiting for the Home Office to enforce their repatriation at some uncertain point. Mr Harrison stressed the importance to be attached to the policy

of the Convention and the fact that these children are American and have no ties with the UK. It was, he argued, only by going back to the US that the children had any prospect of restoring their relationship with their father. Mr Harrison submits there has been no acknowledgement by the mother of the harm that she has already caused to these children and that the evidence of the children's guardian is clear that there is a risk of the harm being perpetuated in the UK. It is, he submits, completely unrealistic to conclude that any therapy and help offered to the children has a prospect of success whilst the children remain in the care of their mother, separated from their father.

63. The father has offered the following protective measures:

a) 'CYS to be informed of the mother's return.

b) Father will tell the prosecutor and Judge that he does not want the mother to be imprisoned, nor would he initiate any criminal proceedings against the mother in respect of the abduction.

c) Father agrees that the children should remain in their mother's care prior to any custody/contact hearing in the USA, including if she is released on bail.

d) Father will not seek to contact the mother prior to any hearing in the USA.

e) Father will not harass, molest pester, use or threaten violence against the mother.

f) Father would pay for the children's flights and would not attend the airport on their arrival.

g) Father agrees to pay for therapy for the children.'

64. On behalf of the guardian, Ms Tyler submitted that a factor of primary importance is that the children are operating on the basis of allegations of serious harm which have been repeatedly investigated and determined to be unfounded. There is, therefore, evidence that the children are not in possession of the correct factual background, and that their expressed views are neither independent nor authentic.

65. In her oral evidence, Ms Baker, the children's guardian, highlighted the following factors:

a) Alienation can cause long lasting harm.

b) False allegations of sexual abuse can cause harm, and the longer that the boys are exposed to the false narrative the more that they will adhere to it.

c) Holding on to this narrative, and being cut off from the paternal family, will undermine the children's sense of identity. If they remain in the UK the boys' relationship with their father is unlikely to be repaired.

d) Being removed from their home country is in any event likely to have been upsetting for them.

e) It is harmful to be living in a situation which is fundamentally unstable.

66. It is the guardian's professional opinion that the children's welfare requires that they be summarily returned to the USA.

Children's objections: conclusion

67. In approaching the exercise of our discretion whether or not to order the children's return to the US, despite their very clear objection to that outcome, we have taken account of all the circumstances and in particular:

i) The children's views are firmly based upon the narrative that their father has abused them and is an altogether malign individual. The allegations that underly that narrative have been investigated by the CYS on a number of

occasions, the US Family Court and the FtT. Each of these bodies has found that the evidence fails to support the allegations and that they are unfounded or unproved (even, in the FtT, on a lower standard of proof). Although we accept that the children's subjective views are firmly held, the weight to be attached to the children's objections that are based upon an unfounded narrative, in this case, must be substantially reduced.

ii) Whilst not being in a position to make any findings, and expressly not doing so, the prospect that the children's views of their father may have been generated by alienating behaviour on the part of their mother and that they have thereby suffered harm requires serious and detailed consideration, as does the prospect of the children being reintroduced to their father. In terms of the policy of the Convention these matters are for the court in the children's home state but, more importantly in this case, the involvement of the father can realistically only be achieved if they are back in the US.

iii) The children are American and have no ties or connection with the UK.

iv) In the UK the mother and children will continue to live in very straitened accommodation on a basic subsistence allowance until, at some stage, they may be removed back to the US in any event, because they have no lawful basis to remain in the UK.

v) It is the guardian's professional view that it is in the children's best interests to be returned to the US.

vi) The current situation has been entirely generated by the belief of the children's mother that the children have been abused by their father. There is no credible

evidential basis for this belief, yet the children were abducted, in breach of orders of the US court, and have been kept, initially secretly, in the UK because of the mother's belief. There is a strong policy ground based on comity between member states and the father's application.

68. In all the circumstances, and notwithstanding the children's objections, we take the clear view that both A and B must be summarily returned to the USA.

Overall conclusion

69. The mother has failed to establish either of the two exceptions upon which she has relied. In the circumstances, the father's application for a return order under the 1980 Hague Convention succeeds and a return order will be made, subject to further discussion and submissions from counsel as to the detailed arrangements.

The practical interplay between the 1980 Hague Convention proceedings and asylum claims: some observations and guidance

70. While the 1980 Hague Convention requires the summary return of a child who has been wrongfully removed or retained to the country of their habitual residence immediately before the wrongful removal or retention, asylum legislation prohibits the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution ('refoulement'). The target conclusion date for proceedings under the 1980 Hague Convention is six weeks of the date of the application. There is thus potential for there to be tension between parallel Hague and asylum proceedings if the latter proceedings take a considerably longer time, as was so in the present case.

71. It is important to be clear that the High Court is not prevented from determining a 1980 Hague Convention application or making a return order with respect to a child refugee were there are parallel asylum proceedings. In *G v G* [2021] UKSC 9 the Supreme Court gave guidance on the desirable steps to take when there are related Convention and asylum proceedings to ensure expedition and communication. Lord Stephens (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Burrows agreed) confirmed that the refugee or subsidiary protection claim is exclusively a matter for the Secretary of State, but there is no reason why the merits of any 1980 Hague Convention proceedings cannot be heard and determined prior to a decision in relation to the requests for international protection, even if the factual issues overlap.

72. The general proposition that "the High Court should be slow to stay an application prior to any determination" is entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority. Lord Stephens said:

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

> 164. However, the 1980 Hague Convention proceedings are separate from the asylum process. Frequently, the same factual background forms the basis for both (i) an application for asylum by a child and (ii) a "defence" to an application for a return order under article 13(b) (grave risk to the child). In determining an application for a return order under the 1980 Hague Convention, the court does not impinge in any way upon the Secretary of State's exclusive function in determining refugee status. Rather, information in the 1980 Hague Convention proceedings and the court's decision may inform the determination by the Secretary of State of a person's asylum claim or as to whether the Secretary of State revokes refugee status. Similarly, information available to the Secretary of State such as country background information (though in this case that information is publicly available) and the decision of the Secretary of State may inform the court's decision in the 1980 Hague Convention proceedings.
>
> 165. For these Conventions to operate hand in hand, I consider that there are various practical steps which should ordinarily be taken, aimed at enhancing decision making in both sets of proceedings, where they are related. I consider that proceedings are related once it becomes apparent that an application for asylum has been made by a parent (regardless of whether the child is objectively understood to have made an application or been named as a dependant) or by a child."

73. Six practical steps are identified by Lord Stephens in paragraphs [166] to [177] of his judgment. In summary:

i) As soon as it is appreciated that there are related 1980 Hague Convention proceedings and asylum proceedings it will generally be desirable that the Secretary of State be requested to intervene in the 1980 Hague Convention proceedings.

ii) Other steps which in general it is desirable should be taken as soon as it is appreciated that there are related proceedings include:

a) Ensuring that there is liaison and a clear line of communication between the courts and the Home Office.

b) Joining the child as party to the 1980 Hague Convention proceedings with representation; and

c) Directing that the papers that have by that stage been provided to the Secretary of State in relation to the asylum application should be disclosed to the child's representative.

iii) The documents in the 1980 Hague Convention proceedings should ordinarily be made available to the Secretary of State.

iv) The court should give early consideration to the question as to whether the asylum documents should be disclosed in the 1980 Hague Convention proceedings, applying the balancing exercise set out in *In the matter of H (A Child) (Disclosure of Asylum Documents)* [2021] 1 FLR 586. In carrying out the balancing exercise:

a) A relevant factor will be whether the left-behind parent in the 1980 Hague Convention proceedings is "the alleged [actor] of persecution of the applicant for asylum".

b) It will ordinarily be appropriate to identify the information contained in the asylum application which is distinct from and additional to the information that the taking-parent has already disclosed in the 1980 Hague Convention proceedings ("the additional information").

c) Any disclosure exercise conducted in the 1980 Hague Convention proceedings would need to balance the systemic importance of maintaining confidentiality in the asylum process, together with the applicant parent's and the child's particular right to confidentiality in that process against the left-behind parent's rights under articles 6 and 8 ECHR and the child's rights under article 8 ECHR.

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

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

74. We take this opportunity to draw attention to three particular documents that aim to ensure, as far as is possible, that proceedings under the 1980 Hague Convention can be completed within six weeks of the date of the application notwithstanding that there is a parallel asylum claim.

75. First, in *G v G* Lord Stephens endorsed the steps which the Home Office had taken towards establishing a specialist asylum team to which this small group of cases would be assigned. Guidance has been issued by the Home Office[1] setting out the procedure that is to be followed by staff dealing with asylum casework when

[1] https://assets.publishing.service.gov.uk/media/60ec333ce90e0764d283781d/hague-convention-cases-operating-instruction-v1.0-gov-uk.pdf

processing asylum claims involving children where there are concurrent 1980 Hague Convention proceedings in the High Court. The aim is to outline a clear procedure to be proactive and expedite the processing of straightforward asylum claims within 30 days of the Home Office being notified of the relevant case. Where cases are more complex, the intention is that there are clear lines of communication between the Home Office and the Family Division.

76. Second, *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* was issued on 1 March 2023 by the President of the Family Division concerning cases involving both child abduction proceedings and protection claims and appeals[2]. The aim of the guidance is to ensure that the case management of child abduction proceedings is conducted in a manner that will enhance decision making in both jurisdictions where there are related applications.

a) Appendix 2 of the *Practice Guidance* applies where the parent or child has an outstanding protection claim with a right of appeal within the meaning of section 82 of the Nationality, Immigration and Asylum Act 2002 ['NIAA 2002'] or has been granted protected status under Part 11 of the Immigration Rules. Paragraph [1] of Appendix 2 highlights that any party to proceedings to which the guidance applies who is aware of a linked protection claim must notify the court of the existence of that claim.

b) Paragraph [8] of Appendix 2 requires that where it is apparent, either from the application form or at the first hearing, that a concurrent protection claim has been made or is to be made, the matter should be allocated to a named judge of the Division who has been designated to deal with child abduction proceedings

[2] https://www.judiciary.uk/wp-content/uploads/2023/03/Presidents-Practice-Guidance-on-Case-Management-and-Mediation-of-International-Child-Abduction-Proceedings.pdf

involving a protection claim or grant of protection status. Once the named judge has been allocated, that judge should retain the proceedings through to their conclusion.

77. Third, the Senior President of Tribunals has also issued guidance specific to appeals where an application under the CACA 1985 has been made in respect of a child who is an appellant or family member of an appellant in a protection appeal brought under the NIAA 2002[3]. The guidance highlights the duty of the parties under the Tribunal Procedure Rules before the First-tier Tribunal and Upper Tribunal to help the Tribunal to further the overriding objective and to cooperate with the Tribunal generally.

a) Paragraph 10 of the guidance refers to the continuing obligation to inform the Tribunal and the other parties if they become aware of 1985 Act proceedings affecting a child who is an appellant or a family member of such an appellant, if necessary, obtaining the prior authorisation of a court dealing the child abduction proceedings.

b) Paragraph 11 reminds parties that a failure to act efficiently and promptly may well fall to be treated as unreasonable conduct for the purpose of applications for costs.

78. The Senior President's guidance sets out:

a) The steps to be taken by a party or their representative where child abduction proceedings are known about before an appeal notice is provided (paragraph 12) and once an appeal is pending (paragraph 13).

[3] https://www.judiciary.uk/wp-content/uploads/2023/03/Guidance-on-abduction-protection-cases.pdf

b) The action to be taken by the Tribunal, including assignment to a dedicated Legal Officer and the management and hearing of the appeal by a salaried judge, who with the relevant Resident Judge will be the judicial point of contact for any communication with the judge in the High Court or Court of Session who has charge of the child abduction proceedings (paragraphs 14 to 16). The guidance requires copies of any directions or orders made by the Tribunal, at the same time they are sent to the parties, be sent to the High Court or the Court of Session (paragraph 31).

c) The action to be taken by the Secretary of State to ensure that conduct of the appeal be given to a dedicated case owner or presenting officer, who will provide appropriate liaison with the specialist protection team (paragraphs 17 to 21).

d) The relevant case management steps, including orders as to disclosure, that should be taken by the Tribunals to ensure substantive listing of the appeal on the first available date (paragraph 23 to 28).

79. Paragraph 30 of the guidance requires that a copy of the promulgated decision of the FtT be sent to the High Court on the same day as it is uploaded to the MyHMCTS website.

80. We have drawn attention to these three interlinked protocols because they provide for the efficient despatch of both asylum and Hague procedures where there are parallel claims. It is important that these guides, and the detailed requirements that they impose, are well known to each and every lawyer who may be engaged in such a case, whether in the immigration process or in the Family Division. Whilst we have not conducted an audit of the present proceedings in order to establish in detail what went

awry, it is apparent that there was a significant failure to follow the procedure that has been laid down, with the result that it is only now, nearly two years after the mother made her asylum claim, that the immigration process has run it course and, separately, a final hearing has been achieved in the Hague proceedings.

Return order under the 1980 Hague Convention prior to determination of asylum claim

81. The Secretary of State for the Home Department has sole responsibility for both examining and determining protection claims. All decisions relating to protection claims fall within the exclusive powers of the Secretary of State. The court cannot trespass on the Secretary of State's exclusive function.

82. In *G v G* the Supreme Court considered the prohibition of refoulement in Article 33 of the 1951 Geneva Convention. Lord Stephens referred to the protection from refoulement whilst a claim for asylum was being considered by the SSHD provided by article 7(1) of the Procedures Directive (*Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status*) and Article 21 of the Qualification Directive (*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*).

83. In his analysis, Lord Stephens relied heavily on the Qualification Directive and the Procedures Directive as being effective as a matter of retained EU law, a point that was conceded by the SSHD in *G v G*. More recently in *R (AAA (Syria)) v Home Secretary* [2023] UKSC 42, Lord Reed and Lord Lloyd-Jones (with whom the other three SCJ's agreed) concluded that the Procedures Directive did not have the effect in

the domestic law of the United Kingdom as retained EU law [paragraph 148]. They accepted that the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 was designed to repeal retained EU law relating to immigration. Mr Harrison submitted that the decision in *R (AAA (Syria))* undermines the conclusion in *G v G* that, if a return order is made, the court must stay implementation while refugee status is maintained.

84. Mr Harrison relied upon *Re S (Children) (Child Abduction: Asylum Appeal)* [2002] EWCA Civ 843, in which the Court of Appeal held that the prohibition on removal (which commences when a person makes a claim for asylum and ends when the SSHD gives notice of the decision on the claim under s15 of the Immigration and Asylum Act 1999) was directed towards the immigration authorities alone and did not create any exception to the obligations arising under the 1980 Hague Convention.

85. In the present case, the mother made a claim for international protection with the children as dependents. As we have said, decisions to refuse the claims made have been made by the Secretary of State. The subsequent appeals to the FtT were dismissed by a panel of FtT judges for reasons set out in their decision promulgated on 25 March 2024. Permission to appeal to the Upper Tribunal has been refused by the FtT and on renewal, by the Upper Tribunal. The question whether the implementation of any return order should be stayed does not, therefore, arise in these proceedings and we are consequently not required to address the prohibition of refoulement in Article 33 of the 1951 Geneva Convention that was considered in *G v G.*

86. Our attention has however been drawn to the decision of Mrs Justice Knowles in *A Local Authority v A* [2024] EWFC 110 (Fam). Knowles J referred to the decision of

the Court of Appeal in *Re S (Children) (Child Abduction: Asylum Appeal)* and to the reasoning of Lord Stephens in *G v G*. She also drew upon the obiter observations made in a judgment of Keegan LCJ in the Court of Appeal in Northern Ireland*, In the matter of AB (Minor)* [2023] NICA 37, in which it was suggested that a stay of implementation of return of a child to Switzerland should not have been granted pending the determination of the asylum claim in proceedings concerning a child who was habitually resident in Switzerland, and who had been abducted to Northern Ireland by his mother (an Eritrean national) who then made a claim for asylum, naming him as her dependent. The circumstances in *AB (Minor)* were unusual because the international protection claim was based on a fear of persecution in Eritrea where the return of the child was to Switzerland and the Swiss authorities had provided reassurance that the mother and child did not face refoulement and would be afforded sufficient protections and support in Switzerland. Mrs Justice Knowles said:

> "I find myself drawn to the analysis in *AB* which recognises a different reality now applying to the determination of asylum claims from that which Lord Stephens considered in *G v G* in early 2021. Though the decision in *AB* is not binding on me, it is highly persuasive, emanating as it does from the Lady Chief Justice of Northern Ireland. The analysis of immigration law in *AB* is also likely to be on all fours with that in England and Wales which adds to the importance of that decision. Though I have not heard detailed argument on the point, *AB* is authority for the proposition that, as appears from the Supreme Court's decision in *R (AAA)*, the Procedures Directive is no longer part of retained EU law in this jurisdiction. Thus, the reliance by Lord Stephens on article 7 of that Directive may no longer be sustainable as a matter of statute. Further, the amendments to section 77 of the Nationality, Immigration and Asylum Act 2002 which came into effect from 28 June 2022 and the amended paragraph 329 of the Immigration Rules operate together to rescind the positive obligations flowing from article 7 of the Procedures Directive which played so significant a role in Lord Stephen's decision. The interlocking effect of these developments appears to confine safeguards in the immigration process to that process alone so that, as *In re S* (2002) held, those safeguards do not fetter a judge considering an application under the Hague Convention. Thus, the dicta from *In re S* (2002) cited in paragraph 113 of *G v G* appear to have been given new life by developments since *G v G* was decided."

87. Although we recognise the force in what is said by Mrs Justice Knowles and in the submissions made by Mr Harrison, and by Ms Tyler on behalf of the children's guardian in this respect, we have heard no submissions from the Secretary of State as to whether the statutory framework post-Brexit has an impact upon the protection from refoulement whilst a claim for asylum remains outstanding before the Secretary of State and on appeal to the Tribunals. There is no need to decide the issue in the present case, and we do not do so. It is, however, in our judgment, a matter that warrants full argument in an appropriate case.

88. We would, however, stress that, if parties act, as they must, in accordance with the guidance that has been issued since the decision of the Supreme Court in *G v G*, and to which we have made reference in paragraphs [75] to [79], there is no reason why, in all but exceptional cases, any claims made to the Secretary of State and any proceedings dealt with under the 1980 Hague Convention, cannot be completed within (or close to) six weeks of the date of the application.