IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2020/0191**

ON APPEAL FROM:
THE COURT OF APPEAL (CIVIL DIVISION)
***G v G* [2020] EWCA Civ 1185**

BETWEEN:

[redacted]

Appellant

and

[redacted]

Respondent

and

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE
(3) INTERNATIONAL CENTRE FOR FAMILY LAW, POLICY AND PRACTICE
(4) SOUTHALL BLACK SISTERS
(5) UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(6) INTERNATIONAL ACADEMY OF FAMILY LAWYERS

Interveners

WRITTEN CASE ON BEHALF OF
INTERNATIONAL ACADEMY OF FAMILY LAWYERS ("IAFL")

Introduction

1. The IAFL is grateful to the court for permitting its intervention in this case, pursuant to its order made on 13 January 2021, granting permission to participate through 20-page written submissions, to be filed on 18 January 2021.

The IAFL

2. The IAFL (formerly the International Academy of Matrimonial Lawyers, whose name was changed in 2015) was formed in 1986 to improve the practice of law and the administration of justice in the area of divorce and family law throughout the world. It is a not-for-profit association incorporated in the United States. The IAFL

is a worldwide association of practising lawyers which currently has over 860 "Fellows" in 59 countries, each of whom is recognised in his or her country as an experienced and skilled family law practitioner.

3. IAFL Fellows have made presentations in Europe, North America, Australia and Asia in relation to legal reforms. The IAFL has sent its representatives to participate in relevant international conferences, often as non-governmental experts, and has observer status at the Special Commissions on the Hague Convention, sending representatives to all of the meetings. Its Fellows have also written and lectured widely on the Hague Convention and related topics, such as the relocation of children across state borders.

4. The IAFL has intervened, by way of amicus curiae briefs, in the United States Supreme Court cases of *Cahue v. Martinez*, 137 S. Ct. 1329 (2016); *Lozano v. Montoya*, 134 S. Ct. 1224 (2014); and *Monasky v. Taglieri*, No. 18-935 (2019). The IAFL was granted intervener status in the Supreme Court of the United Kingdom in *In the Matter of AR*, (Children) (Scotland) UKSC 2015/0048 and *In the Matter of NY*, (A Child) UKSC 2019/0145. The IAFL has intervened in the Cour de Cassation of France, *Bowie v. Gaslain* (No. T 15-26.664). Additional amicus briefs have been filed in lower courts in various jurisdictions.

5. Further, the IAFL has recently sought permission to intervene in a similar case pending in the Ontario District Court which will hear the request next month. The IAFL comprises practitioners across a wide range of jurisdictions with direct knowledge of cases of the type under appeal, notwithstanding their apparent rarity.

6. Counsel and solicitors representing the IAFL in this case do so *pro bono*.

The IAFL's intervention

7. In this intervention, the IAFL seeks to assist the court by drawing to its attention some general observations of relevance to the matters in this appeal, before

offering a number of specific comments in respect of each of the three issues. Those observations are, it is submitted, consistent with the obligations arising under article 30.3 of the 1969 Vienna Convention on the Law of Treaties, noting in particular that the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (**"the 1980 Hague Convention"**) is (i) the later treaty; and (ii) directed to addressing the best interests of children generally in being restored, expeditiously, to their "home" following abduction.

General observations

Child abduction: a scourge

8. Child abduction is a scourge. In the words of the Lord Chief Justice, Lord Judge, in *R v Kayani* [2011] EWCA Crim 2871, [2012] 1 WLR 1927, para 54,

   "*The abduction of a child from a loving parent is an offence of unspeakable cruelty to the loving parent and to the child or children…*".

9. The "*unspeakable cruelty*" is one that can cause irreparable harm: tearing children away from loving parents, with all the emotional and developmental consequences of that. In practical terms, it may often mean a child not only taken from her parent, but a child removed from her primary carer, her broader family, her school, her language, her social and support network and, indeed, all sense of security and stability.

10. An act of abduction is a unilateral act. In the context of most cases under the 1980 Hague Convention it is an act designed to alter the habitual residence of a child and, consequently, all the routine touchstones by which the day-to-day life of that child is defined. Determination of where and how a child shall live is an act of parental responsibility; in cases of abduction it is a unilateral exercise of parental responsibility in breach of the rights of another holder of parental responsibility (often, the second parent). That is a topic returned to below: see **Parental**

responsibility. The relief – and the procedure applicable to the obtaining of that relief – is focussed on correcting that wrong as expeditiously as practicable.

11. Indeed, the United Nations Convention on the Rights of the Child is express in its call for the establishment of international cooperation to fight this scourge. In particular, article 11 ("*(1) States Parties shall take measures to combat the illicit transfer and non-return of children abroad. (2) To this end, States Parties shall promote the conclusion of bilateral or multilateral agreement or accession to existing agreements*") and article 35 ("*States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.*").

12. Legal frameworks exist, both in domestic and in international law, to make available that relief. The present case is concerned with one such framework, the 1980 Hague Convention. But the principles determined in the present case must be equally applicable to the other frameworks. That includes, on the international plane, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; and, in the domestic context, applications for summary return, both under the inherent jurisdiction and the Children Act 1989. This appeal, then, touches on the ability of each of those to provide relief for the benefit of the abducted child.

13. The purpose of the 1980 Hague Convention is to ensure that such children be *summarily* returned. Article 1 of the 1980 Hague Convention identifies its object as being "*(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State*" and "*(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.*"

14. In *E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, Lady Hale and Lord Wilson (giving the judgment of the court) described the objectives of the 1980 Hague Convention in these terms (para 8),

"…The first object of the convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there".

15. That concept too is picked up on in the explanatory report of Professor Elisa Perez-Vera (an aid to construction recognised in international law and in particular under article 32 of the 1969 Vienna Convention) who explains (para 11),

"With regard to the definition of the Convention's subject-matter, we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child".

16. That purpose remains untouched by the end of the Brexit transition period.[1]

17. Unsurprisingly, the abduction of a child also has consequences in criminal law. Whilst the present case is concerned with an "incoming abduction", many cases concern (including those dealt with by our courts, both under the inherent jurisdiction and the Children Act 1989) "outgoing abduction", i.e., the wrongful removal or retention of a child from this jurisdiction. The abduction of a child may give rise to the commission of numerous offences: (i) under sections 1 (removal of a child from the UK without permission) and 2 (taking or detaining a child) of the Child Abduction Act 1984; (ii) kidnapping, contrary to common law; and (iii) false imprisonment, pursuant to common law. It is understood that equivalent criminal offences exist in many other countries.

18. The court is invited to bear in mind the extent of the harm of child abduction and the criminal consequences of it when considering the interface between child abduction and asylum law.

[1] Whose abduction impact in this context is limited to the removal of article 11 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility in "European" (except Denmark) abduction cases.

Parental responsibility and "doubling down"

19. To date in these proceedings, very little consideration appears to have been given to, or emphasis placed upon, parental responsibility.

20. In our domestic law:

    a. in simplified terms (and not, for the purposes of this explanation, taking account of the more complex position in respect of adoption and children conceived by non-traditional methods), a mother always has parental responsibility and a father who was at the time of birth married to the mother or has otherwise obtained parental responsibility in accordance with the Children Act 1989 (including being named on the birth certificate, or having entered into a parental responsibility agreement) has parental responsibility too: section 2 (1) – (2), Children Act 1989;

    b. a holder of parental responsibility has "*all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property*": section 3 (1), Children Act 1989;

    c. "*by law*" refers both to common law and "*to those statutory provisions which give rights etc to parents, such as the Marriage Act 1949, which gives them the right to withhold consent to the marriage of a 16 or 17-year-old child*" (para 20), *In the matter of D (A Child)* [2019] UKSC 42. The various terms which relate to parental authority and obligations were consolidated in the Children Act 1989. As Lady Hale explained in *Williams and another v London Borough of Hackney* [2018] UKSC 37, "*The concept of 'parental rights and duties', 'parental powers and authority' and similar phrases used in statute and common law are replaced with 'parental responsibility', defined in section 3 (1)* [CA 1989]" (para 18).

21. A useful summary of the shape and functioning of parental responsibility at common law was provided by Wall J in *A v A (Children) (Shared Residence Order)*

[2004] EWHC 142 (Fam), [2004] 1 FLR 1995. Wall J appended to his judgment a checklist of actions taken as part of one's parental responsibility, traversing the spectrum from (i) "*decisions that could be taken independently and without any consultation or notification to the other parent*" (such as personal care and how children are to spend their time during contact) to (ii) *"decisions where one parent would always need to inform the other parent of the decision, but did not need to consult or take the other parent's views into account"* (for example, emergency medical treatment and planned GP visits) culminating in (iii) "*decisions that you would need to both inform and consult the other parent prior to making the decision"* (choice of school; holiday contact rotas; and planned medical and dental treatment). Whilst only examples, these are illustrative of the point that parental responsibility, to use the words of Lady Hale in *Williams* [2018], "*encompasses all the rights of a parent"* (para 38); and that the more significant the decision, the greater the input required from other holder(s) of that parental responsibility.

22. The act of abduction – the removal or retention of a child, in conflict with another's rights – is a unilateral act of parental responsibility *par excellence*, usually taking the form of a parent moving a child across borders, or retaining her abroad, without the permission of the second parent.

23. Within the specific context with which the present appeal is concerned (namely, the 1980 Hague Convention) for a case to fall within the subject-matter jurisdiction article 3 must be satisfied. Article 3 reads,

> *"Article 3*
>
> *The removal or the retention of a child is to be considered wrongful where -*
>
> *a) it is <u>in breach of rights of custody</u> attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."* (Emphasis added).

24. As such, a wrongful removal or retention is linked to "*rights of custody*", tying abduction to parental responsibility even beyond the parameters of our domestic law.

25. What, then, of the making of an application for asylum: be that either assisting the child to do so independently, or naming the child as a dependant?

26. Such a step commonly involves, in the case of a dependant child, attending an asylum intake unit with her parent to apply and undergo a screening process. The dependant child may be interviewed; most children aged 12 or older will be. Interviews for children under 12 may be conducted with safeguards. Child applicants for asylum follow a different, specific procedure with a welfare interview and a series of checks. Fingerprints are taken for all children over five. Children under five have their photographs taken. The relevant local authority is notified, and a welfare assessment is conducted. The child and the application are referred onto relevant organisations: Secretary of State's Children's Asylum Claims (Version 4.0) (Updated Dec 2020).

27. It is plain, then, that asylum applications (independently made or as a dependant: with the Court of Appeal's conclusions in the present case attracting the future unscrupulous abductor to the former) almost invariably involve significant acts of parental responsibility. Often those too are taken unilaterally. It is notable that there is no reference to the left-behind parent (or the input of that parent) in the 1951 Geneva Convention and attendant 1976 Protocol, the Qualification Directive, the Procedures Directive, the Immigration Rules or the relevant Home Office guidance.

28. In that context is it important – and, one might think, startling – to consider the immense consequence of the effect of the second unilateral act (the first being the abduction itself). It will, in many circumstances, not only cause the child not to be returned, but to make her non-*returnable*: see Court of Appeal's judgment, paras

118 and 128. To use an American phrase, the abducting parent has capacity, by removing the available relief, to "double down" on the harm caused to the child.

29. Indeed, it is difficult to think of any other decision in our domestic law taken by a parent in respect of a child which cannot be prevented or undone by a family court. It is more striking still when one pauses to note that this decision is drastically to change every element of a child's life.

30. In fact, the control of the exercise of a person's (normally a parent's) parental responsibility is a central and day-to-day function of the family courts. That is both in the context of children who are competent to make their own decisions (see, for example, the decision of the House of Lords in *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112) and, importantly for present purposes, in cases where the court considers that parental responsibility is or will be exercised other than in the children's best interests (either in private law proceedings or, where the test in Part IV of the Children Act 1989 is met, public law proceedings). The discussion of Sir Thomas Bingham MR, Auld and Wald LJJ in *Re Z (A Minor) (Freedom of Publication)* [1995] 2 All ER 961 emphasises the point: see, for example, "*When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say the welfare of the child*" (985 f), citing *Re K D (A Minor) (Ward: Termination of Access)* [1988] 1 All ER 577, at 588.

31. The analogous situation in *Y (Children In Care: Change of Nationality)* [2020] EWCA Civ 1038 also illumines. In that case, a unilateral act to secure nationality (there, by a local authority using its parental responsibility) was deprecated. Peter Jackson LJ held (para 18),

> "*Every local authority will encounter situations where action is needed to secure the immigration position of a child in its care. In some cases an application will be made for leave to remain. In others it may be possible for a child to have dual citizenship. These cases, where the child is gaining a benefit and losing nothing, are to be contrasted with cases where a child may lose his or her original nationality. In those cases, the issue is of a magnitude that cannot in my view be resolved by a local authority acting*

in reliance upon its general statutory powers. In the absence of parental consent, it requires a decision of the High Court under its inherent jurisdiction. That is so whether the issue arises within or outside proceedings."

And (para 23 (1)),

"… Changing a child's citizenship is a momentous step with profound and enduring consequences that requires the most careful consideration." (Both, emphasis added).

32. The only answer to that is to say that permitting abduction unilaterally to be made irreversible is a necessary consequence of there being a risk sufficient to grant the conferral of refugee status. But that argument becomes hard to sustain in circumstances in which *either* the risk is linked to being in the care of the abducting parent *or* the "risk" would not, if considered on an *inter partes* basis, with full evidence, be made out. The second is self-explanatory; the twice-cited example by the appellant of female genital mutilation (see the appellant's case, paras 85 and 100) is instructive in respect of the first. In that scenario, it is entirely plausible that the risk is linked to a child being in, say, her mother's care (situated within a particular socio-cultural or ethnic background), with it disappearing if instead cared for by her father (from a very different culture). As it stands, in circumstances such as that, the child and father are deprived of meaningful access to a family court (or family courts) capable of implementing decisions in respect of the return of and (subsequently) appropriate care for the abducted child.

33. But the picture may be more disquieting still. It is, again, entirely plausible that, not only is making the child non-returnable not required by the risk presented, but that the left-behind parent may be unable, for whatever reason (financial; family; immigration), to come to the country in which the child will now remain. To think that such a position could be achieved through two unilateral acts of parental responsibility not only seems unfair (in a descriptive sense) but must raise concerns in respect of the articles 6 and 8, ECHR rights of both the left-behind parent and the child. These are rights with which, of course, a public authority is bound to act compatibly: section 6 (1) of the Human Rights Act 1998. These are principles of equal weight to that of non-refoulement.

34. It is perhaps for such reasons that absolute bars and inflexible tests are not much found in children law. Examples abound of the courts resisting absolute bars otherwise applying in civil proceedings: from the dislodging of the fundamental public policy principles of *res judicata* (highlighted, for example, by the non-finality of children orders) to the relaxation of the *Ladd v Marshall* test in respect of fresh evidence on appeal (in respect of which see, for example, *Re E (Children: Reopening Findings of Fact* [2019] EWCA Civ 1447, [2020] 2 All ER 539).

35. All of this gives rise to another matter which does not appear yet to have received consideration: working on the proposition that an application for asylum is an act of parental responsibility, it is, prior to its determination by the Secretary of State, potentially one that can be restrained by an order regulating the applicant parent's exercise of parental responsibility either under s 8 of the Children Act 1989 or the inherent jurisdiction, in which the child's welfare would be paramount, thus compelling the court to consider the underlying facts and the competing merits of the abduction and asylum claims.

Interface between child abduction and asylum law

36. Much of the Court of Appeal's judgment is devoted to an examination of the interface between child abduction under the 1980 Hague Convention and asylum law, with attention given to four categories of case. Those being: (i) a child who has had her refugee status recognised by the Secretary of State; (ii) a child who has made an independent application for asylum, pending determination; (iii) a child who has made an independent application for asylum which was refused, but is being appealed, pending determination of the appeal; and (iv) a child in respect of whom no independent application for asylum has been made, but who has been name as a dependant by a principal asylum applicant (all, see para 115 of the Court of Appeal's judgment).

37. The present case is concerned with category (iv) – and it is that which forms the principal subject-matter of this appeal. In respect of category (iii), the Court of

Appeal felt able to make no conclusive observations (paras 132 – 136 of the Court of Appeal's judgment). The Court of Appeal's views in respect of categories (i) and (ii) are technically *obiter* (albeit the case at first instance was decided on what proved to have been an incorrect factual basis – category (ii)). Nevertheless, they were reached after full argument and will, no doubt, be given significant weight by courts moving forward.

38. In case it assists this court when considering the matter more generally, and despite the (understandable) absence of a cross-appeal by the respondent, the IAFL summarises its concern in respect of the consequences of the conclusions reached by the Court of Appeal in respect of categories (i) and (ii).

39. First, it is apparent that the determination of category (i) and (ii) cases requires the resolution of the tension between domestic and international principles of, on the one hand, children law (which emphasise the need for the child to be returned "home" on as expedient a basis as practicable, with longer-term investigations and decisions to be made there) and, on the other, asylum law (in particular, the principle of non-refoulement and the procedural protections within the process of asylum). Naturally, as an organisation comprised of family law practitioners with particular experience in the deleterious consequences of child abduction, the IAFL is concerned that the Court of Appeal's decision might be utilised as an "abductor's charter".

40. Secondly, in distinguishing our domestic decision-making framework from that in other signatories to the 1980 Hague Convention, the Court of Appeal's *obiter* conclusions act to set this jurisdiction apart from many of our cousins around the globe. In particular, the IAFL draws to this court's attention the fact that, of the 101 countries which are currently parties to the 1980 Hague Convention, very few countries join the United Kingdom in having changed the approach to child abduction on the basis of asylum law and principles.

41. In Costa Rica, a hard rule does appear to have been drawn. There, in a case for which there is no full report in English, the matter was eventually determined by

the Constitutional Court. In many respects, the facts of that case are the "poster boy" for the abuse of asylum protection. The family lived in New York. The mother had made repeated claims of sexual abuse which had been rejected by the police, the court-appointed psychologists, and the other authorities involved. The court-appointed psychologist diagnosed the mother as suffering from Munchausen syndrome by proxy and that she was a risk to the child. The father was awarded sole custody. During summer contact with the mother (and despite an order in respect of non-removal) the mother took the child to Costa Rica, having obtained false passports. There they hid for close to a year under different identities. The child was placed in a shelter run by children's services. The father applied for return under the 1980 Hague Convention; the mother applied for asylum. In a long judgment, whose logic is not immediately understandable to the British lawyer, the Constitutional Court held that the 1951 Geneva Convention and 1980 Hague Convention must exist simultaneously in harmony, but that the child would not be returned. Given that neither the mother nor the child had any connection to Costa Rica, and that they were there only because the mother had found a website promoting Costa Rica as a place where mothers dissatisfied with child custody decisions could seek refuge, one might question the outcome in welfare terms.

42. A slightly different approach has been adopted in Canada, which is a party both to the 1980 Hague Convention and the 1951 Geneva Convention. There, the Court of Appeal for Ontario has ruled, in *AMRI v KER* [2011] ONCA 471 that, whilst there is no absolute bar, deference must be given to the asylum decision-maker, with factual findings acting to reverse the burden of proof in the abduction proceedings in respect of article 13 (b), 1980 Hague Convention (article 13 (b) being a defence to return in circumstances in which there is a grave risk that the child's return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation).

43. In the USA, the leading case of *Sanchez v R.G.L, 761 F.3d 495 (5th Cir. 2014)*, heard by the US Court of Appeals for the Fifth Circuit, concerned three children taken without their mother's permission from Mexico to the USA by their aunt and

uncle, who requested refugee status for them. The children were subsequently granted asylum by the US Citizenship and Immigration Services. On appeal, it was held by the majority that whilst the grant of asylum was binding on the Attorney General and the Secretary of State for Homeland Security, it was not on the courts, with that grant not capable of superseding the scheme under the 1980 Hague Convention. Instead, it was relevant, as in Canada, to the article 13 (b), 1980 Hague Convention question.

44. In another US case, *Diaz Palencia v Velasquez Perez, 921 F.4 1333 (2019),* the District Court granted a father's petition for return to Guatemala under the 1980 Hague Convention despite the mother having filed an asylum application for herself and the child. That decision was upheld on appeal. In the 2020 case of *Da Silva v De Aredes*, *953 F.3d 67 (1st Cir. 2020)* the Court of Appeals upheld a first-instance return order to Brazil, despite the mother having filed an application for asylum in her name and that of the child.

45. Thirdly, at paras 121 – 124, the Court of Appeal distinguishes the schemes discussed in the foreign case-law from our domestic arrangements primarily on the basis that, whilst it is "*not unusual that administrative and/or judicial decision-makers with different functions are required to make possibly overlapping decisions but in accordance with the evidence before them (which may well not be the same as that available to another decision maker exercising a different function) and the substantive and procedural provisions of the statutory scheme under which they are operating, albeit against the backdrop of the same factual matrix*" (para 122), the courts (meaning, in particular, the High Court (Family Division) dealing with the 1980 Hague Convention applications) must not intervene in a process (decisions in respect of asylum applications) which has been assigned to the Secretary of State (paras 123 – 124).

46. Whilst that contention, as a matter of principle, is not one with which the IAFL would raise issue, the IAFL would make the following observations:

a. 1980 Hague Convention proceedings, while summary in nature, are subject to the fundamental principles of fairness to each party and due process. Opposing sides must be notified of the proceedings and given an opportunity to be heard. Oral testimony may be heard, witnesses can be cross-examined and evidence must meet the standards required by law to ensure that it is credible and probative. Where children are involved, a guardian may be appointed and the child's wishes ascertained;

b. in the application for asylum, the applicant's documentation is not subject to strict rules of evidence or challenge by an opposing party. The left-behind parent is not privy to the nature of the information relied on, may in fact be denied access to it (if he is regarded as the persecutor) and is certainly unable to challenge such information. It is foreseeable that factual matters relied on by the abducting party in making their asylum application will be disputed by the left-behind party; it is similarly foreseeable that the availability and sufficiency of protective measures in relation to any established risk may be disputed by the left behind party;

c. the standard of proof applied in substantiating material facts in an asylum application is relatively low, it is a "reasonable likelihood": para 4.1, Secretary of State's Asylum Policy Instruction: Assessing Credibility and Refugee Status (Version 9.0) (January 2015);

d. as noted at para 33, above, there is a concern, in particular, in respect of the article 8, ECHR rights both of the left-behind parent and the child. Whilst article 8, ECHR contains no explicit procedural requirements, it is well-established that the decision-making process involved in measures of interference must be fair and sufficient to afford due respect to the interests safeguarded by article 8 (see, for example, *Petrov and X v. Russia* no. 23608/16, 23 October 2018);

e. it is foreseeable that an abducted child (or a guardian appointed to represent the interests of the child) might, in fact, be opposed to the making of an application for refugee status on their behalf or the grant of refugee status or might have some highly pertinent case to present in the 1980 Hague Convention application. An absolute bar prohibits the abducted child articulating or having articulated on their behalf any such case or any opposition or different approach to the asylum application or grant of refugee status;

f. 1980 Hague Convention proceedings are, in appropriate cases, able to permit some significant fact-finding: in this jurisdiction, for example, in *X v Y and X Police Force* [2012] EWHC 2838 (Fam); and in other jurisdictions too, for example in Canada, in *Sabeahat v. Sabihat*, 2020 ONSC 2784, which is a case in the Canadian State of Ontario (in which the IAFL has sought to intervene). In *Sabeahat* the first-instance judge determined the 1980 Hague Convention application (against a background of refugee status having been afforded to the children) and was able to hear evidence from the parties and other witnesses before making express findings (which overlapped with the basis of the asylum applications) as to the father's history of domestic violence, the risk of further such violence and that a grenade attack was linked to the mother's application for protective orders such that there was a grave risk of physical or psychological harm to the children or that they would otherwise be placed in an intolerable position. Summary return was refused. The left-behind father was, however, able fully to participate and be heard in the application. Similarly, in *Re H (Child Abduction: Mother's Asylum)* [2003] EWHC 1820 (Fam); [2003] 2 FLR 1105., the court was afforded an opportunity to address the availability and sufficiency of protective measures.

47. Of course, that asylum law and its procedure are open to the risk of abuse to the extent that they impact on abducted children is entirely unsurprising. The 1951 Geneva Convention and the law that has flowed steadily from it are not aimed at

dealing with family breakdowns, marital disputes or wrongfully retained / removed children. They are ill-suited to being pressed into that service.

Article 20, 1980 Hague Convention

48. The IAFL strongly endorses the approach of the Court of Appeal that the ambit of article 20 of the 1980 Hague Convention should be narrowly drawn. In particular, the IAFL (i) commends the words of the US District Court, Northern District of Illinois, which in the case of *Walker v Kitt, 900 F.Supp.2d 849 (2012)* held, "*To invoke article 20 to refuse to return a child for anything less than gross violations of human rights would seriously cripple the purpose and effectivity of the Convention*" (p 864); (ii) notes that the widening of the provision would have broad and significant consequences, striking at the very heart of the principle of comity (after all, it is hard to see one can judge another country as failing to uphold fundamental freedoms in case A, and then order the return of a child in case B; indeed, one questions whether the effect would be the *de facto* exclusion of a country so judged from the 1980 Hague Convention); and (iii) draws to this court's attention that, in *Walker v Kitt*, it was recorded that neither the court nor the respondent had been able to find a single non-return decision from a US court based on article 20 (p 863).

49. Further, the IAFL would wish to associate itself with the points made on behalf of the respondent in respect of article 20 at paras 39 – 43 and 85 – 90 of the respondent's case.

Specific observations in respect of the first issue

50. Irrespective of the IAFL's broader concerns, the IAFL agrees with the Court of Appeal's conclusion in respect of category (iv) cases at para 137 of its judgment. On this central point, the scope of disagreement between the two parties to this appeal is in fact relatively limited, with it being agreed between the two parties that:

a. a refugee who falls within article 33 of the 1951 Geneva Convention (**"an article 33 refugee"**) is protected from non-refoulement;

b. that protection inheres in an article 33 refugee, even if yet to be formally recognised as such (see respondent's case, para 48);

c. an asylum applicant is, during the currency of the application, protected from removal: section 77 (1), Nationality, Immigration and Asylum Act 2002.

51. Really, their dispute centres on a narrow point: whether a child named as a dependant in a parent's asylum application is covered by non-refoulement in circumstances in which the child may (or may not) be an article 33 refugee.

52. The appellant casts her net in broad terms. See, for example, her introduction to it, "*… the Appellant submits that a child named as a dependant on a parent's asylum can have protection from refoulement where there are circumstances that indicate that the child may have an independent protection claim*": appellant's case, para 3 (emphasis added).

53. That broad net catches both article 33 refugees and others. Whilst the article 33 refugees are, according to the parties to this appeal, protected, it is plain that the others are not. The question, really, becomes whether the Secretary of State is the sole decision-maker as to who is what within that net.

54. The IAFL invites this court to consider whether, in an overlapping abduction / asylum case, in which the child is not herself an asylum applicant, there is any principled reason why the 1980 Hague Convention judge cannot consider the underlying facts, as against the tests for the definition of refugee and non-refoulement in the 1951 Geneva Convention, so far as they are relevant to the dependant child. It is far from apparent that the obligation in article 21 of the Qualification Directive – namely, "*Member States shall respect the principle of non-refoulement in accordance with their international obligations*" – would be in any way offended by such an approach.

55. When considering that, the court is invited to bear in mind the observations generally made in this intervention, including that such an approach would serve to limit, at least in the category (iv) cases strictly before this court, the dissonance brought about by the Court of Appeal's conclusions between England and Wales and its cousins across the globe.

Specific observations in respect of the second issue

56. The IAFL would be concerned about the practical impact of bringing forward any bar currently applicable to the point of implementation to an earlier stage of the proceedings. The IAFL agrees with the points made by the Court of Appeal at paras 142 – 145 of its judgment; and would additionally note:

    a. in making and implementing a return order, the court is obliged to have regard to (i) the child's refugee status, or potential refugee status where an application is pending; (ii) the prohibition against refoulement arising from article 33 of the 1951 Geneva Convention; and (iii) domestic obligations arising from the grant of refugee status or any application for such status;

    b. at the time that the 1980 Hague Convention application is heard, the factual circumstances giving rise to the grant of refugee status or the grounds in support of an application for such status may have altered significantly such that, for example, a prior risk of persecution had passed;

    c. ultimately, on the particular facts of a given case, if a refugee faces no risk of persecution in his or her country of nationality, removal to that country is not prohibited. There is no reason why a return order, if the 1980 Hague Convention judge determines that there is no such risk, should not be made (and, indeed, implemented);

    d. alternatively, where the judge determining the 1980 Hague Convention application comes to such a conclusion, it may be appropriate to alert the

Secretary of State to that conclusion where it appears that the grant of refugee status was made on the basis of the abducting parent's "misrepresentation or omission of facts" such that, pursuant to article 14 of the Qualification Directive, that status should be revoked. Similarly, any such conclusion would be relevant to a pending application.

Specific observations in respect of the third issue

57. The IAFL sees great merit in the Court of Appeal's observations at paras 155 – 161 of its judgment. In particular, given the pressing focus of expedition that is central to child abduction frameworks, including the 1980 Hague Convention, the guidance that "*the High Court should be slow to stay any application prior to determination*" (para 154).

Conclusion

58. Whilst neutral as to the outcome of this appeal, the court is invited to consider the matters set out in this document on behalf of the IAFL.

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Signature(s) **17 January 2021**

Mark Twomey QC **Sarah Tyler** **Alexander Laing**