33 Bedford Row

The Family Team at 33 BEDFORD ROW
Invite you to attend

FAMILY LAW SEMINAR 2022

27TH JANUARY 2022
FROM 6PM TO 7.30PM

CONWAY HALL
25 Red Lion Square, London WC1R 4RL

Registration and welcoming drinks from 5.30pm

Lectures commence at 6pm

Followed by canapes and beverages at the venue

CHAIR PERSON
Deborah Bryan *- Deputy Head of Chambers*

PROGRAMME

1. **Fact Finding hearings, Domestic Abuse, Coercive Control, Getting the most from Scott Schedules and your client**
   Jamil Mohammed

2. **From Hague Convention to the Home Office - Top tips for Family Practioners**
   Dr S Chelvan (Head of immigration and Public Law)

3. **Special Guardianship Orders, Grandparents and Recommendations of the Public Law Working Group**
   Elise Jeremiah

4. **Parental Orders, Surrogacy and Modern Families**
   Deborah Seitler (Head of Family)

Please contact Charlotte Cracknell to confirm attendance:
events@33bedfordrow.co.uk
T 020 7242 6476 DX 75 Chancery Lane

Approaching Fact-Finding hearings, Domestic Abuse and Coercive Control in Private Children proceedings

1.

PD12J: Defines Domestic Abuse as:

The purpose of this Practice Direction is to set out what the Family Court should do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic violence or abuse perpetrated by another party or that there is a risk of such violence or abuse.

For the purpose of this Practice Direction –

- 'Domestic violence' - includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse.

- 'Controlling behaviour' - means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

- 'Coercive behaviour' - means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.

Recognising Domestic Abuse:

F v M [2021] EWFC 4

The court's view is that the concept of coercive and/or coercive behaviour is central to the modern definition of domestic abuse.

The court endorses the recent judgment of Hayden J in F v M [2021] EWFC 4 as being of value both 'because of the illustration that its facts provide of what is meant by coercive and controlling behaviour, but also because of the valuable exercise that the judge has undertaken in highlighting at paragraph 60 the statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime

Act 2015 which identified paradigm behaviours of controlling and coercive behaviour. That guidance is relevant to the evaluation of evidence in the Family Court.'

A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

i) Is directed against, or witnessed by, the child;

ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;

iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men

2.

Not all unsavoury behaviour is abuse.

It is just as important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be *'abuse'* in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour.

The court endorsed the approach taken by Peter Jackson LJ in ***Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121 (paragraph 61):***

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict."

This is likely to be an issue that can only be decided by the trial judge but inevitably there will also be arguments in the early stages of proceedings as to whether the alleged behaviour is relevant to the safety of interim contact.

3.

Credibility - An individual does not need to be blameless to be the victim of domestic abuse.

- In Re H-N the Court of Appeal accepted the submissions of the mother's counsel that the hearing, rather than a fact-finding on the limited issues in dispute and a determination as to whether this was an abusive relationship, became a binary choice between:

- "[a] relationship characterised by the deeply-controlling father described by the mother, a relationship in which she was blameless and under his spell? Or [b] is the problem in this case the deeply-troubled mother with mental health difficulties unrelated to the father's behaviour and responsible herself for the wild, unboundaried behaviour described by the father?"

- The Court of Appeal was clear that *'It goes without saying that an individual does not have to be 'blameless' to be the victim of domestic abuse and neither was that the mother's case.'*

4.

Fact-Finding Hearings

A fact-finding hearing usually takes place in child proceedings where the parties are unable to reach an agreement and are making allegations against each other which the courts may feel needs to be addressed ahead of a final hearing in the family court.

It is important to note that the court will only list for a fact-finding hearing if it is satisfied that such hearing is required to determine the issues and not just because of the allegations between the parties or because it is recommended by Cafcass. If the court does not feel that that a fact-finding hearing is necessary, then the matter will usually proceed to a final hearing.

5.

When is a Fact Finding hearing necessary? (PD12J)

In paragraph 37 of the judgement Lady Justice King and Lord Justice Holroyde set out a four-stage approach to deciding if a fact finding necessary, as follows:

i. "The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a Child Arrangements Order and if so in what terms (PD12J.5).

ii. In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii. Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv. Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'.

A fact-find hearing is not relevant in every case. Usually, a fact find hearing is needed where there are allegations, and the courts will order a fact-find hearing if those allegations will affect the final outcome.

If the allegations will not alter the final outcome a fact find hearing should not be ordered.

6.

Relevance / Admissions

- Consider the relevance of each allegation.
- Consider the standard of evidence.
- Whether and to what extent admissions can be made.

If an allegation of domestic abuse has made and accepted, then a fact-finding hearing may no longer be necessary/proportionate if sufficient admissions have been made.

If the alleged perpetrator of domestic abuse was prosecuted and received a criminal conviction, it may be prudent to make admissions. (Unless if in process of appeal of conviction).

In summary:

- Court must be satisfied a fact find hearing is required. They are not listed because the parents want such hearings.
- If allegations are accepted no fact find hearing is required.
- Whether the nature and extent of allegations warrant a fact find hearing.
- Whether a separate hearing is required or whether issues can be considered in a final hearing.
- Whether to make tactical admissions when the evidence is overwhelming.
- Or can admissions be made on a basis.

  E.g., *'R accepts striking A on one occasion following an argument and being pushed and provoked by A. The children were in bed at the time and were not privy to the incident, R has regretted the incident ever since'*

7.

Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

Controlling and coercive behaviour has very much developed recently in respect how the Court takes this aspect of abuse into consideration in relation to private law Children Act proceedings.

The Court of Appeal handed down its highly anticipated decision in 4 conjoined appeals in Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 on 30 March 2021.

The appeals all raised issues related to consideration of allegations of domestic abuse in private law proceedings. The court took the opportunity to give more general guidance about matters which commonly arise in the Family Court and are of great importance.

The Court of Appeal has given updated and significant guidance on how the Family Courts should now deal with allegations of domestic abuse.

The approach should now be, moving away from focussing on specific allegations and instead focus on the wider context demonstrated by patterns of behaviours and conduct.

Re H-N summarized

- An appeal was allowed against case management orders made consequent upon the judge having declined to make a finding of rape and having indicated that certain admitted incidents of abuse against the mother should not be taken into account.
- The issue was whether the judge (HHJ Tolson QC) had failed to look at the pattern of control and the abuse which were demonstrated even on the basis of the father's admissions alone.
- It was held that the judge had discounted the father's admissions of domestic abuse perpetrated over a significant period of time and had underestimated the significance, both for the mother and for H-N, of the fact that the father had wrongfully retained H-N abroad for a period of 8 months.
- The judge commented that such allegations are 'increasingly common' and, whilst emphasising that he was not making a political point, expressed his belief that 'it is necessary to factor in the effects of a system which encourages allegations of domestic abuse'.
- The judge referred to what he regarded as the significant advantages to a litigant in 'portraying herself as a victim of serious domestic abuse' by reference to the availability of public funding in such circumstances and to what he described as 'professional sympathy'.

- The judge expressed the view that this mother is a victim of domestic abuse by virtue of the father's 'minor' admissions and expressed the hope that she would retain public funding for the next stage of the case. The Court of Appeal said such comments were inappropriate and should not have been made.
- The court found the judge's analysis to be seriously flawed in many respects and allowed the appeal.

In relation to coercive and controlling behaviour and PD12J: *Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448*, the court did not provide a specific definition of controlling and coercive behaviour. Instead, the court deferred to Hayden J's judgement in *F v M* ***[2021] EWFC 4 (Fam)*** where he set out the following:

"In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation."

8.

RIP Scott Schedules … Long Live the Scott Schedule

Scott Schedules in family proceedings are to be used when the court is being asked to make a finding about disputed allegations or facts. The schedule should:

- Give each allegation or item a number.
- Summarise the allegation or item.
- Summarise the position of all other parties on each allegation or item.
- Refer to any relevant evidence in the court bundle, both for allegation and response.

In family cases, Scott schedules are commonly used in cases involving factual disputes about:

- Domestic violence or abuse involving adults or children.
- Other injuries to children.
- The allocation of resources in financial disputes, including financial misconduct.

The schedule should list the following:

- The allegations made by one party.
- The other party's responses to those allegations.
- Relevant evidence in the court bundle on which each party seeks to rely, with page and paragraph numbers.
- Findings made by the court on each allegation or item (following conclusion of the hearing).

9.

The influence of Re H-N on Scott Schedules

Key to the judgement of King LJ and Holroyde LJ was the endorsement of the move away from Scott Schedules, which focus almost solely on specific factual incidents. From the represented parties the court heard a unanimous voice on the point that the value of Scott schedules in domestic abuse cases had declined so significantly as to become a potential barrier to fairness rather than an aid.

- Two main submissions were put forward in support of this. Firstly, it was submitted that there was a need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, rather than a list of specific factual incidents. The

Home Office

Operating instruction

Hague Convention cases

Version 1.0

 Published for Home Office staff on 12 July 2021

Contents

About this guidance

This guidance explains the procedure which you must follow when processing asylum claims involving children where there are concurrent Hague Convention proceedings in the UK High Court. It applies to all staff dealing with asylum casework and covers:

- notification of a case
- processing cases under the expedited process
- processing complex cases

Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email AsylumPolicy.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

Publication

Below is information on when this version of the guidance was published:

- version **1.0**
- published for Home Office staff on **12 July 2021**

Changes from last version of this guidance

This is new guidance.

Related content
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Introduction

This guidance relates to asylum decisions involving children where there are concurrent Hague Convention proceedings in the UK High Court. Any disclosure or information sharing is likely to be sensitive and must be done in compliance with caselaw and guidance as set out in the Disclosure and confidentiality of information in asylum claims guidance.

Background

The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980 (the Hague Convention) seeks to combat parental child abduction. States which are party to the Hague Convention (which includes the UK) have agreed to return children who have been either wrongfully removed from, or wrongfully retained away from, the State where they were habitually resident immediately before the wrongful removal or retention. These cases are dealt with in the UK High Court.

G v G [2021] UKSC 9 (19 March 2021)

This case concerned the inter-relationship between the UK's obligations under the Hague Convention and the principle of non-refoulement in asylum law. The Home Office intervened in the Court of Appeal (CoA) and the subsequent Supreme Court (UKSC) case to provide information about the operation of the asylum system.

The UKSC handed down its decision on 19 March 2021 (see the judgment G v G). Although the UKSC did not set standard directions specifying how the Home Office must determine a claim, the Home Office agreed to the creation of a specialist team within Asylum Operations to process and expedite asylum claims where there are concurrent Hague Convention proceedings.

Policy intention

The intention of this guidance is to:

- outline a clear procedure to expedite the processing of straightforward asylum claims within 30 days of the Home Office being notified of the relevant case
- be proactive in progressing claims
- where cases are more complex, maintain clear lines of communication with the Family Division of the High Court

Application in respect of children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements for ensuring that immigration, asylum and nationality functions are discharged having regard to the need to safeguard and

promote the welfare of children in the UK. The section 55 duty applies whether the child applies in their own right or as the dependant of a parent or guardian.

The statutory guidance, Every Child Matters – Change for Children, sets out the key principles to take into account in all actions concerning children. All decisions must demonstrate that the child's best interests have been a primary (albeit not necessarily the only) consideration. Disclosure and confidentiality is one of the factors to take in account when processing a child's asylum claim where there are concurrent Hague Convention proceedings.

You must carefully and sensitively consider cases involving children and whether and when it is appropriate to share information, for example in the interests of safeguarding. You must also be aware that there may be individual protection needs or safeguarding concerns for children who are part of a family seeking asylum. Therefore, depending on the individual circumstances, it may be appropriate to share information with third parties in the best interests of the child.

For further information, see also the Processing children's asylum claims instruction.

Safeguarding

You must be vigilant that a claimant may be at risk of harm and be prepared to refer cases immediately to the Asylum Safeguarding Hub. If you become concerned that a claimant may be in danger, you need to take immediate action to ensure their safety. In an emergency the case must be referred to the police without delay. The Safeguarding Advice and Children's Champion (SACC) can also offer specialist safeguarding and welfare advice on issues relating to children, including family court proceedings and complex child protection cases.

Related content
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Procedure

Notification of Hague Convention proceedings

In cases where there is an asylum claim involving a child (where a child is either making an application in their own right or as a dependant) the Home Office will be made aware of related Hague Convention proceedings by either:

- the High Court
- one of the parties as directed / ordered by the High Court

The agreed Protocol with the Family Division is that they will send notification to the Home Office's Status Verification, Enquiries and Checking (SVEC) team. SVEC at the earliest opportunity will;

- notify the Asylum Chief Casework Team (ACCWT) within 24 hours via the Asylum Operations CCWT mailbox and copy in Appeals, Litigation and Admin Review (ALAR) Litigation Operations
- include details of the case and instructions

In some instances, where there is an urgent court order, the Government Legal Department (GLD) may also receive notification from the Family Division of Hague Convention cases. In these circumstances GLD will also notify the ACCWT and ALAR as above.

Processing the asylum case: the Asylum Chief Casework Team

Day 1-3 the ACCWT will receive notification of the case from SVEC / GLD and will:

- allocate to the Expedited Team (this will initially be within the ACCWT itself until an assessment of the volume of relevant cases is made)
- notify safeguarding hub

The ACCWT will also act as the point of contact between the Expedited Team and SVEC (in most cases) and the Appeals, Litigation and Admin Review (ALAR) (for cases with GLD involvement). They will be responsible for:

- communicating any delay identified by the Expedited Team in processing the claim to SVEC / ALAR
- communicating any feedback or concerns from the Family Division (received through SVEC/ ALAR) to the Expedited Team
- notifying SVEC / ALAR of the asylum decision (in straightforward cases, day 31)

Once the ACCWT have been notified a case has been decided, the Decision-Making Unit (DMU) will be responsible for high-profile notifications or ministerial submissions.

Processing the asylum case: the Expedited Team

Day 1-3 – on receipt of the notification of allocation from the ACCWT / completing screening of asylum claim (whichever is later) the Expedited Team will:

- carry out an initial review to ensure that the claim is suitable for the Expedited Process
- ensure CID / Atlas are updated with the date of Day 1 (date of notification to the Home Office from the High Court or one of the parties as directed / ordered by the High Court)
- ensure the Safeguarding hub are aware of the case

Where the case is established to be straightforward and able to be dealt with under the Expedited Process and within 30 days, the indicative timetable to be followed by the Expedited Team is:

- day 4-5 - arrange a date for interview and issue an invitation to interview to the claimant
- day 12-18 - the substantive asylum interview takes place
- day 17-25 (5 working days after the asylum interview) - any further representations from the applicant / legal representative received
- day 26-30 - the asylum case is decided
- day 31 - the asylum decision is served

These indicative timescales may be varied as necessary, as long as the asylum decision is served by day 31.

The Expedited Team is also responsible for:

- actively monitoring the case and identifying any issues
- ensuring the ACCWT is informed of any delays in progressing the decision
- notifying the ACCWT when the decision is served

Processing the asylum case: Status Verification, Enquiries and Checking (SVEC) team

SVEC is responsible for:

- communicating information received from ACCWT to the Family Division about any delay to deciding the claim
- communicating any feedback to ACCWT from the Family Division about the progress of a case, including agreed extended timescales
- once notification is received from ACCWT, notifying the Family Division that the decision has been served (no later than day 33 in straightforward cases)

Processing the asylum case: Appeals, Litigation and Admin Review (ALAR) team

In cases with GLD involvement, ALAR is responsible for:

- communicating information received from ACCWT to the Family Division via GLD about any delay to deciding the claim
- communicating any feedback to ACCWT from the Family Division about the progress of a case, including agreed extended timescales
- once notification is received from ACCWT, notifying the Family Division via GLD that the decision has been served (no later than day 33 in straightforward cases).

Delay in progressing the case

In some cases, factors will become apparent during the consideration of the claim which mean the case cannot be determined in accordance with the Expedited Process. During the Expedited Process, claims will be actively monitored by the Expedited Team to identify any such issues.

Factors which may complicate the determination of a claim in accordance with the Expedited Process may include:

- difficulties authenticating documents
- cases where referrals in respect of modern slavery have to be made to the National Referral Mechanism (NRM)
- difficulties obtaining appropriate interpreters for less common languages
- claimant being unable to attend an interview (for example, for health reasons) or non-compliant with reasonable requests (for example, failure to attend substantive interview)
- requirement for medical reports or other third-party material

Any barriers must be signed off by a Senior Caseworker (SCW), clearly noted on CID / Atlas and ACCWT notified as soon as the barrier is identified.

Where such factors are identified the timetable for these cases is:

- day 4 - 20: the Expedited Team will identify any difficulties in resolving the claim, assess the likely timeframe for resolving them, and produce an estimate as to how long it may take to determine the claim - the Expedited Team will look at the whole process, rather than simply identifying the most immediate obstacle, to permit concurrent activity
- the Home Office will notify the Family Division (via the ACCWT and ALAR / GLD or SVEC as outlined in the sections Processing the asylum case: the Asylum Chief Casework Team and Processing the asylum case: Status Verification, Enquiries and Checking (SVEC) team) of the obstacle to

progression, provide an overview of the reasons why the Expedited Process is not suitable and propose a revised timetable for determining the claim

Working with the Family Division

As outlined in this section on Procedure, it is important that the Family Division is kept informed of the progress of the case and that effective lines of communication are established. It may be that the court can assist us in progressing the case where we encounter difficulties. For example, where third party material is awaited, an order for disclosure from the High Court may well produce faster results than a request by the asylum claimant. Similarly, where documents need to be verified, if the High Court is in possession of material (or has made findings) which help to resolve their status, external verification may not be required.

Any requests of this nature should be directed to the Family Division through the communication channels outlined in this guidance.

Enforcing compliance

Where claimants do not engage with or comply with what is required to advance their claim, existing policy should continue to be followed, see Withdrawing asylum claims and Asylum interviews guidance.

Cases which cannot be determined within 30 days

There will be claims where the timetable prescribed in the Expedited Process is not suitable from the outset, for example where the case is particularly complex. Some examples of reasons for delay are outlined in the section Delay in progressing the case. For cases that are not been able to decided in 30 days, the case will be reviewed no later than 30 days before the scheduled hearing in order to provide an update to the court via the channels outlined in this guidance.

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importance of this stems from the cumulative impact coercive and controlling behaviour can have upon its victims which is unidentifiable by simple reference to separate and isolated consideration of individual incidents.

- Secondly, the advocates put forward that Scott Schedules further inhibit the courts view due to the need the limit allegations. It was said that this process of selection further reduces the focus of the hearing.

10.

Scott Schedule Tips

- Don't throw everything in there.
- Include what you're most likely to prove.
- Items with corroborating evidence.
- Make sure the witness statement synergises with the Scott Schedule.
- An overarching allegation of coercive control & behaviour.

No when to keep it imprecise

"On xx xx 22 the Respondent slapped me in my face"

No when to detail it

"On xx xx 22 the Respondent slapped me in my face causing me a red mark [exhibit ABC123]" - This one is when you have a photograph to support it.

If something is not evidenced, explain why.

For example, *"On xx xx 22, after s/he slapped me I felt unable to tell anyone for fear s/he would find out and do it again, s/he said if I go to the police no one would believe me and they would take the children from me ".*

11.

Witnesses

- It is important to note that witnesses can give evidence in fact find hearings.
- Permission must be obtained from the court prior to the witnesses providing evidence.

- Usually witnesses submit statements - Make sure the witnesses are relevant to the allegations.
- Witnesses can include the police or medical services.

12.

What is the main advice for the Fact-Finding Hearing?

- The best advice on a fact find hearing is to ensure you are prepared.
- If you are the party making the allegations you need to prove your case.
- Makes sure the evidence supports this (witness statement be focussed). Go to the matters in issue.
- It is important that any allegations are backed up by evidence where available.

Parties should not make false or embellished allegations to portray a negative image of the other party involved.

- *Re W* [2010] UKSC 12 where Hale LJ said that in private law FFHs:

> *"… there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert Local Authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication."*

13.

Application of Law

We at times forget to actually apply the law.

There is a significant amount of Case Law related to fact findings.

Burden of Proof

The burden of proof is on the party making the allegations *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35:

> *"[2] If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened.* ***There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not.*** *If the tribunal is left in doubt, the doubt is resolved by the rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated is having happened."*

The court must look at each possibility, both individually and together, factoring in all the evidence before deciding whether the "fact in issue more probably occurred than not." The court arrives at its conclusion by considering whether, on an overall assessment of the evidence, the case for believing that the suggested event happened was more compelling than the case for not reaching that belief (which was not the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities (*Re A (Children)* [2018] EWCA Civ 1718).

But also remember that it is not for the party that does not bear the burden of proof to provide an explanation or disprove the account alleged. The person making the allegation must prove it.

The standard of proof is the balance of probabilities per Denning J (as he then was) in *Miller v Ministry of Pensions* [1947] 2 All ER 372: *"If the evidence is such that a tribunal can say: 'We think it more probable than not', the burden is discharged but, if the probabilities are equal, it is not."*

Findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation: *A (A Child) (No 2)* [2011] EWCA Civ 12.
The law was summarised in *Re BR (proof of facts)* [2015] EWFC 41 and *Re D* [2017] EWHC 3075 (Fam): The court must act on evidence, not speculation or assumption. It acts on facts, not worries or concerns. Evidence either will or will not be sufficient to prove the facts in issue to the appropriate civil standard. Evidence in family proceedings comes in many forms, written, direct, hearsay, electronic, and circumstantial. Contemporaneous documents are particularly helpful. Each piece of evidence must be looked at in the context of the case as a whole. Of the live evidence the Court has to consider credibility, demeanour, themes in evidence, family relationships and interactions and weigh those in the balance.

14.

In the absence of a Scott Schedule / Supplementary to a Scott Schedule

With there being a deviation away from Scott Schedules what can you do to better set out your case? Sometimes the witness statement alone may not sufficiently home in on what your case is actually about.

- Create a Case Summary (of how you see the case)
- Or a Findings Document.

Here's an example:

(Prepared for the Applicant mother in a control/coercion case) may look like this:

It will be submitted on behalf of the Applicant mother that the father is aggressive and unsupportive of the Applicant mother. In order to establish this conduct the mother seeks the following findings:

a) *The children (Bobby and Barbara Little) are at risk of suffering significant emotional harm as a result of the aggressive, unsupportive, antagonistic and constant purposeful undermining of the mother by the father.*

b) *The father has during the course of the parties' relationship would verbally chastise mother (undeservedly), he would use derogatory name calling as well as intimidation tactics such as threats and stares.*

c) *The father would not allow the mother to leave the home of her own volition, the mother would require father to give her permission for leaving the family home.*

d) *Financial abuse - The father would be in control of the family's finances, and not relinquish any of this control throughout the duration of the relationship. The mother would have to seek permission and justification from the father to spend money*

e) *The father 'gaslights' the mother, persistently manipulating and brainwashing her, which causes the victim to doubt herself and ultimately lose her own sense of perception, identity and self-worth.*

f) Since the separation the father has used social media to intimidate and abuse the mother, deliberately to undermine and distress her; the mother's health is being significantly damaged by the behaviour of the father who has by a deliberate or reckless course of action, unhelpful communication, a deliberate disregard for maternal routine, or a deliberate undermining of the mother's parental responsibility impacted upon the mother's health and put the child at risk of emotional harm. The father's behaviour seeks to oppress, harass and intimidate the mother in order to pressurise her, unreasonably influence her or deliberately harm her.

g) The relationship between the parties is such that the ongoing difficulties in the parties' relationship will ultimately impact on the child's health and wellbeing.

15.

Narrative Statements / Evidence

Re JK (A Child) (Domestic Abuse: Finding of Fact Hearing) *[2021] EWHC 1367 (Fam)*

Mr Justice Poole [para 25] ... *Since Scott Schedules had been prepared and the case has been managed by reference to them, I did not dispense with them but, at my invitation, the parties prepared short narrative summaries of their respective cases about the allegedly coercive and/or controlling behaviour of the other. The summaries were very different in style and illustrated the complexities involved in presenting allegations for a finding of fact hearing such as this one where there are overlapping allegations by the mother against the father of coercion and control, physical violence against the mother, physical violence against the child, and allegations by the father against the mother of control, fabrication, and abduction. How can the party alleging a pattern of coercion and control over a relationship that has lasted several years present that case for a finding of fact hearing in a way that is proportionate and manageable, and without giving a day-by-day account of the whole relationship?*

Jamil Mohammed
33 Bedford Row

From Hague Convention to the Home Office

Top Tips for Family Practitioners

Dr S Chelvan

Head of Immigration and Public Law, 33 Bedford Row Cambers

Thursday 27 January 2022, Conway Hall, London

HAGUE CONVENTION PROCEEDINGS AND ASYLUM CLAIMS

G v G [2021] UKSC 9; [2021] 2 W.L.R. 705:

I - Summary of Judgment:

1. **Where a left-behind parent applies to the UK Courts for return of their child, it is now clear an asylum claim is an absolute bar to enforcement of a Hague return order, until the claim has been either decided by the Secretary of State for the Home Department ('the SSHD') (ratio of the judgment), or until all appeal rights have been exhausted (arguably obiter).[1] This does not prevent the determination of the Hague return order, but does bar any enforcement of the order, noting a grant of refugee status would act as an absolute bar to return, leading to a "devasting impact [to] the Hague proceedings".**

2. **Allowing the appeal in-part, the Supreme Court held (in summary form):[2]**

(1) Does a child named as a dependent on a parent's asylum application have any protection from refoulment? (allowed, where it can be objectively shown as part of the parent's application in their own right, the child has raised an asylum claim) [124-134], [135-140] and [141-153];
(2) Can a return order be made under the 1980 Hague Convention even where a child has protection from refoulment (dismissed, the return order can be made, but not implemented) [154-162]; and

[1] Sections 77, 78 and 104 of the Nationality, Immigration and Asylum Act 2002 (as amended). At the time of the 25-27 January 2021 hearing, the 3 February 2021 (negative) asylum decision had yet to be made by the SSHD. Whilst post-hearing submissions were made, these findings may be considered *obiter*.
[2] Case summary https://www.supremecourt.uk/cases/uksc-2020-0191.html (last accessed 19 March 2021).

(3) Should the High Court be slow to stay an application under the 1980 Hague Convention prior to the determination of an application for asylum (dismissed, the High Court should not stay proceedings) [154-162].

II - (Brief) Facts of the Case:

3. **The Supreme Court, noting a 30-day timetable proposed to be adopted by the SSHD for a decision to be made following the making of an asylum-claim [6], has strongly recommended the adoption of an expedited asylum appeal (for in-country appeals) and/or judicial review proceedings (for certified decisions).**

4. **There is additionally proposed by the Court proactive involvement of a High Court Judge of the Family Division, sitting as a Judge of the First-tier Tribunal (Immigration and Asylum Chamber) ('IAC') in determining an in-country asylum appeal to the FtT,, thereby diminishing the impact on the duty of act promptly, as required by the 1980 Hague Convention. The Court emphasized the need to address disclosure in the asylum proceedings, and vice versa, and the need to ensure the child had independent representation in the Hague proceedings [163-177].**

5. **Expedition of the asylum proceedings was highlighted by the Court as "needing urgent consideration for a legislative solution" [163-167], and will have to include both Judges of the Family Division of the High Court and the Judges of the IAC, in-hand with rules safeguarding procedural fairness being drafted and accepted by the MOJ's Tribunal Rules Committee.**

6. **Where the system is bound to be the subject of abuse by some using a claim for asylum as a deliberate tool to frustrate Hague return, the rights of the child will be *the* determining factor, to ensure their welfare and best interests are safeguarded.**

7. **The question still posed following today's Supreme Court judgment: does this result in the 1951 Refugee Convention and UK law being used an International Child Abductor's Charter, or A Pathway to Freedom?**

8. G (Appellant mother) is a South African national who wrongly removed her eight-year-old daughter 'G' from South Africa, on 2 March 2020. On arrival in the UK, mother claimed asylum based on her fear of persecution in South Africa as a lesbian, naming G as her child dependent on her asylum claim. The mother highlighted in her asylum screening interview and subsequent statement the additional risk to G, as her daughter, from her family due to the acts of violence targeting the mother, as a lesbian[3].

9. G (Respondent father) (a dual South African and EU Member State (EUMS_ national),[4] had following his divorce from the Mother been granted in 2018 the South African equivalent of a child arrangements order, where he shared full parental rights and responsibilities in relation to G. G lived with mother, but with extensive contact with father.[5]

10. On 11 March 2020, the father, having been informed by the mother through text messages that she had left South Africa with G, applied to the South African Central Authority for the return of G, pursuant to the 1980 Hague Convention. This request was transferred to the English Central Authority, with an application issued on 14 April 2020 in the Family Division of the High Court. The first hearing on 29 April 2020 before Newton J, resulted in a disclosure and location order being served on the mother the next day, with a return date fixed for 15 May 2020.[6]

11. Pursuant to the disclosure order, the SSHD confirmed the 2 March 2020 application by the mother, and (incorrectly referred to a separate application) 'by and behalf of G'.[7] The 1980 Hague Convention return date was subsequently adjourned by MacDonald J to 22 May, and 5 June 2020 by Gwynneth Knolwes J, in order for asylum application documents disclosure in the 1980 Hague Convention application and vice versa.[8]

[3] [25].
[4] [15].
[5] [17].
[6] [21].
[7] [22].
[8] [26] and [29].

III - Hearing Before Lieven J, 5 June 2020 Order:

12. Lieven J considered the above two points, with the additional application for a stay of the Hague proceedings, as the applications for asylum were pending a decision by the SSHD. Both parties accepted G could not be returned to South Africa until the asylum application was determined.[9] At [10] pf her judgment, Lieven J granted the stay on the basis this would additionally apply to any appeal pending, "*it could be many months, indeed well more than a year, before there is any possibility of this child being returned to South Africa pursuant to the Hague Convention*".

IV - Appeal Before the Court of Appeal:

13. On appeal from the Family Division of the High Court to the Court of Appeal [2020] EWCA Civ. 1185 (Hickinbottom, Moylon and Peter Jackson LJJ),[10] the Court of Appeal had the benefit of the additional written and/or written and oral argument of the SSHD, Reunite International Child Abduction Centre, the International Centre for Family Law, Policy & Practice, and Southall Black Sisters ('SBS').

14. Four grounds of appeal were advanced by the Appellant father to the Court:[11]

"Ground 1: The judge erred in considering any form of refugee status to be an absolute bar to a return under the 1980 Hague Convention. Alternatively, insofar as there is a bar, it is to the *implementation* of a return order, not to the *determination* of the application.
Ground 2: In respect of the application for disclosure of the documents within the asylum file into the 1980 Hague Convention application, the judge erred in relation to their relevance and weight by failing to follow the procedure set out in R v G and H (Secretary of State for the Home Department intervening) [2019] EWHC 3147 (Fam) ("R v G and H").
Ground 3: By staying the 1980 Hague Convention application in the way she did, the judge erred, because such a stay was in breach of article 11 of the

[9] [29].
[10] [2020] EWCA Civ.1185, [2020] WLR(D) 505. Hearing dates 10-11 August 2020, with further written submissions 17 August-14 September ('[CA]').
[11] [21] [CA].

Convention which requires the judicial or administrative authorities of Contracting States to "act expeditiously in proceedings for the return of the child". Any derogation from that obligation can only be made after a careful appraisal of any justification, in this case consideration of the *bona fides* and merits of any asylum claim as it applies to the mother and (vitally) to G, an exercise which the judge did not perform.

Ground 4: The judge erred in failing to consider G's own status within the asylum claim (i.e. whether she had made an application for asylum in her own right, or merely as a dependent of the mother), because different considerations apply to each of those circumstances."

15. In determining Issue One (Asylum bars to Hague Convention Proceedings), the Court of Appeal held children with refugee status (bar those granted as dependents under the Asylum Policy Instruction as they are not refugees), cannot be returned to countries from which they have refuge under the 1980 Hague Convention (category 1 children).[12]

16. Those children whose applications for asylum are pending, this operates as a bar to enforcement of Hague return during the period for initial decision-making by the SSHD. The EU Directive provisions continue to operate as a bar, notwithstanding the ending of Brexit transition on 31 December 2020 (category 2 children).[13] The Court drew on the earlier 2017 authorities of F v M and anor (JCWI intervening)[14] and E v E (SSHD intervening)[15] to provide a jurisprudential starting point, supporting this finding. It is important to note Mostyn J in E v E rejected a 'opening the floodgates' submission, and until the last twelve months, he was correct to do so. Noting the increase in these hybrid cases in the last year, the question for future Courts, is how to address the potential for abuse of the system?

17. Where an asylum appeal was pending, not a live issue before the Court, it accepted it had not heard full argument and this would be an issue for the Home Secretary and Parliament, noting "it is our view vital that steps are taken to avoid asylum appeals being used as a tactical device to delay and potentially

[12] [127] [CA].
[13] [131] [CA].
[14] *F v M and anor (JCWI intervening)* [2017] EWHC 949 (Fam); [2018] Fam 1 (Hayden J). See also for successful appeals and remittal back to the High Court: *Re H (a Child) (International Abduction: Asylum and Welfare)* [2016] EWCA Civ. 988; [2017] 2 FLR 527.
[15] *E v E (SSHD intervening)* [2017] EWHC 2165 (Fam); [2018] Fam 24 (Mostyn J).

prevent the return of children under the 1980 Hague Convention" (category 3 children).[16]

18. The Court of Appeal, in a departure from the accepted practice, held where the child is named as a dependent to the asylum claim only, then this is not a bar to return of a child under the 1980 Hague Convention, as paragraph 329 of the Immigration Rules prohibiting removal pending final determination of an asylum appeal does not apply to dependents (category 4 children: (Dependent) Child with no asylum application).[17]

19. The Court additionally made the following findings (in summary form). (Issue Two) - any bar to removal only operates to bar implementation of the Hague return order, and not the determination of and making of the order.[18] With respect to Issue Three, the Court should be slow to stay the determination of a Hague return application, pending the asylum decision.[19] Issue Four and the Voice of the Child – the child should be joined as a party to the Hague Convention proceedings.[20] And lastly, (Issue Five), the SSHD should be fully informed of the steps in the Hague Convention proceedings.[21]

20. The Court of Appeal allowed the appeal on Grounds One and Three, refused permission to appeal with respect to Ground Two, and dismissed the appeal on Ground Four.[22]

V - Appeal Grounds Before the Supreme Court:

21. The appellant mother advanced three separate grounds of appeal before the Supreme Court:

(1) "Can a child that is named as a dependant on a parent's asylum application, but has not made a separate independent application for asylum, have protection from refoulement pending the determination of that application?";

[16] [136] [CA].
[17] [140] [CA].
[18] [152] [CA].
[19] [154] [CA].
[20] [163-164] [CA].
[21] [165-166] [CA].
[22] [167-183] [CA].

(2) "If a child named as a dependant is protected from refoulement pending the determination of the asylum application, does that protection from refoulement act as a bar (i) to the determination by the Family Division of the High Court of an application for a return order under the 1980 Hague Convention seeking the return of a child to the country of their habitual residence where that child has protection from refoulement, or (ii) to the making of a return order, or (iii) only to the implementation of the return order?"**; and**

(3) "If there is no bar to the determination of an application under the 1980 Hague Convention, what approach should the Family Division take in relation to the task of deciding that application? In particular, was the Court of Appeal right to hold that the High Court should be slow to stay a 1980 Hague Convention application?"

22. The Court noted the Respondent Father had not cross-appealed the finding of the Court of Appeal that there is a bar to implementation of a ague return order if the child is granted refugee status, or an asylum application is pending **[14]**.

23. The author was instructed as one of the Junior Counsel with Charlotte Baker for Southall Black Sisters ('SBS'), lead by Alex Verdan QC (instructed by Janet Broadley of Goodman Ray Solicitors), submitting written submissions only.

24. The Supreme Court summarized SBS's submissions (as the fourth intervenors) **[54]**:

"The fourth intervener, Southall Black Sisters ("SBS"), is an organisation which provides advice, resources and advocacy in respect of gender-related violence and discrimination against black and other ethnic minority (mainly migrant) women. SBS supported the proposition that, as a matter of law, a child named as a dependant on a parent's asylum claim must be afforded the same protection from refoulement as the principal applicant."

25. As well as the three other intervenors who contributed to the proceedings before the Court of Appeal, the United Nations High Commissioner for Refugees ('UNHCR'), and the International Academy for Family Lawyers were given permission to participate as intervenors.

VI <u>Analysis of the Reasoning of the Court:</u>

26. In allowing the appeal in-part ([2021] UKSC 9), the Supreme Court addressed the three grounds in the following terms (see also **Summary Section I of this Note**). For the purposes of this Case-Law update, the author concentrates on Ground One, noting this has the greatest scope for highlighting the interplay between the Refugee Proceedings and the Hague Proceedings.

Ground One:

(a) **Does a child named on a parent's asylum application have any protection from refoulment? (allowed, where it can be objectively shown as part of the parent's application in their own right the child has raised an asylum claim) [124-134], [135-140] and [141-153]**

27. There are approximately 100 1980 Hague Convention applications annually in England and Wales, with no figures for how many within that number are related to asylum applications **[6]**. Nevertheless, what is clear is where there is an asylum related issue arising in 1980 Hague Convention proceedings, there is, in this author's opinion, the *primacy of the 1951 Refugee Convention over and above the 1980 Hague Convention.*

28. The absolute prohibition on refoulment ('expulsion or return to a country where they may be persecuted' **[2]**) enshrined in not only Article 33 of the 1951 Refugee Convention and 1967 Protocol ('the Geneva Convention'),[23] reflected in the UK's continuing obligations to EU Directives post-31 December 2020 (i.e. Article 21 of the 2004 Minimum Standards Qualification Directive),[24] transposed in UK domestic legislation[25] (including our immigration rules). The prohibition to refoule, in this judgment trumps the 1980 Hague Convention requirement to return a child. This judgment reinforces this underlying rationale of the Geneva Convention and prohibiting implementation of any determined return order, where the child has been recognized by the UK as a refugee **[37]**.

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[23] The Convention Relating to the Status of Refugees, opened for signature, 28th July 1951, 189 U.N.T.S. 150, entered into force, 22nd April 1954, as amended by the Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267, *entered into force*, 4th October 1967. UK's ratification of the 1951 Convention on 11 March 1954 and accession to the 1967 Protocol on 4 September 1968: <http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> accessed 19 March 2021.

[24] 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 (Official Journal 2004 L 304, 30/09/2004 p. 12).

[25] Refugee or Persons in need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) (commencement 9 October 2006).

29. There is of course the absolute 'safety net' provision of Artucle3 of the ECHR, accepted within our own domestic case law, reflecting Strasbourg cannon of case law,[26] prohibiting return of a foreign national to a country where they would face a real risk of 'torture, ill-treatment or inhumane and degrading treatment'.

30. Whilst an application is pending, then both paragraph 329 of the immigration rules,[27] and section 77 of the Nationality, Immigration and Asylum Acy 2002 ('the 2002 Act') prohibit removal **[106].**

31. The key issue for the Supreme Court is where G is a dependent child, and not an applicant, then is she afforded the same protection from refoulment as the primary applicant as a matter of law?

32. It is important to note the SSHD's complete U-turn in these proceedings, communicated only a few days prior to the hearing. She would have been expected, in line with her own published policy (Asylum Policy Instruction ('API') *Dependents and former dependents* (May 2014),[28] even when a child is only names as a dependent on an asylum claim, she will investigate whether the child is also entitled to refugee status determination ('RSD') in their own right, in line with her section 55 of the Borders, Citizenship and Immigration Act 2009 duty to promote the 'best interests and welfare of the child' **[107-111**].

33. Importantly, the Court accepted an individual *is* a refugee when they have left their country of nationality (or habitual residence) and fulfil the definition of a refugee contained in Article 1A (2) of the Geneva Convention. On this basis, status declaration is recognition of this pre-existing right, recognized in recital 14 , in-line with recital of the 2004 MSQD EU Directive **[86].** The requirement for any negative decision on asylum to give rise of a resolution procedure, pursuant to Article 4 (1) of the 2005 Procedures Directive[29] **[93]**, with Article 7

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[26] See *Soering v United Kingdom* (1989) 11 EHRR 439.
[27] "[329] Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 no action will be taken to require the departure of the asylum applicant or their dependants from the United Kingdom." **[102]**.
[28] 'API on *Dependents and Former Dependents'* (22 May 2014):<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/314042/DependantsAndFormerDependants_External2014-05-22.pdf> (last accessed 19 March 2021.
[29] *Council Directive 2005/85/EC of 1 December 2005 minimum standards of procedures in Member States for Granting and Withdrawing Refugee Status: https://eur-*

(1) of the same Directive providing protection from *refoulment* when this procedure is engaged **[94]** protecting procedural rights for applicants, and their dependents, pursuant to Article 6 (3) of the 2005 Procedures Directive **[95]**. In line with the immigration rules (paragraphs 327, 327A, 334 and 349 of the Immigration rules**)** and the statutory protection mechanisms contained in sections 77, 78, 82 and 104 of the Nationality, Immigration and Asylum Act 2002 **[96]-[106]** provides the route-map for status determination.

34. Where domestic provisions fall short, then reliance on Articles within the Directive through direct effect are available, noting the Directive was part of UK law, prior to Brexit (the *Marleasing* principle **[124]**).

35. On this basis, Article 7 of the Procedures Directive enables the applicant (including a child who has made an application in their own right), a right to remain in the UK until their application is determined **[40]-[41]**. Where a dependent child is understood to have made an application (Article 2(g) and 2(b) and recital 27 of the 2004 MSQD) where it is objectively clear such an application is being made. Any omission for a dependent child to make an application, was ruled by the Supreme Court not to arise from any choice the child has made **[117]**. Enabling the broad humanitarian interpretation of the Geneva Convention and the Directives to give, "generous and purposive interpretation bearing in mind their humanitarian aim" **[118]**, the Supreme Court establishes the point of principle and procedure at **[122]** and held:

"*Accordingly, I consider that a child named as a dependent on the parent's asylum application and how has not made a separate request for international protection generally can and should be understood to be seeking such protection and therefore treated as an applicant. I would therefore allow this aspect of the appeal".*

36. At **[122]-[153]** the Supreme Court makes clear this protection from refoulment, in line with Articles 7 and 8 (2) 2005 Procedures Directive extends to the final determination of the in-country appeal procedures (i.e. the statutory rights of appeal), in line with section 104 (1) of the 2002 Act, "finally determined, withdrawn, or abandoned" **[139]-[140],** thereby providing a bar to the implementation of a 1980 Hague Convention return order **[153]**, providing, "*a devastating impact on 1980 Hague Convention proceedings*".

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF (last accessed 19 March 2021).

(a) Ground Two:

Can a return order be made under the 1980 Hague Convention even where a child has protection from refoulment (dismissed, the return order can be made, but not implemented) [154-162].

(b) Ground Three:

Should the High Court be slow to stay an application under the 1980 Hague Convention prior to the determination of an application for asylum (dismissed, the High Court should not stay proceedings) [154-162].

37. Both these grounds lead to the Supreme Court dismissing these grounds of appeal (**see Section 1 of this Note**) affirming the approach of the Court of Appeal.

VII – Where Next?

(i) Home Office Guidance – "Operating Instruction: Hague Convention Cases" – version 1 – 21 July 2021:[30]

38. By July 2021, the Home Office had published policy guidance with respect to Hague Convention cases and Asylum Claims [attached].

39. Woth respect to channels of communication, the policy states (at page7):

> Processing the asylum case: Status Verification, Enquiries and Checking (SVEC) team SVEC is responsible for:
> • communicating information received from ACCWT to the Family Division about any delay to deciding the claim

30 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001180/hague-convention-cases-operating-instruction-v1.0-gov-uk.pdf (last accessed January 14, 2022).

• communicating any feedback to ACCWT from the Family Division about the progress of a case, including agreed extended timescales
• once notification is received from ACCWT, notifying the Family Division that the decision has been served (no later than day 33 in straightforward cases)

40. It further states (at page 8):

"Working with the Family Division

As outlined in this section on Procedure, it is important that the Family Division is kept informed of the progress of the case and that effective lines of communication are established. It may be that the court can assist us in progressing the case where we encounter difficulties. For example, where third party material is awaited, an order for disclosure from the High Court may well produce faster results than a request by the asylum claimant. Similarly, where documents need to be verified, if the High Court is in possession of material (or has made findings) which help to resolve their status, external verification may not be required. Any requests of this nature should be directed to the Family Division through the communication channels outlined in this guidance."

41. Where the case will take more than 30 days to complete:

Cases which cannot be determined within 30 days There will be claims where the timetable prescribed in the Expedited Process is not suitable from the outset, for example where the case is particularly complex. Some examples of reasons for delay are outlined in the section Delay in progressing the case. For cases that are not been able to decided in 30 days, the case will be reviewed no later than 30 days before the scheduled hearing in order to provide an update to the court via the channels outlined in this guidance.

(ii) Subsequent Case Law:

42. There are a number of cases applying the Supreme Court's guidance (Source: Westlaw: 17 January 2022) (followed and/or mentioned)):

- (i) A and B [2021] CSIH 52 2021 S.L.T. 1569

- (ii) Avaaz Foundation v Scottish Ministers [2021] CSOH 119 [2021] 11 WLUK 347
- (iii) H v W [2021] CSOH 97 [2021] 9 WLUK 366 2021 Fam. L.R. 142
- (iv) VR v YD [2021] EWHC 2642 (Fam) [2021] 9 WLUK 394
- (v) L (a Child: Wrongful Removal: Alleged Sexual Abuse) [2021] EWHC 2687 (Fam) [2021] 9 WLUK 417
- (vi) P (a Child) (Abduction/Inherent Jurisdiction)[2021] EWCA Civ 1171 [2021] 7 WLUK 442; and
- (vii) SSHD v GA [2021] EWCA Civ 1131 [2021] 1 W.L.R. 5966
- C v B [2021] EWHC 1369 (Fam) [2021] 5 WLUK 372

43. Of specific interest are the following cases, dealing with issues arising from the Supreme Court's guidance in G v G:

(a) Disclosure of Material relating to the Asylum Claim:

44. In K (a child) (Stay of Return Order: Asylum Applicant: Contest to a Parent in Self Isolation) Re [2020] EWHC 2394 (Fam), the Court was dealing with a case where an asylum application is made after a return order is made, and yet to be enforced.

45. Issues of a future application for disclosure of material from the asylum claim were highlighted by the Judge (Deputy High Court Judge Darren Howe QC) [43]:

> "The exercise that I would undertake if determining an application for disclosure of evidence collected for an asylum application is set out in detail in the judgment of MacDonald J in *R v G (No 1)* and it is not necessary for me to repeat those principles herein. What I have to consider is whether those same principles, or similar considerations, apply to the mother's application for the father to be required to file a statement in the current application."

46. The Court would be required to inspect the asylum documents to address the balancing exercise between confidentiality and the left-behind parent's right to know (MacDonald J in R v G (No 1) [2020] EWHC 3147 (Fam).

(b) Grant of Refugee Status renders the Hague Return Proceedings a Nullity:

47. The Court of Appeal on 7 and 8 December 2021 heard the appeal against the judgment of Mrs Justice Roberts in VR and YD and anor [2021] EWHC 2642 (Fam) (29 September 2642) [76 and 77] (**emphasis added**):

> "[76] The facts in this case are different from those in *Re B*. The 'new facts and information' in that case related to the nature and extent of the mother's mental health and the consequences for both her and the child were the order for summary return to be enforced. In this case there has been a decision made by another arm of the state which operates to prevent the enforcement of an order for summary return to a different jurisdiction. **I accept the submissions of the respondent, the Guardian and the SSHD that little purpose is served by allowing the 1980 Convention proceedings to 'limp' on without further purpose or effective remedy for the applicant. In the context of those proceedings there is nothing further for this court to examine. In accordance with paragraph 89 of *Re B* I have considered the applicant's request for disclosure of the asylum file which I have dismissed in the context of the Convention application. There is no further evidence which is relied on as potentially relevant to the set aside decision. In the context of Mr Harrison QC's proposal that there might be a further round of written statements in anticipation of a further lengthy hearing, I ask myself what would inform the content of those statements? I have thus considered separately whether there is any purpose in prolonging the life of the proceedings and reached the conclusion that there is not.**
>
> *The committal application*
>
> [77] There is no information before the court at the present time to confirm whether or not the applicant intends to pursue his application for committal given the subsequent decision of the SSHD to grant asylum to the respondent and M. I have referred to this aspect of the proceedings in paragraph 63 above. I did not hear specific submissions from Mr Harrison QC and Ms Chaudhry as to the impact on the committal application in the event of a set aside of the return orders. That application was an aspect of enforcement designed to secure the summary return of the child to Ukraine. **I recognise the importance of ensuring that orders made by this court, or any other, are respected and observed. It is unclear to me at present on what basis the**

> **application might be pursued and I recognise that there may be complex issues arising were the applicant to seek punitive sanctions on a parent for not returning their child to the country in respect of which asylum has been granted**. In the circumstances, I propose to say nothing further in this judgment about the committal proceedings. If Mr Harrison QC or any of the other advocates wish to make further short submissions on this aspect of the case, I will consider them in the wider context of the orders which will flow from this judgment."

Other Points Arising:

(a) Procedures before the Immigration and Asylum Chamber:

48. If the asylum application by the child is refused, then there is a statutory right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber).[31]

49. There is no specific Procedure Rule for interventions by non-expert (ie UNHCR) third parties. An application should be made under the Case-Management Powers (Rule 4 of the 2014 First-tier Tribunal Procedure Rules (as amended), noting Rule 2 and the over-riding objective (a just, timely and effective disposal of appeals).[32]

50. Rule 9 of the 2008 Upper Tribunal Procedure Rules enable the addition of interested parties to proceedings.

51. Where the left-behind parent, there should be no complete confidentiality bar where this parent is not alleged to be, or connected to the claimed potential persecutor. Where the parent is alleged to be the potential persecutor, then there can always be closed hearings and/or special advocates for specific parts of the hearing.

52. **As far as the author is aware, this has yet to be tested in any reported or unreported case of the Tribunals.**

[31] Section 82 of the Nationality, Immigration and Asylum Act 2002.

[32] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926550/consolidated-ftt-iac-rules-20200721.pdf

Nationality and Borders Bill 2021:

Clause 31 – Amendment to Low Standard of Proof:

53. The accepted (current) standard of proof is the *Sivakumaran*[33] "reasonable degree of likelihood", lower than the civil standard of proof (real risk) in asylum claims.

54. Clause 31 stipulates (as of 14 January 2022) [**emphasis added**]:

"Article 1(A)(2): well-founded fear (1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.

(2) The decision-maker must first determine, on the balance of probabilities—

(a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic. (See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)

(3) Subsection (4) applies if the decision-maker finds that— (a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and (b) the asylum seeker fears persecution as mentioned in subsection (2)(b).

(4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual

[33] R (Sivakumaran) v SSHD [1990 Imm AR 80.

residence)— (a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and (b) they would not be protected as mentioned in section 33. (5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 34 (internal relocation).

55. Will a change to the (understood) asylum standard of proof post G v G enable the Hague proceedings to address 'very serious grounds' for risk in asset-aside application? - **back to the Family Court arena?**

Dr S Chelvan

Ead of Immigration and Public Law

33 BEDFORD ROW CHAMBERS

17 January 2022