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:
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Table of Contents

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

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?*

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From Hague Convention to the Home Office

Top Tips for Family Practitioners

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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]**.

[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?**

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17 January 2022

Grandparents 'Rights', Special Guardianship Orders and Public Law Working Group.

Grandparents

Summary of the Current Position

1. The Children Act 1989 (even in its amended form) makes no specific reference to grandparents. They have no immediate superior role to other family members.

2. Successive governments have considered whether grandparents should be given the facility to apply for a section 8 order in their own right; The Family Justice Review Report 2011 concluded that notwithstanding the importance of grandparents, the requirement for them to seek leave should remain. This is still the position.

3. Grandparents will usually have to make an initial application for permission to file a section 8 application-which creates a two stage process to filter out inappropriate applications as a protection against unwarranted interference in the child's care.

4. Any application by a grandparent for permission is unlikely to succeed if a similar application is being made by another party e.g a father is making an application for an order to see his children, and his own parents (the grandparents) want to see the children at a different time. The court is likely to see the grandparents own application as a duplication of the father's application as there is no reason why the children cannot see the grandparents at the same time as their father: **Re W (A child) (Care Proceedings : Leave to Apply) 2005 2 FLR 468**

Basic and Common Situations Faced by Grandparents

1. **The need to acquire Parental Responsibility**. It could be that the grandchild has been living with the grandparent for some time and he/she feels unable to make important decisions on behalf of the child e.g. there has been a visit to a hospital and the hospital has queried the grandparents right to make a decision for the grandchild; In **B v B (A Minor) (Residence order [1992] 2 FLR 327** a grandmother applied to the Magistrates Court for a residence order in respect of her granddaughter who had lived with her for some time to enable her to have parental responsibility. Her application was supported by the mother. The application was refused on the "no order principle" Section 1(5) Children Act 1989. This decision successfully appealed: a residence order should be granted where there was a need to acquire parental responsibility.

2. **When Parents Divorce or Separate.** Where the parents separate and the grandparent has been refused any contact with the grandchild or for some other reason they lose contact with them: When the parents refuse the grandparent contact with their children. It could be there has been a fallout between the adults within the family, and the grandchildren are caught in the cross fire.

3. **Involvement of Social Services**. The parents may be unable to care for their children safely and Social Services look to the grandparents to care for the children, in the short term or even long term. Thorpe J in **Re J (Leave to issue application for residence order (2003) 1 FLR 114** suggested that trial judges should recognise the greater appreciation that has developed of the value offered by grandparents to their grandchildren, particularly those who have disabled parents. Sir James Munby when participating in a panel for World Social Worker Day 2021 was very vocal of the need to engage grandparents at the earliest stage possible in Public Law proceedings.

4. **Informal Arrangements**. Informal care arrangements can often take place where a relative looks after a child without holding parental responsibility, the child not being a 'looked after' child by the local authority. There is often no clear agreement and the terms of placement are undefined. Without parental responsibility, the carer is technically powerless in making medical, schooling and travel decisions. Parents can end the arrangement at any time and without notice. Grandparents can be put in this position and have no immediate recourse to any principle in law. The grandparent may wish to apply to the court for an order that would give them parental responsibility and at the same time confirm the residence position for the child.

Orders Available to Grandparents

1. A Child Arrangements Order Section 8 Children Act 1989 (as amended) confirms where a child will live and with whom, and when they will spend time with a person or people other than those they normally live with. This is usually the parent, although can include grandparents and other relatives. A typical Child Arrangements Order can deal with:-
    - which parent the child will live with;
    - how much time the child will spend with the other parent (if any);
    - when a child will spend time with the other parent;
    - whether Contact with the other parent should be supervised.

2. Prohibited Steps Order Section 8 Children Act 1989.

3. Specific Issue Order Section 8 Children Act 1989

These Section 8 Orders once made, usually last until the child concerned reaches 16. In exceptional circumstances, an Order can last until the child reaches 17.

When considering whether to make a Section 8 Order, the Court' s first and overriding obligation is to the welfare of the child.

Welfare Checklist.

The Court will proceed on the basis that delay in resolving a dispute about Section 8 Orders is likely to prejudice the welfare of the child. The Court will not make a Section 8 Order unless it considers that doing the so would be better for the child than making no Order at all. This is called the "No Order" principle

Special Guardianship Order - Section 115 Adoption and Children Act

A Special Guardianship Order (SGO)appoints one or more people as Special Guardians of the child. The Order lasts until the child is 18 unless it is changed by way of Court Order before then.

The Special Guardian has parental responsibility for the child and can take most decisions about the child (such as where the child will live or go to school) without having to consult anyone else. The Special Guardian cannot change the child surname or take them abroad for more than three months without the agreement of anyone else with parental responsibility or the permission of the Court.

An SGO has the benefit of enabling the child to keep ties with their birth family, although the family's responsibilities and are reduced. This type of order is commonly made in favour of a grandparent.

A SGO is very commonly the only other alternative to a Care Plan of Adoption by way of Care and Placement Orders being sought by a Local Authority in public law proceedings.

Adoption Order Adoption and Children Act 2002

" When the child is adopted, he or she becomes part of their new" adoptive family and all legal ties with their birth family are cut. The natural parents lose their parental responsibility and the adoption order cannot, except in extremely rare occasions, be varied or discharged. Adoption by family members is rare as an adoption order breaks the link between the child and the birth parent and transfers parental responsibility to the adopters. However, some adoptions are "open" in that the child remains in contact with the birth parents.

Power of court to make section 8 orders.

Who can apply ? - Section 10 Children Act 1989
(1) In any famil proceedings in which a question arises with respect to the welfare of any child, the court may make a Section 8 order with respect to the child if:

(a) an application for the order has been made by a person who—

(i) is entitled to apply for a section 8 order with respect to the child; or

(ii) has obtained the leave of the court to make the application; or
(b) the court considers the order should be made even though no such application has been made

(2) The court may also make a section 8 order with respect to any child on the application of a person who -

(a) is entitled to apply for a section 8 order with respect to the child; or

(b) has obtained the leave of the court to make the application

(3) This section is subject to the restrictions imposed by section 9

(4) The following persons are entitled to apply to the court for any section 8 order with respect to the child-

(a) any parent, guardian or special guardian of the child;
(b) any person who is named, in a child arrangement order that is in force with respect to the child, as a person with whom the child is to live

(5) The following persons are entitled to apply for a child arrangements order with respect to a child

(a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family; any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family

(b) any person with whom the child has lived for a period of at least three years;

(c) any person who

(i) in any case where a child arrangements order in force with respect to the child regulates arrangements relating to with whom the child is to live or when the child is to live with any person, has the consent of each of the persons named in the order as a person with whom the child is to live;

(ii) in any case where the child is in the care of a local authority, has the consent of that authority; or

(iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.

Other provisions:

any person who has parental responsibility for the child by virtue of provision made under section 12(2A).

A local authority foster parent is entitled to apply for a child arrangements order to which subsection (5C) applies with respect to a child if the child has lived with him for a period of at least one year immediately preceding the application.

A relative of a child is entitled to apply for a child arrangements order to which subsection (5C) applies with respect to the child if the child has lived with the relative for a period of at least one year immediately preceding the application

This subsection applies to a child arrangements order if the arrangements regulated by the order relate only to either or both of the following—

(a) with whom the child concerned is to live, and

(b) when the child is to live with any person.

Summary

There are a number of situations when the grandparent is not obliged to seek the courts permission to file a Section 8 application. They are :

1. If the child is in the care of the Local Authority and the Local Authority supports the application;

2. The applicant is a Guardian;

3. Where all the parties with Parental Responsibility consent to permission being granted;

4. The applicant is a Special Guardian;

5. When the applicant is named in a Child Arrangements Order providing for residence;

6. The applicant is a foster parent and the child has been living with him/her for one year or more;

7. A "relative" who has cared for the child for one year more; The definition of "a relative" is wide and clearly includes "any grandparent “

What if the courts permission is required ?

If a grandparent is seeking the courts' permission to file a Section 8 application, the authorities are found in the **Family Procedure Rules 2010 Part 18 and Practice Direction 2010 18A**

The test for deciding an application for the grant of permission was addressed in **Re J (Leave to Issue Application For Residence Order (2003)1FLR 114** when the court stated that the statutory checklist in Section 10(9) must be given its proper recognition and weight. The test is not whether or not the applicant has an arguable case . Applicants enjoy a right to a fair trial pursuant to Article 6 and in the nature of things they very often enjoy Article 8 rights,

The mother was a psychiatric in-patient and the local authority wanted to place her 18-month-old daughter for adoption. An older child had largely been raised by the paternal grandparents and to a lesser extent by the maternal grandmother and was about to go to university.

The Local Authority had rejected the grandmother as a possible carer due to her volatile relationship with her daughter and her age, 59. It said the application did not merit judicial consideration. Nevertheless the grandmother applied to be joined as a party and for leave to apply for residence; the mother supported the application as had the father prior to the Local Authority’ s objection.

The lower court had not adequately considered the Section 10(9) checklist; the question for the Court was ‘ has the applicant satisfied the Court that he or she has a good arguable case for the criteria that Parliament applied in section 10(9)?

The Court allowed the application, accorded the grandmother party status and allowed her to make an application for residence.

To support an application for leave the case Re J (A Child) (Leave to issue application for Residence Order) [2002] EWCA Civ 1346 can be used as a precedent.

Section 10 (9) of the Children Act 1989 sets out a short check list of what the court will consider when dealing with an application for permission.

These are :

1. The nature of the proposed order — in other words, what order is your client seeking;

2. The applicant's connection with the child—in our case, a grandparent;

3. Risk of disruption or harm to the child. If the child has been living with another adult, what the consequences are of any move for the child should your clients application be successful. Or alternatively, if the child is already living with the grandparent, why the court should change this arrangement.

4. If the child is in the care of the Local Authority, what are their plans for

5. The views of the parents, remembering that the parents have every right to be heard on the application;

It should be note that the case law has made it clear that the list in Section 10 (9) is not exhaustive"

The words particular regard" in Section 10 (9) implies that there may be other factors for the court need to take into account when dealing with a permission application.

One example may be "the prospects of success" of the substantive applicant.

In the case of Re B (Paternal Grandmother : Joinder as Party) 2012 2 FLR 13 the court said the application must be arguable if permission to file is granted. But even if it is arguable, there is no guarantee that the application for permission will necessarily be granted. The court will, of course, take into account all the other factors

One particular case of help when applying for permission to file a Section 8 application is **Re A (A Child - Application for leave to apply for a child arrangements order)** [2015] EWFC 47

The application concerned Alice, a 9 year old girl, whose family structure was of a complex nature. Alice was born to Rachel (her biological mother) and David (a known sperm donor who lived abroad and did not have parental responsibility). Rachel was in a civil partnership with Helen (her non-biological mother).

Both Rachel and Helen had mental health issues. (Rachel, schizophrenia and schizo - affective disorder and Helen, emotionally unstable personality disorder, anxiety and depression). Helen had limited mobility and received support from local authority carers. She also had two adult children from a previous relationship, one of whom (Susan) had physical and learning difficulties.

When they separated in 2009, Rachel was detained under the Mental Health Act 1983. Alice then went to live with Helen under a residence order (made by consent) where she had remained ever since. Following her discharge from hospital, Rachel has had supervised contact to Alice, provided for in the consent order.

Helen started a relationship with Matthew (a female to male transsexual in the process of transitioning, who also had mental health difficulties). The relationship subsisted from 2009 - 2013, during the course of which Matthew played a role in the care of Alice. When they separated, Matthew entered into his current relationship with James.

There were disputes as to fact, with Matthew and Helen each alleging abusive behaviour on the part of the other. Helen alleged that, due to Matthew's aggression caused by the testosterone used in his transitioning, they did not live together continuously and Matthew asserted that he had been in the "dominant parent role".

After their separation, Matthew continued to have contact to Alice for about 16 months, following which it ceased in acrimonious circumstances. Matthew then applied for leave to seek a child arrangements order.

Alice herself had been diagnosed with autism spectrum disorder. She was identifying as a boy.

David, with whom Alice had established a relationship by social media and occasional visits, was aware of the application and opposed it.

Rachel also opposed the application, considering that Alice's wellbeing considering that Alice’s wellbeing had improved markedly since Matthew’s departure.

Due to the exceptional circumstances, HHJ Bellamy made Alice a party and appointed a guardian. Her enquiries revealed that Alice had been subject to local authority involvement. Alice herself was reported to be aware of the proceedings but disinterested in the outcome.

If the application was to proceed, it would entail expert psychiatric evidence, disclosure of the local authority documents and a fact finding hearing

Having set out s.10 Children Act 1989 in full, the judge noted that it was accepted that Matthew had to seek leave, pursuant to s.10(9)

He then considered the relevant case engineering, citing, in particular, Black LJ's comments in Re B (A child) [2012] EWCA Civ 737 to the effect that s.10(9) did not contain a test, merely factors to which the court should have regard. One of these factors was plainly the prospect of success, but simply having an arguable case would not necessarily be sufficient. Additionally, whilst the child's welfare was not paramount, it was still relevant.

In terms of Matthew's role, drawing on Baroness Hale's judgment in Re G (Children) (Residence: Same-sex Partner)[2006] UKHL 43, his claim to "parenthood" could only be as a "psychological" parent.

On his behalf it was asserted that his role in Alice's life both before and after the separation (said to be analogous to that of a step parent) and the "minimal impact" an order would have on her, militated in favour of leave being granted.

In addition, it was argued that he would have been able to apply as of right (by virtue of having lived with her for 3 years) had he applied earlier and that it would be unfair to prejudice his position because in seeking to avoid litigation he had not issued sooner.

Helen, although accepting that Alice was a child of the family, asserted that the impact of granting leave would be considerable and would bring her into a harmful arena of conflict.

The guardian felt that reintroduction of Matthew would have to be sustainable and of significant benefit to Alice, given the "extensive" number of adults with whom she was already involved.

Rachel asserted that granting the application would exacerbate Helen's health issues to Alice's detriment and might restart her gender confusion. She did not need a father- figure as she had two mothers. Moreover, Matthew's own mental health issues were ongoing.

The guardian noted Matthew had been a significant adult and could
potentially be a father figure but also the risk of Helen's health deteriorating to Alice's detriment.

In considering the application, HHJ Bellamy looked at the s.10(9) factors in the light of the authorities, noting that, although he was not making a finding, the evidence strongly suggested that, in relation to the "connection with the child" required by s. 10(9)(b), Matthew had become a psychological parent.

With respect to whether or not such a relationship could also be lost over time, s. 10(5)(b) provided that the right to make an application based on 3 years of living with the child, expired after 3 months had elapsed. If granted, the court would need to determine not only if Matthew had been a psychological parent but also, if he had ceased to be so.

With regard to the issue of risk of disruption to the child (s.10(9) (c)) given the features of Helen's illnesses, combined with her older daughter's needs and Alice's autism, this family had considerable care needs and would find continued litigation burdensome and disruptive. Accordingly, HHJ Bellamy concluded that there was a risk of the application causing harm to Alice.

The risk element had to be balanced with other factors and the court had to take account of all elements of the case. In this instance, the extensive range of adult relationships available to Alice was relevant.

As for whether or not Matthew had an arguable case, although there were positive factors to weigh in the balance, those on the other side included the range of adults with whom Alice was already engaged, the health needs of those adults and her own autism. On balance, the judge was satisfied that the case was, at best "barely arguable".

Accordingly, taking a global view, the application should be refused.

The Welfare Test

In Section 8 applications, “the welfare of the children test” always applies. However, this does not apply at the permission stage.

Otherwise known as the "paramountcy test" (Section 1(1) Children Act 1989 it was held in Re A (MInors) (Residence Orders:Leave to Apply) (1992) 3 All ER 872 that the welfare of the child is not the courts paramount consideration when determining whether or not to grant leave to apply. In granting or refusing an application for leave to apply for a section 8 application, the court is not determining a question with respect to the upbringing of the child concerned. The question only arises when the court hears the substantive application. It will, however, be a factor, but not a determining factor.

G v Kirklees MBC (1993) 1FLR 505 confirms this decision

Human Rights

All grandparent applications for permission will be taken seriously by the courts. Articles 6 & 8 of the European Convention of Human Rights give grandparents the right to a fair trial and respect for family life. Whatever the nature of any application by a grandparent, the court is under a duty to give it careful attention.

- **Re J (Leave to issue application for residence order) 2002 EWCA Civ 1346** the court held that the minimal essential protection of a grandparent's human rights was that their application should not be dismissed without full enquiry.

- **Re B (Paternal Grandmother: Joinder as Party) (2012) 2FLR 1358** at paragraph 51 "full enquiry" must be read in the context of the facts of the particular case being dealt with.

The age of the grandparent ?

A feature that often arises in grandparent cases is the question of age.

It is sometimes argued that the grandparent is too old to care for a child. This subject is not specifically mentioned in the Section10 (9) check list but will be a factor the court will take into account when deciding whether permission should be granted when dealing with the grandparents application.

Re C (A Child) (2009) EWCA Civ 72 the Court of Appeal warned lower courts against making assumptions that grandparents cannot provide proper care because of their old age. The court made it clear that whilst age will be a factor, it is not necessarily an overriding factor.

Summary on the Law re Permission

The case of Re A (2015) All ER (D) 24 gives a helpful summary of what the court is looking for when deciding on a permission application :

1. Every case is fact specific;
2. Section 10(9) sets out a check list but is "not exhaustive";
3. All material facts will be taken into account including whether there is an arguable case;
4. The welfare of the child is relevant but not a paramount

Should the court refuse a party permission to file an application, there is a duty on the court to give reasons for that decision: **T v W (Contact Reasons) 1996 2 FLR 47**

Application for party status

Not having automatic party status and not knowing the full factual matrix of the case can make the position of a grandparent difficult. At some point and usually quite far into proceeding a grandparent may apply for party status. If party status is granted, they are entitled to attend future court hearings, have legal representation (means and merits tested re LA funding) and have sight of all court papers. The court will consider the application for party status on its merits

Re B (A child) [2012] EWCA Civ 737concerned an application by a grandmother for joinder as a party to care proceedings. The leading judgment was given by Black LJ. It is clear from her judgment that the approach to a joinder application is similar to the approach to an application for leave under s.10

Special Guardianship Orders

These are an invention of Section 115 of the Adoption and Children Act 2002 and became Section 14A of the Children Act 1989. Such orders have been available to the courts since the 30th December 2005 and have increased in use over the years. Even though they are private law orders they are more frequently made in public law proceedings.

A Special Guardianship Order is an order appointing one or more individuals to be a child's 'special guardian'. It is a private law order made under the Children Act 1989 and is intended for those children who cannot live with their birth parents and who would benefit from a legally secure placement. It is a more secure order than a child arrangement order but less than an adoption order because it does not end the legal relationship between the child and his/her birth parents. It avoids an adoption which would bring any formal relationships with the family to an end.

The order remains in place until the child is 18 years of age unless discharged earlier. The usual end day for a Residence Order or Child Arrangements Order is 16 years.

One particular feature is that the order gives the Special Guardian greater control over the care and upbringing of the child, at the expense of the parents. Whilst parents retain parental responsibility, this is reduced to the extent that they will only need to be consulted by the Special Guardian on issues of a change of name and removal from the courts jurisdiction for a period of more than three months. Contact between the grandchild and the parents often takes place but is at the behest of the Special Guardian.

The Special Guardian can appoint a testamentary Guardian to look after the child if the Special Guardian dies before the child reaches 18 years of age. The person appointed will share parental responsibility with the birth parent;

The Special Guardian Order also carries with it the right to receive help from the Local Authority in the form of counselling and other support.

The Special Guardian can also seek financial help from the Local Authority. A means test is involved to assess the grandparents needs under the Special Guardianship Regulations 2005.

Variation of a Special Guardianship Order

If circumstances change significantly, a court can vary or discharge a Special Guardianship Order under Section 14 D Children Act 1989.

Parents require the court's permission before making this application. The court will need to be satisfied that there has been a significant change in circumstances since the order was made.

Applying for permission is a two stage process.

If the applicant is granted permission, the court will then go on consider the welfare of the child and whether it is in the interest of the child to vary or discharge the Special Guardianship Order.

Who can apply for Special Guardianship Orders?

The applicant must be over 18 years of age and cannot be the parent of the child in question. The applicant can make an application on his/her own or jointly with another person. The following people may apply to be special guardians:

- Any guardian of the child.
- Those who have a Child Arrangements Order or a Residence Order for the child
- Anyone with whom the child has lived for at least three years out of the last five
- Anyone with the consent of the LA if the child is in care
- A LA foster parent with whom the child has lived for at least one year preceding the application.
- A relative of the child and the child has resided with them for at least one year immediately pre-dating an application for a Special Guardianship Order
- Anyone with parental responsibility for the child

What is the role of the local authority ?

The Special Guardianship Regulations 2005 state that the local authority report should include certain key information about the child such as:

- Whether the child has brothers and sisters and details of both parents.
- The relationship a child has with other family members and the arrangements for the child to see or keep in touch with different family members.
- Details of the child's relationship with his/her parents.
- The parent's and child's wishes and feelings.
- The prospective Guardian's family composition and circumstances
- Parenting capacity of the Guardian
- Medical information on the child, prospective special guardian and the birth parent(s).
- An assessment of how long a Special Guaridanhip Order would meet a child's needs long term.
- Financial assistance (means tested).
- Respite care.
- Counselling, advice, information and other support services.

- A recommendation regarding contact and Special Guardianship. Implications of the making of the Special Guardianship Order for all those involved.
- Assistance with the arrangements for contact between a child, his/her parents and any relatives that the local authority consider to be beneficial. This assistance can include cash to help with the cost of travel, entertainment, and mediation to help resolve difficulties on contact.
- Services to enable children, parents and special guardians to discuss matters, this might include setting up a support group.
- Therapeutic services for the child.

What happens after an assessment?

This assessment determines whether a person has a need for special support services and whether the Local Authority can offer this service. The person should be given notice and information of the support offered and if appropriate the financial support too.

What about financial support?

It may be possible to make an application to your Local Authority for a Special Guardianship Allowance. Local Authorities will then have to work out how much fostering allowance would have been paid had the child been fostered rather than cared for under a Special Guardianship Order.

What kind of support is available to a Special Guardian?

Under the Adoption and Children Act 2002, financial support and other services may be available for the Special Guardian, the child and the parent(s). However, if a child is not (or was not) looked after by a Local Authority, then there is no automatic entitlement to an assessment for Special Guardianship Support services. It is possible to request an assessment for support in this situation.

It is possible to apply to the Local Authority for a Special Guardianship Allowance.

What will happen after an assessment for support services has taken place? The assessment will determine whether a person has a need for special support services. Where the Local Authority decides to offer support services, they should give the person notice of the services they intend to offer including, if applicable, the amount of financial support. The person should have the opportunity at this point to make representations regarding the proposed support. It is advisable to seek independent legal advice before you agree to any provision.

Is assistance available in cash?

Regulation 3(2) states that a local authority can provide assistance in cash to a Special Guardian. For example: money to pay for a babysitter to provide respite for an evening; or money for petrol to facilitate a contact visit. This kind of assistance should not be means tested as it is being provided as part of a service rather than financial support.

What financial support is available?

It is possible to apply to the Local Authority for a Special Guardianship Allowance. The allowance is means-tested but guidance is given in the Special Guardianship Regulations 2005. These Regulations direct Local Authorities to have regard to how much fostering allowance would have been paid had the child been fostered rather than cared for under a Special Guardianship Order. Recent case engineering confirms that the rate for Special Guardianship Allowances should be calculated in line with fostering allowances. Deductions may be made to take into account Child Benefit and Tax Credit.

Discharge or Variation of a Special Guardianship Order - recent developments

Unlike an adoption order, the court may vary or discharge a Special Guardianship Order on the application of :

However, an application to *discharge the order* cannot be made by certain people unless the court has given them *permission* to do so. These people include:

- The child concerned (provided they have sufficient understanding of the proposed application);
- A parent/guardian;
- A step-parent who has parental responsibility under Section 4A of the Children Act 1989;
- Any other person who had parental responsibility for the child immediately *before* the Special Guardianship Order was made.

The *first stage* is that a parent who wishes to obtain permission to

apply to discharge the SGO must show a *significant change in circumstances*. If a parent cannot show a *significant change in circumstances* their application will fail. If a parent shows there is a *significant change in circumstances* the court has to go on to *stage two*. The court will only *give permission* for an application to discharge the order if it is satisfied that there has been a *significant change of circumstances*since the Special Guardianship Order was made. The only exception to this is when it is the child who is seeking leave to apply for a discharge.

At *stage two* the court will decide whether leave should be granted, based on a realistic evaluation of the applicant's prospects of success in the context of the effect on the child's welfare of the application being heard or not heard. The prospects of success must be real. The child's welfare is an important factor but it is not the paramount consideration. The degree of any change in circumstances is likely to be intertwined with the prospects of success, and the greater the prospects of success, the more likely it is that leave will be granted.

A Court of Appeal case which concerned *the test* for granting leave to apply to discharge a special guardianship order and the construction of Section14D(5) of the Children Act 1989.

The proceedings in ***Re M (Special Guardianship Order: Leave to Apply to Discharge)*** **[2021] EWCA Civ 442** illustrates the above points.

<u>Care Order co-existing with Special Guardianship Order</u>

Re F & G (Discharge of Special Guardianship Order) [2021] EWCA Civ 622

The Court of Appeal confirmed that a Special Guardianship Order can co-exist with a Care Order and remitted for re-hearing the question of whether or not the SGO in this case should be discharged.

Background

The mother (M) of twin girls born in 2010 formed a relationship with K during the pregnancy and the girls grew up believing him to be their father; they had no contact with their biological father. M and K later married, divorcing in 2017. After M formed a relationship with a violent man, the LA issued care proceedings, placing the children with K under ICOs in April 2019.

K was assessed as having extremely low cognitive ability and although he coped well with the children he needed considerable support. An SGO assessment was positive; despite his learning disability he had evidenced his ability to meet the children's emotional needs. At the final hearing of the care proceedings in April 2020 all parties agreed to the making of an SGO in favour of K and a full care order to the LA. No judgment was delivered giving the reasons for this outcome.

The placement with K broke down a few weeks later and the LA gave notice of their intention to remove the children to foster care. K applied to discharge the care orders and unsuccessfully applied for an injunction preventing the girls' removal. Following the children's placement with foster carers the LA initially sought the discharge of the SGO on the basis that K no longer needed PR. By the final hearing however the LA and guardian thought the SGO should remain in place despite there being no plan for the children to return to K. M had, without the necessary permission, filed an application to discharge the SGO. Rather than considering whether the test for permission was met the judge heard argument about whether the SGO should remain in place on the basis of the court's power pursuant to s14D(2) CA 1989. He refused to discharge the SGO but attached a condition limiting K's power to seek information from third parties while the care order was in force.

The appeal

The first ground of appeal was that SGOs and care orders cannot exist in law. This was rejected because the amendments to the Children Act 1989 made when SGOs were introduced clearly do allow for this situation:

• S91 makes it crystal clear that an SGO is not automatically discharged by the making of a final care order.

• S33(3)(b)(i), as amended, allows a LA to determine the extent to which a "parent, guardian or special guardian" may exercise PR when a care order is in force. This demonstrates Parliament's intention that an SGO could continue after the making of a care order.

• The provisions of s14D which entitle a LA designated in a care order to apply for the discharge of an SGO would be pointless if a care order operated to discharge a pre-existing SGO. The SGO must continue unless and until discharged.

• SGOs are intended to provide long-term support for the child and it would be contrary to the purpose of special guardianship if SGOs came to an end automatically on the making of a care

order; whether or not they should remain in force depends on the circumstances and must be decided in accordance with the child's welfare.

The second ground, that the judge was wrong to refuse to discharge the SGO, raised more complex issues. There were welfare arguments in both directions. The judge had been particularly concerned that the children should maintain links with K, who had been treated as their father and was an important person in their lives. He worried that over time the LA might cease to communicate with him and his relationship with the children could be undermined. His attention was not drawn to an option which emerged during the appeal hearing, namely to make an order for contact under s34(2) and to invite the LA to amend its care plan to contain an express provision that K fell within the category of persons identified in s22(4), namely a person whose wishes and feelings it considered relevant when making decisions about all matters concerning the children's future. A well drafted care plan could have provided substantial protection for the children's relationship with K and his involvement in decision-making.

The CA was uneasy about allowing a decision to stand that had been arrived at "after an unsatisfactory process without full consideration of the options". Accordingly the decision was set aside and the matter remitted to the trial judge for rehearing.

Take Away Points:

- A Care Order can be made in respect of a child whom is already subject to a Special Guardianship Order
- The court must consider whether the outcome can be achieved by a more orthodox means
- This is the first authority that definitively confirms that it is possible for Care Orders and Special Guardianships Orders to exist as a package of final orders.

Public Law Working Group

https://www.judiciary.uk/wp-content/uploads/2020/06/PLWG-SGO-Final-Report-1.pdf

Published June 2020 as a stand alone report.

Conclusion

The working group commends these recommendations and the proposed best practice guidance to the President of the Family Division.

The key themes of the SGO recommendations are:

i. to ensure full and comprehensive assessments are undertaken of prospective SGs and that sufficient time is afforded to local authorities to undertake these assessments;

ii. where there is little, or no, prior connection/relationship between the child and the prospective SG it is very likely to be in the child's best interests that the child is cared for on an interim basis by the prospective SG before any final consideration is given to the making of an SGO;

iii. the SGSP should be based on the lived experience of the child and of the proposed SG and must be a comprehensive plan based on the assessed needs of the individual child and of the proposed SG; and

iv. the plan should include clear provisions for the time the child will spend with his parent(s) or former carers and the planning of and support for the contact arrangements.

We are of the view that the implementation of the recommendations and the BPG will lead to a better outcome for

(1) the children and young people who are involved with local authority children's services departments and are the subject of care proceedings or are the subject of private law proceedings and

(2) for special guardians and their families. Our focus throughout has been on seeking to put the welfare best interests of these children and young people at the forefront of all considerations.

Surrogacy, Parental Orders and Modern Families

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Introduction:

Who was the first surrogate mother?
Biblical Times: The first mention of **surrogacy** can be found in "The Book of Genesis" in the story of Sarah and Abraham. Sarah and Abraham were married but could not conceive a child of their own, so Sarah turned to her servant Hagar to be the **mother** of Abraham's child.

It is likely that throughout history many similar arrangements took place.

It was in 1978 – Louise Brown, the **first** "test-tube baby", was born in England, the product of the **first** successful IVF procedure. 1985–1986 – A woman carried the **first** successful gestational **surrogate** pregnancy. 1986 – Melissa Stern, otherwise known as "Baby M," was born in the U.S.

A surrogacy arrangement is when a woman agrees to carry a child through pregnancy to birth for the child to be brought up by another couple or single person.

The couple or single person who intends to care for and bring up the child are known as the commissioning intended parents.

According to Stonewall, a registered charity representing the rights of the LGBTQ+ community, surrogacy and the treatment of intended parents is an issue of particular importance to the rights of this community. Most UK surrogacy organisations have reported significant increase

over the last few years in proportion of intended parents using surrogacy who are male same-sex couples, with several reporting a proportion of around 50%.[1]

The gametes that are used for the conception of the child maybe those of the intended parents, it may be the surrogate mother's own egg, or it may be a donor egg so neither the intended parents nor the surrogates.

There are 2 main pieces of legislation that cover this area of law.

The Human Fertilisation and Embryo Act 2008 [HFEA 2008] and the Surrogacy Act 1985.

This area of law is complex and in 2020 in the case of Whittington Hospital NHS Trust (Appellant) v XX [2020] UKSC 14 it was described by Lady Hale as follows '*UK law on surrogacy is fragmented and in some ways obscure'.*

Key terms:

Surrogate Mother *- the woman that carries the child through pregnancy*

Gamete – *the reproductive cell that creates a human child a female gamete is the egg or ova and the male gamete is the sperm*

Intended parent – *the intended parents are the couple or single person who enter the surrogacy arrangement to have a child and form a family. One or both may be the gamete providers. If it is a single person, they must be the gamete provider.*

Legal Parent – *at birth the HFEA 2008 provides that the surrogate mother and her husband or civil partner at the time of birth are registered on the birth certificate as the parents of the baby. They are the legal parents.*

[1] English Law Commission Consultation Paper 244/Scottish Law Commission Discussion Paper 167 Building families through surrogacy: a new law (a Joint Consultation Paper)(6th June 2019, cited at pp9-10 of the statement of facts), p45; and surrogacyuk.org which also illustrates the growth in the proportion

Parental order – *the intended parents can within 6 months of birth apply to the court for a parental order. This is similar to an adoption order and makes the intended parents' lifelong legal parents of the baby. The making of a parental order links to the birth certificate but the birth certificate itself is not changed.*

Many intended parents do not regularise their surrogacy births and Lady Justice Theis who hears many of the cases in this area described the risk of not obtaining a parental order as 'a legal ticking time bomb' that could explode on death or separation.

Theis J says legal reform is needed in this area. There is a Law Commission looking at this area of law but it will take a few years before changes are made.

Public Policy surrogacy arrangements must be 'altruistic'

The public policy around surrogacy arrangements in England and Wales is that they must be altruistic, there is no commercial surrogacy. The only money or goods that can change hands for the purposes of a surrogacy is to meet reasonable expenses of the surrogate mother.

Historically 'selling and buying babies' etc it had a stigma to it.

The surrogate herself does not get paid for the act of carrying a child for another person she is only paid for reasonable expenses so that she is not out of pocket. [see Surrogacy Arrangements Act 1985 s2].

In other jurisdictions such as the USA the arrangement can be commercial and there is a contract. Further in certain states in the US the intended parents will both go on the birth certificate rather than the surrogate mother and her husband which is the case in the UK.

Nonetheless when the child is brought to this jurisdiction HFEA s33 applies and the surrogate mother in the US is deemed the legal mother and the intended parents must apply for a parental order.

Surrogacy arrangements:

There are 2 different ways of conducting a surrogacy

Traditional Surrogacy: where the Surrogate mother uses her own egg and artificial insemination with the sperm of the intended father. She carries the child and then the intended parents will bring up that child.

Gestational Surrogacy: This is much more common now due to IVF you can use the egg of the intended mother or a donor egg. The surrogate mother is a host to the developing baby through to birth. She carries the child that is conceived from the gametes of the intended parents.

Who are the Legal Parents:

The surrogate mother is the legal mother in this country. This is not dependent on whether it is with her own egg or a donor egg or the egg of the intended parents. [s33 HFEA 2008].

In terms of the legal father or parent

S35 HFEA 2008 provides that

(1) If-

(a) At the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage with a man, and

(b) The creation of the embryo carried by her was not brought about with the sperm of the party to the marriage, then, subject to section 38(2) to (4) the other party to the

marriage is to be treated as father of the child unless it is shown that he did not consent to the placing in her of the embryo sperm and eggs or to her artificial insemination (as the case may be).

Section 38 - Further provision relating to sections 35 and 36

(1) Where a person is to be treated as the father of the child by virtue of section 35 or 36, no other person is to be treated as the father of the child.

(2) In England and Wales and Northern Ireland, sections 35 and 36 do not affect any presumption, applying by virtue of the rules of common law or section A1(2) of the Legitimacy Act 1976 or section 2(1)(a) of the Family Law Act (Northern Ireland) 2001, that a child is the legitimate child of the parties to a marriage or civil partnership.

(3) In Scotland, sections 35 and 36 do not apply in relation to any child who, by virtue of any enactment or other rule of law, is treated as the child of the parties to a marriage.

(4) Sections 35 and 36 do not apply to any child to the extent that the child is treated by virtue of adoption as not being the man's child." (emphasis added)

Importantly, section 35 of HFEA 2008, excludes the male spouse of the surrogate from 'father' status where he has not consented to the surrogate mother being implanted with the embryo

The surrogate mother's husband or civil partner (if she is married), is deemed the legal father. If the surrogate is married to a man then under s35 of the HFEA 2008 that man provided he consented to the surrogacy arrangement being undertaken is deemed the legal father of the child and placed on the birth certificate. It should be noted he has no biological relationship to the child and does not intend to bring the child up.

It is likely that historically this is in place firstly in line with the presumption of legitimacy ie any woman who gives birth to a child her husband is the father and secondly to protect the surrogate mother should the intended parents change their mind. Note if the surrogate

mother is married to a woman then under s42 HFEA 2008 the woman goes on the birth certificate as the child's parent.

Consent by the husband or legal partner to the surrogacy arrangement is a key element in terms of the surrogate's husband or civil partner becoming legal parent.

Re the Human Fertilisation and Embryology Act 2008 (Case G) [2016] EWHC 729 (fam)

Whether or not the husband or civil partner has consented is a question of fact. Any registered clinic will ensure this is done properly and in writing.

The Parental Order Process:

Within 6 months of birth the intended parents can apply to court for a parental order.

The child is placed in the care of the intended parents from birth in line with the surrogacy arrangement agreed.

A parental order once made will extinguish the legal parents' rights and grant lifelong parental status to the intended parents.

What is a Parental Order?

Parental orders are bespoke orders that confer parental rights on the intended parents and extinguish the surrogate's parental rights. In UK law, a child can have no more than two parents.

A parental order is a life long order, that is to say it goes beyond the age of 18 and endures throughout the child's life.

It is most similar to an Adoption order in its legal reach. A crucial difference though is that one or both of the intended parents will have a biological connection to the child and that is why adoption orders are not favoured in these circumstances.

The UK courts have clearly recognised that this is the mechanism most suited to conferring legal parenthood on intended parents in a surrogacy arrangement.

Lord Justice Munby, the then President of the Family Division, in *Re X (a child) (Surrogacy: time limit) [2014] EWHC 3135 (Fam) at [54]* explained why the UK courts hold that full legal recognition of parenthood is fundamental to the welfare of a child as follows:

(a) A parental order 'goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. … [It has] a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also… in relation to the practical and psychological realities of X's identity.'

(b) It has an effect 'extending far beyond the merely legal' as it 'has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in Re J (Adoption: Non-Patrial) [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences."'

(c) The 'consequences are lifelong and, for all practical purposes, irreversible: see G v G (Parental Order: Revocation) [2012] EWHC 1979 (Fam), [2013] 1 FLR 286.'

(d) A court considering an application for a parental order 'is required to treat the child's welfare throughout his life as paramount' and that Parliament, in legislating this, has 'required the judge considering an application for a parental order to look into a distant future'.

Conditions for the making of a parental order:

The conditions for the making of a parental order are set out in **S54 HFEA 2008** as follows:

(1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if—

(a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm **and** eggs or her artificial insemination,

(b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, **and**

(c) two persons who are living as partners in an enduring family relationship **and** are not within prohibited degrees of relationship in relation to each other.

(3) Except in a case falling within subsection (11), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born.

(4) At the time of the application **and** the making of the order—

(a) the child's home must be with the applicants, **and**

(b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.

(5) At the time of the making of the order both the applicants must have attained the age of 18.

(6) The court must be satisfied that both—

(a) the woman who carried the child, **and**

(b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43), have freely, **and** with full understanding of what is involved, agreed unconditionally to the making of the order.

(7) Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement; **and** the agreement of the woman who carried the child is ineffective for the purpose of that subsection if given by her less than six weeks after the child's birth.

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order,

unless authorised by the court.

Please note 54(A) was added to the Act in 2019 to allow single persons to apply for a parental order provided they are the gamete holder. This was following the case of *Re Z (a child) No 2 [2016] 2FLR 327* where Sir James Munby, President of the Family Division as he then was made a declaration of incompatibility in terms of s54 requiring only a couple being able to obtain a parental order. The declaration stated that this requirement was a breach of Article 8 and Article 14 and parliament amended the act and incorporated s54A.

Practical matters and interpretations of s54:

a) S54 has been subject to challenge and interpretation in the courts. And some aspects of it remain problematic.

b) The Act provides that the application for a parental order must be made within 6 months. In the case of Re X in 2015 the court was invited to read down the statute and it is read in a sensible way allowing more flexibility to this requirement. ***Re X (A Child) (Surrogacy: Time Limit) - [2015] 1 FLR 349***

c) S54 (4) provides that at the time of the making of the order the child needs to be living with the parents. In *Re: A (Surrogacy: s.54 Criteria) [2020] EWHC 1426 (Fam)* before Keehan J the intended parents had separated before the child was born. Mr Justice Keehan held that you need to look at the meaning of home in the widest possible sense. Therefore child has home with both parents even though they live in different houses.

> The biological mother and biological father entered into a surrogacy arrangement to have a child but separated shortly after confirmation of the surrogate pregnancy. The child, A, was subsequently born and the mother and father made a joint application for a parental order. The statutory criteria for

the making of a parental order on the application of two people were set out in s 54[a] of the Human Fertilisation and Embryology Act 2008, which provided: '(2) The applicants must be … (c) two persons who are living as partners in an enduring family relationship …' and '(4) At the time of the application and the making of the order—(a) the child's home must be with the applicants …' All parties were agreed that it was manifestly in A's welfare best interests to be made the subject of a parental order in favour of the mother and the father. However, three issues relating to the requirements of s 54 arose: (i) the application was made outside of the six-month time limit (s 54(3)); (ii) the child's home at the time of the application and upon the making of any parental order would not be the same home as both parents because they were separated (s 54(4)(a)); and (iii) whether, at the time of the application, the mother and the father could be found to be 'two persons who are living as partners in an enduring family relationship' (s 54(2)(c)). The court had regard, in particular, to art 8 (right to respect for private and family life) and art 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and to the requirement to read and give effect to legislation in a way which was compatible with Convention rights in s 3[b] of the 1998 Act.

Held – When considering whether or not the statutory criteria were satisfied on the facts of the present case and whether a parental order should be made, the following principles applied:

(i) when interpreting legislative provisions, the court had to have regard to the underlying purpose of the requirement and ensure the interpretation did not 'go against the grain' of the intentions of Parliament;

(ii) s 3 of the 1998 Act required the court, where possible, to give a Convention compliant interpretation of statutory provisions;

(iii) a failure to adhere to the 6-month time limit to make an application for a parental order was not fatal to the making of the order;

(iv) the questions whether the applicants were in an enduring family relationship and whether the child had his home with the applicants were matters of fact for the court to determine;

(v) where the court found that the art 8 and/or art 14 rights of the child were engaged, the biological and social reality of the child's life had to prevail over legal presumption;

(vi) the existence of family life was not defined nor was its existence constrained by legal, societal or religious conventions;

(vii) there were no minimum requirements that had to be shown if family life was to be held to exist;

(viii) what was required was an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which was clearly a question of fact and degree;

(ix) the mere fact that the parents were now separated was not fatal to the application for a parental order;

(x) similarly, the mere fact that the parents lived in separate homes was not fatal to the application;

(xi) if a parental order was not made, the child was likely to be denied the social and emotional benefits of recognition of his relationship with his parents and would not have the legal reality that matched his day to day reality;

(xii) the transformative effect of a parental order could not be overstated; and

(xiii) the ultimate test for the making of a parental order was the welfare best interests of the child. It followed that the fact that the application was made over two years after the time limit prescribed by s 54(3) was not a bar to the court making a parental order. To find to the contrary would be nonsensical and would deprive A of the enormous benefits of a parental order. The mother and the father were committed to A's welfare and future care in which both were agreed they should play an active role. The court was satisfied that A had a 'family life' with both

of his parents and, accordingly, that his art 8 and art 14 rights were engaged. In light of their agreement and commitment to A, the court was also satisfied that the parents were in an enduring family relationship. Further, the term 'home' had to be given a wide and purposive interpretation; it was not and should not be restricted to cases where the applicants lived together under the same roof. It was the plain intention of the parents that A would be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. Giving a wide and purposive interpretation of the word 'home', A had his 'home' with the mother and the father. Reading the provisions of s 54 in a purposive and Convention compliant manner, the statutory requirements were met on the facts of the present case. It was overwhelmingly in the welfare best interests of A that he was made the subject of a parental order in favour of both the mother and father and the application would accordingly be granted.

d) The court will do its best to make any order available to ensure the child is placed with their intended parents and Child Arrangements orders and Parental responsibility orders will be used to regularise the intended parents legal status with the child in their care but it falls far from a parental order. See ***AB v CD ETC [2018] EWHC 1590 (Fam)*** where Mr Justice Keehan expresses his frustration when intended parents who were both the biological parents of twins but had not applied for a parental order within the time limit (they were 2 years late) at the inadequacy of the replacement orders he had to make.

Consider what Keehan J says in the following paragraphs

73. I am wholly satisfied that the welfare best interests of the twins requires me, a) to make them wards of court for the time being, b) to make a child arrangements order in favour of the first respondent and the applicant, c) to make no order as to contact between the second respondent and the children,

d) to give the second respondent permission to withdraw his application for a child arrangements order, e) to dismiss his deemed application for a parental responsibility order, and f) to make an order restricting the exercise of the parental responsibility of the surrogate mother and her husband.

The absurdity of the law not recognising the first and second respondent as the mother and the father of these children is plain.

75. The losers are predominantly the children who do not have their biological parentage recognised in law.

76. I find myself extremely frustrated, as no doubt are the first and second respondents, that I am prevented, without any obvious good, legal or policy reason from making orders which explicitly recognise them as the legal mother and the legal father of these children. Instead, I am forced, as have other judges before me, to construct a set of orders to secure the welfare of the children which fall very far short of the transformative effect of a parental order.

S54(6) consent:

e) s54(6) requires that the surrogate and her husband must consent to the making of a parental order; this is absolute. This is where parental orders differs to an adoption in that the court can override parental refusal to give consent if the court is of the view it is being unreasonably withheld. S54(6)remains an absolute veto and can be devastatingly problematic in surrogacy arrangements and cannot be overridden by the court.

f) 54(6) also creates a spousal "veto": a husband of the surrogate mother can prevent a parental order being made, even if it would otherwise be in the child's best interests. The husband might have no biological connection to the child yet can prevent a biological parent from obtaining parental rights, and impede the establishment of the child's relationship with their parent, even if that parental relationship had always been intended. There is no requirement for such agreement to be 'reasonable' or relate at all to the child's best interests.

Re AB (Surrogacy: Consent) [2017] 2 FLR 217 [2016] EWHC 2643 (Fam) Theis J

The twins were born in 2015 as the result of an altruistic surrogacy agreement. The applicants were unable to conceive naturally due to medical reasons and met the surrogate and her husband through a non-profit organisation. A surrogacy agreement was entered into 3 months after they met and the surrogate became pregnant. Relations between the two couples deteriorated after the 12-week scan at which point concerns were raised about the health of the surrogate if the pregnancy were to continue. The surrogate felt that the applicants had not been sufficiently concerned about her well-being. The applicants were not present for the birth and had some difficulty seeing the children who spent a period of time in the neonatal intensive care unit. Following their discharge from hospital, the applicants had cared for the children and sent the surrogate photos and updates until she indicated that she no longer wanted to receive them. Parental order applications were made and all of the requirements of s 54 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008) were met apart from the issue of consent. The parental order reporter was of the view that she withheld consent to reflect her sense of grievance but hoped that the parties would be able to reconcile.

***Held** – adjourning the application for parental orders with liberty to restore before Theis J –*

(1) Without the surrogate's consent (withheld from a sense of grievance unrelated to the children's best interests), the respondents would remain the children's legal parents even though they were not biologically related to them and they expressly wished to play no part in the children's lives. From the perspective of the children's lifelong emotional and psychological welfare, parental orders were the only orders that accurately and properly reflected the children's identity as surrogate born children. While all of the other requirements of s 54 of the HFEA 2008 were met, the court could not make

parental orders where the consent of the surrogate under s 54(6) was not obtained (see paras [9], [11]).

(2) A parental order was devised specifically for a surrogacy arrangement, recognising the biological connection of the applicants as intended parents of the child. Whilst the respondents had indicated they would not object to an adoption order being made, that did not reflect the reality: the children were already the biological children of the applicants (see para [29]).

The biological father, the birth certificate and the child's identity s35 and 38 HFEA 2008:

Lady Hale definition of parentage

1. The UK House of Lords in Re G [2006] UKHL 43, defining three ways of parenthood, as genetic, gestational and psychological (Baroness Hale of Richmond):

> "[33]: The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels….[2]
>
> …
>
> [34] The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not: 1990 Act, s 27. ..
>
> …[35] The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting."

The Surrogate mother is the gestational parent and potentially the biological parent and is named at birth on the certificate. The husband of the surrogate where the intention is for

[2] "For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in Re C (MA) (An Infant) [1966] 1 WLR 646). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain."

the intended parents to care for the child under the surrogacy arrangement is neither gestational, biological, social or psychological.

The intended male parent, who is the biological parent is not named on the birth certificate at birth and denies at this crucial stage the identity of the child. In the event the legal parents refuse consent under s54 the child will have no legal record or identity connecting them to their known biological father who in all likelihood will be meeting their day to day care needs. The court has no power to override the refusal of consent only the care arrangements.

A birth certificate is an important fundamental document which is incapable of being separated from the person's biological identity at the time of registration at birth, for life and beyond.

H v UK

An application has been submitted to the EHRC led by Dr Chelvan, leading myself, and Ms Dijkstal in chambers instructed by Colin Rogerson at BLM Law to challenge s35 and s38 HFEA in the European Court of Human Rights. The section that excludes the freely consenting, intended biological father's from being registered at birth on the child's birth certificate. The application is put on behalf of the child highlighting her right to have her birth truly and correctly registered and the lifelong legal document that is her birth certificate to record her father. The government opposed our application. A decision from the European Court is awaited.

Home Office

Operating instruction

Hague Convention cases

Version 1.0

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
Contents

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
Contents

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.

Related content
Contents