Neutral Citation Number: [2022] EWHC 655 (Fam)

Case No: FD21P00779

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2022

Before:

MRS JUSTICE THEIS

- -

Between:

R	**Applicant**
- and -	
G	**Respondent**
- and -	
Secretary of State for the Home Department	**Interested Party**

- -
- -

Ms Jennifer Perrins (instructed by **Dawson Cornwell**) for the **Applicant**
Ms Elizabeth Lanlehin (instructed by **Crystal Chambers** for the **1st Respondent)**
Ms Fiona Paterson (instructed by) for the **Secretary of State for the Home Department**

Hearing date: 17th March 2022
Judgment: 22nd March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns proceedings issued by the father relating to X, age 5, against the mother for X's summary return to Italy. The applicant father's application is made pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention') and was opposed by the respondent mother.

2. Following a contested hearing, a return order was made by Arbuthnot J on 4 February 2022, requiring X to be returned to Italy by 13 February 2022. The mother made an application for asylum for herself and X on 10 February 2022. The issues the court has to determine are

   (i) the mother's application for a further stay of the return order in the light of judicial review proceedings she has just issued challenging a decision by the Secretary of State for the Home Department ('SSHD') on 15 March 2022 that the asylum applications are 'inadmissible' under paragraph 326E of the Immigration Rules, and

   (ii) the father's application for the return order to be effected with, if necessary, a collection order being made so he can take X back to Italy. In addition, the father seeks disclosure of the material submitted by the mother in the asylum applications.

3. The SSHD has attended this hearing, represented by Ms Paterson, to assist the court. The court is very grateful to all counsel who have provided focussed written and oral submissions, which have been of great assistance to the court.

4. The court announced its decision on 17 March 2022 with reasons to follow, which are set out below.

Relevant background

5. Both parents and X are Italian nationals. The parties were in a relationship for a number of years, did not marry, and separated in August 2021 although remained living together. On 30 August 2021 the father was not able to contact the mother, he received a message from her stating that she and X were in England and would be returning on 7 September 2021. They did not return on that date and the father reported the matter to the police and sought legal assistance.

6. On 23 September 2021 the father submitted his application to the Italian Central Authority and on 14 October 2021 these proceedings were commenced seeking X's summary return to Italy.

7. Directions were made by this court on 22 October and 5 November 2021 and the matter listed for a 2 day hearing on 3 February 2022. In paragraph 20 of the 5 November 2021 order, provision was made for the father and X to have video contact on Tuesday, Thursday and Saturday. I was told at this hearing that had largely taken place, although each parent cites some difficulties caused by the other. The 5 November 2021 order also provided that if the father wished to pursue direct contact in England prior to the date of the final hearing he should issue an application on notice.

8. The final hearing concluded on 4 February 2022 when Arbuthnot J made a return order after hearing oral evidence from the parties and rejecting the mother's defences under Article 13 a and b of the 1980 Hague Convention. Arbuthnot J gave a detailed judgment. The mother was ordered to return X by no later than 13 February 2022, with detailed directions made regarding the practical arrangements for X's return. Within those proceedings there was no issue that the father was exercising his rights of custody for the child at the time X was removed and X was habitually resident in Italy at the time of her removal to England in August 2021. That order was not appealed.

9. Just before the mother was due to return to Italy, pursuant to the terms of the return order, her solicitors confirmed on 10 February 2022 she had not purchased return tickets as provided for in the order and had made an asylum application on behalf of herself and X. According to the father, this was after he had made payments to the mother to secure the necessary flights in accordance with Arbuthnot J's order.

10. At the time no further details about the asylum application were provided save for a witness statement from an immigration solicitor instructed by the mother confirming the applications had been made. In relation to the asylum applications Ms Lanlehin's position statement for the hearing on 17 March 2022 states '*[the mother] had provided the same information during the Hague proceedings and her asylum claim is not based on predominantly new facts, that would suggest any fabrication or intention to delay the proceedings. Mother had simply obtained further evidence to advance her asylum claim of which the Secretary of State has a different duty to further investigate. The particular facts of this case suggests the mother equally had a right of appeal against the return order [of] which she could have lodged when the documentary evidence became available to her.'*

11. The matter was urgently restored to court by the father the day after being informed of the asylum applications through his application dated 11 February 2022. The mother also made an application on the same day stating *'the mother has not purchased tickets and is intending to apply for a stay of the order on the basis that the mother and child each made an application for asylum in their own rights…the mother makes an application for a stay of the return order'.*

12. On 15 February 2022 the matter came before this court and the directions order included inviting the SSHD to intervene, to attend the next hearing and to provide a letter to the court and the parties by 21 February 2022 detailing whether the application for asylum had been made, the status of the application, the timeframe for any decision and whether the SSHD intends to apply to intervene in the proceedings. Cafcass were invited to consider whether X should be joined as a party. The matter was listed again on 1 March 2022. The return order was stayed until the next hearing.

13. Cafcass considered the papers and informed the court and the parties that they did not consider X needed to be joined as a party.

14. Prior to the hearing on 1 March 2022 the SSHD confirmed the mother's asylum claim was deemed 'inadmissible' by the SSHD on 28 February 2022 under paragraph 326E of the Immigration Rules on the basis that both the mother and X are EU nationals and there is no evidence to suggest that the test under paragraph 326F was met, namely *'that there are exceptional circumstances which require the application to be admitted for*

full consideration'. The mother did not receive notice of that decision until 10 am on 1 March 2022.

15. At the hearing on 1 March 2022 the court was informed the mother was given a notice under s120 Nationality, Asylum & Immigration Act 2002 ('2002 Act') after her asylum interview the previous week, the effect of which was to give the mother 14 days to provide any further material in support of the asylum application. Counsel for the SSHD informed the court that the decision by the SSHD as to the inadmissibility of the mother's claim superseded the s120 notice and therefore the mother's asylum application had been fully concluded with no right of appeal. The mother sought more time, due the short notice she had been given of the SSHD's decision, indicating that consideration would be given to a claim for judicial review. The father stated that if the mother was not going to return X he would travel over here and collect X to return her to Italy, the order records the father to have been deemed to have made an application for a collection order. The matter was adjourned until 8 March 2022, the stay on the return order was continued until the next hearing.

16. The 1 March 2022 order provided the hearing on 8 March 2022 was to consider whether (i) the stay on the order dated 4 February 2022 should continue; or (ii) X should be returned to Italy; and (iii) whether to make a collection order placing X in the care of the father to enable X to return to Italy in his care. Directions were made for the father's solicitors to lodge a bundle with position statements/skeleton arguments from the parties by 10 am 7 March 2022. The father filed a position statement on 7 March 2022, the mother did not file hers until just before the hearing on 8 March 2022.

17. The SSHD filed a position statement by 4pm 7 March 2022, as directed. It confirmed no pre-action letter had been received nor had any further application for asylum been made. The SSHD had served a further copy of her decision letter, the substance of the decision is the same as that dated 28 February 2022, namely that the mother's application is still deemed to be 'inadmissible', the final part of the letter is different as it sets out that unless the mother has permission to remain here she is expected to make arrangements to leave. Although the SSHD did not express any views on the orders sought by the father the position statement notes *'there is no bar to the court making orders sought by the applicant'.*

18. Just before the hearing started on 8 March 2022 the court and the parties received details of an application for judicial review in the Upper Tribunal (Immigration and Asylum Chamber) by the mother that had been issued that morning. The Upper Tribunal made directions the same day, 8 March 2022, requiring the SSHD to file an acknowledgement of service on 10 March 2022.

19. At the hearing on 8 March 2022 Ms Lanlehin informed the court the basis of the judicial review proceedings was procedural irregularity, as the SSHD had made her decision without giving the mother the opportunity to make the representations provided for in the s120 notice.

20. During the hearing on 8 March 2022 there were discussions between Ms Lanlehin and Ms Paterson which resulted in an agreement being reached that the mother would withdraw the judicial review proceedings on the basis that she would provide the SSHD with any further information relating to the asylum application by 9am 14 March 2022,

which the SSHD would consider and review the inadmissibility decision by 5pm 15 March 2022.

21. On 8 March 2022 Ms Perrins sought the stay to be lifted, the return order to take effect and for the court to make a collection order to enable the father to take X back to Italy. The father had travelled to England for the hearing. That was opposed by the mother, who sought a further stay for the process agreed between the mother and SSHD to take place. The court granted a further adjournment until 17 March 2022. The reasons included that due to what had been agreed between the mother and SSHD it was open to the mother to say the asylum application had not been determined and as a consequence the court was arguably bound by *G v G (SSHD and others intervening) (2021) UKSC 9.*

22. What was agreed took place. The mother provided the information on 14 March 2022. The SSHD sent a letter on 15 March 2022 setting out the SSHD had concluded the mother and X's asylum applications are 'inadmissible'.

23. In the position statement filed for 17 March 2022 Ms Lanlehin stated at paragraph 3 that the mother *'is in the process of filing another application for Judicial Review today, challenging the lawfulness of the decision on admissibility and the failure to independently investigate and consider the evidence provided'.* During the hearing on 17 March 2022 it was confirmed those proceedings had been issued that morning in the Upper Tribunal who had made a direction requiring the SSHD to respond to the application by 21 March 2022, and the permission application to be listed on the *'earliest available hearing date'* after that.

24. On 17 March 2022 the court heard oral submissions from the parties and the SSHD and announced the decision that the application for a stay was refused, the return order would take effect on 23 March 2022 and a collection order would be made to take effect on 22 March 2022. The parties had informed the court they would agree arrangements for X to see her father over the coming weekend.

Submissions

25. In her written and oral submissions on behalf of the father Ms Perrins refers to the case of *G v G* when the Supreme Court considered the potential conflict between the principle of non-refoulement and the obligations that arise under the 1980 Hague Convention. The Supreme Court acknowledged the tensions between the objectives of the 1980 Hague Convention and the principle that refugees should not be refouled, namely expelled or returned to a country where they may be persecuted.

26. The main issue considered by the Supreme Court in *G v G* was whether where a parent had made a claim for asylum and named a child as their dependent, this should result in the child also being treated as an asylum claimant in their own right. In *G v G* the mother had not made a separate claim by or on behalf of the child. The Supreme Court held that [117] *'generally speaking, an application which named a child as a dependent could (and indeed should) be understood as an application by the child [for asylum]'.* Counsel for the father in *G v G* had conceded below that the principle of non-refoulement would operate so as to prevent the implementation of a return of a child in circumstances where the child was an applicant or subject to non-refoulement and that

issue appeared to be accepted in both the Court of Appeal [17] and in the Supreme Court [8] and [14].

27. The Supreme Court's judgment in *G v* G was that the principle of non-refoulement, where it applies, always operates as an absolute bar on the implementation of the return of the child under an order made under the 1980 Hague Convention. Ms Perrins drew attention to what is set out in *G v G* about pending claims and appeals [135 – 153], in particular at [152] that an *'in country appeal acts as a bar to the implementation of a return order in 1980 Hague Convention proceedings.'* In that paragraph Lord Stephens continued *'Due to the time taken by the in-country appeal process this bar is likely to have a devastating impact on the 1980 Hague Convention proceedings. I would suggest that this impact should urgently be addressed by consideration being given as to a legislative solution.'*

28. Ms Perrins continues in her written submissions to state '*the bar on removal/protection from expulsion is said to arise at various stages from a combination of our obligations under the 1951 Geneva Convention and the relevant framework, including EU law which has been transposed or otherwise incorporated into our domestic asylum and immigration law. See in particular Articles 7 & 39 of the procedures Directive and s77 & 78 of the Nationality, Asylum & Immigration Act 2002'.*

29. In her oral submissions at this hearing, Ms Perrins focussed on the point that it was accepted by Ms Lanlehin there was no appeal from the determination by the SSHD that the asylum claim was 'inadmissible'. As a consequence, Ms Perrins submits, there is no bar to the return order taking effect as there is no 'in country' appeal (per Lord Stephens in *G v G* [152]). She relies on the analysis in *G v G* between [135 - 153] where the Supreme Court makes it clear the 'in-country' appeals are those that come within the 2002 Act, which does not apply in the circumstances of this case.

30. Ms Perrins submits the circumstances of this case fall within those categories of cases highlighted by Moylan LJ *Re R [2022] EWCA Civ 188* when he stated

> [9] *'...in my view, the timing of an asylum claim is, potentially, of considerable importance to the application of the principles set out in G v G. If this was ignored as a relevant factor, it would open the door to manipulative applications used to seek to subvert the expedited process that is required in the determination of applications under the 1980 Convention*.' and
>
> [92] '*Before dealing with the merits of this appeal, I sound the following note of caution. If greater experience demonstrates or suggests that the respective processes are being manipulated by one party, it may well be that the court will have to revisit the guidance given in G v G and determine whether it requires adjustment to seek to prevent such manipulation. I do not propose, at present, to suggest where that might lead but I would draw attention again to the different standards of proof applied in the determination of an asylum claim and an application under the 1980 Convention and to the other observations made, in particular by the Court of Appeal in G v G and by the Inner House in Re (A Child).'*

31. Ms Perrins submits this case is an egregious example. The mother arrived in August 2021, made no application for asylum then or soon thereafter, fully engaged in the 1980

Hague Convention proceedings with the benefit of legal advice and representation. No reference was made in those proceedings of any asylum application which was only made on the eve of the implementation of the date for the child to be returned under Arbuthnot J's order. In *Re R* at [68] Moylan LJ highlighted the expectation in *G v G* that both claims would be running in parallel. He recognised that there might be circumstances which explained why an asylum claim was not made until later, such as changed circumstances in the home State. He continued *'However, absent such as explanation, the court is entitled to expect, and there is an obligation on, a parent to advance their full case in the 1980 Convention proceedings.'*

32. Whilst Ms Perrins made some more ambitious submissions about *G v G*, including the extent to what part of that decision is obiter, she accepted that if the court was with her in relation to the 'in-country' appeal point the court did not need to consider her wider submissions and the return order could, and should, be effected, thereby complying with the obligations under Article 12 of the 1980 Hague Convention.

33. Ms Lanlehin, on behalf of the mother, whilst accepting there is no appeal from the SSHD's decisions that the application is 'inadmissible', does not accept Ms Perrin's analysis in relation to 'in-country' appeals regarding the mother's situation. Whilst she acknowledges the mother's position does not fit in with the routes of appeal in the 2002 Act she submits the Inadmissibility; safe third country cases guidance published for Home Office staff on 31 December 2020 ('the Guidance') refers to judicial review proceedings issued in circumstances such as in this case is likely to have *'suspensive effect'*. However, she recognised that this is different and distinctive to the situation when there is an 'in country' appeal under the 2002 Act. Ms Lanlehin submits that the court should treat it as the same, as judicial review is the only effective remedy for the mother and should be regarded as the same as an 'in country' appeal. She submits in these circumstances the issue of refoulement is still *'ingrained'* in this situation.

34. Ms Lanlehin did not accept the judicial review proceedings were a further delaying tactic. She outlined that the mother had contacted the police soon after her arrival, hoped she would find redress in the 1980 Hague Convention proceedings where her fears were referred to in those proceedings. When her defence was rejected she was entitled to take the asylum route due to these fears. She submitted the asylum claim was not tactical as the mother sought redress in the 1980 Hague Convention proceedings first. Ms Lanlehin invited the court to exercise its discretion to grant a further stay of the return order until the judicial review proceedings are concluded.

35. Ms Lanlehin was able to take instructions from the mother about whether the father could spend time with X if he was in this jurisdiction, as he had been for the hearings on 8 and 17 March 2022. Ms Lanlehin confirmed the mother did not object in principle to the father spending time with X, subject to agreement between the parties.

36. Ms Paterson made clear the SSHD remained neutral in relation to the outcome of the hearing. She agreed with the analysis by Ms Perrins in relation to 'in country' appeals as set out in *G v G.* She referred to further contact the mother had made with the SSHD on 16 March 2022 requesting a screening interview, which the SSHD had understood to be a further asylum application made by the mother. Ms Lanlehin was able to take instructions and stated her instructions are the mother has not made any further asylum application.

37. Ms Patterson drew the court's attention to the point that the guidance in *G v G* was grounded in a wholly different factual matrix than that before the Court of Appeal in *Re R* and that in the present application. In *G v G* the mother applied for asylum on arrival at the airport '*on the basis of the fear of persecution from her family as a result of her sexual orientation, from which the South African authorities were unwilling or unable to protect her'.* The father applied for the child's return through the South African Central Authority 9 days after the mother's arrival here. The two applications ran concurrently; the asylum application having preceded the 1980 Convention proceedings.

38. In *Re R* there was a clear basis for the court to be concerned. The mother did not apply for asylum until 20 October 2020, the court having made a return order on 17 July 2020, in respect of which permission to appeal was refused on 3 August 2020 and stays were refused on 4 August 2020, 22 September 2020 and 16 October 2020.

39. Ms Paterson submits this factual matrix needs to be considered against the factual and legal contexts outlined by Lord Stephens in *G v G*, which she effectively and succinctly summarised as follows:

> (i) The relationship between the child and the left behind parent may be harmed beyond repair if there are delays in the resolution of the 1980 Convention and asylum proceedings (*G v G [3])*.
>
> (ii) The purpose of the 1980 Convention is to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted (*G v G* [4]).
>
> (iii) The prompt return of children wrongfully removed or retained is one of the objects of Article 1 of the Hague Convention, which requires an application to be determined within 6 weeks (*G v G* [68]).
>
> (iv) Any delay in either the 1980 Hague Convention proceedings and in any related asylum application is inimical to the obligations imposed on the United Kingdom to determine applications under the 1980 Hague Convention promptly *G v G* [69]).
>
> (v) Section 78 of the 2002 Act provides protection from refoulement only during an in country appeal but not an out of country appeal. A judicial review challenge does not fall within s78 of the 2002 Act (*G v G* [103]).

40. When considering these matters Ms Paterson submits it is arguable that *Re R* is not a departure from *G v G*, but rather an extension of the same principles to a wholly different set of facts, namely where it may appear the asylum system is being manipulated to thwart a return order under the 1980 Hague Convention.

Discussion and decision

41. The circumstances in this case are an illustration of how the tension referred to by Lord Stephens in *G v G* as between the 1980 Hague Convention and an asylum claim can operate on the ground and the impact that can have on decisions taken under the 1980 Hague Convention.

42. The factual matrix in *G v* G, as outlined by Ms Paterson, is arguably very different from that which existed in *Re R* and in this case where the asylum application is made after the 1980 Hague Convention proceedings have been concluded, following a contested hearing.

43. What this court needs to determine in this case is whether there is any bar, in accordance with the principles set out in *G v G,* that prevents the return order taking effect. I am satisfied there is no bar for the following reasons:

(i) There is no right of appeal against the decision by the SSHD that the asylum claim is 'inadmissible'. That is agreed by both Ms Perrins and Ms Lanlehin.

(ii) As a consequence, there is no 'in country' appeal in accordance with the 2002 Act and consequently the protection afforded for such a situation by s78 2002 Act does not apply.

(iii) I reject Ms Lanlehin's submission that this court should treat the mother's application for judicial review as having the same effect as an 'in country' appeal on the basis that it is the only route by which the admissibility decision can be challenged. That decision and distinction was made by Parliament when it had the opportunity to do so and it chose not to include the situation this mother is in as having such protection under the 2002 Act. Ms Lanlehin realistically acknowledged the reliance by her on the Guidance to Home Office staff did not give the mother the same protection as an appeal under the 2002 Act.

(iv) Consequently, there is no bar in accordance with the principles set out in *G v G* that prevent the return order being implemented.

44. Ms Lanlehin sought to suggest the court retained a general discretion to stay the return order in the circumstances of this case until the mother's claim for judicial review was determined. I reject that for the following reasons:

(i) Whilst the court does retain a general power to order a stay of an order under rule 4.1 (3) (g) Family Procedure Rules 2010 ('FPR 2010'), in this context that is generally exercised either in circumstances where the principles in *G v G* apply or in other specified circumstances, such as a time limited stay pending the filing of a notice of appeal.

(ii) Rule 12.52A FPR 2010 provides a procedure whereby return orders can be set aside where no error of the court is alleged. That is not an application made in this case and there has been no appeal of the return order.

(iii) Having determined that there is no bar on the return order being effective under *G v G* the court has to consider Article 12 of the 1980 Hague Convention which requires this court to return the child unless one of the defences under the 1980 Hague Convention has been established.

(iv) The considerations summarised in paragraph 38 above are relevant and underpin the obligation under Article 12 of the 1980 Hague Convention.

45. Having considered the position the court is now in with no bar under *G v G* to the return order taking effect, the acceptance by the mother that arrangements can be made for the father to spend time with X over the next few days I am satisfied an order should be made for X to be returned to Italy by 23.59 on 23 March 2022 and for this court to make a collection order in favour of the father to take effect on 22 March 2022. This will give an opportunity for the father to see X, if the parties can agree the arrangements, and for the mother to consider her position as to whether she is going to return with X before the collection order takes effect. If she does not, X will be returned to Italy in the care of the father. The undertakings given by the father on 4 February 2022 remain in place (subject to adjustments to reflect that X is returning in his care) which include not '[using or threatening] *violence against the mother nor to harass or pester her, directly or indirectly'* or *'to attend the property where [she] resides, nor come within 100 metre radius of the same, without prior written permission from the mother or with permission of the court'*.

46. Finally, the father included in his application a direction for the mother to disclose her asylum application(s) as they are likely to be relevant to the issues between the parties in the Italian courts. That issue will need to be restored for determination if the parties are unable to reach agreement and the court will need to consider the relevance of the documents to the Italian proceedings and how the respective Article 8 and 6 rights of the parties should be balanced.