Pragmatic reconciliation and pragmatic avoidance: The UK Supreme Court faces the norm conflict on abducted (refugee?) children in G v G

ejiltalk.org/pragmatic-reconciliation-and-pragmatic-avoidance-the-uk-supreme-court-faces-the-norm-conflict-on-abducted-refugee-children-in-g-v-g/

By Ed Robinson March 25, 2021

The topic of this post is a Supreme Court ruling from Friday 19 March, '*G v G*', and specifically its approach to the potentially conflicting treaties respectively governing (a) the protection of refugees and (b) the return of abducted children to their previous state of residence. The Court demonstrated a commendable refusal to inflict undue violence on either of the regimes at issue; there was no (to borrow from Milanovic) 'creative' or 'forced' avoidance or 'reading down' of their requirements. There were instead extensive efforts to find practical measures to meet the requirements of both; however in the most intractable areas the Court effectively delegated the 'dirty' work of reconciling the potentially irreconcilable to other actors in the UK's domestic law system.

This post summarises those aspects of the judgment, examining the case from the international law perspective. Citations to the ruling of the Supreme Court (or 'the Court') are included in square brackets below.

Background

The treaties of interest here are the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1951 Geneva Convention and Protocol relating to the Status of Refugees. Each of these has been, effectively, largely incorporated into English law. Refugee law in the UK is also supplemented by a body of EU law which, it was agreed for the purposes of this case, is still 'retained' in English law post-Brexit. The domestic and EU rules do not however preclude an assessment of the case in terms of its public international law dimension, with due caution.

The case concerns an application under the Hague Convention by the father of a child born and raised in South Africa, removed by the mother (his ex-wife) to England in breach of the custody arrangement ordered in South Africa. The mother sought asylum in the UK, naming the child as a 'dependant' in her asylum claim. The details of the asylum claim are not public, but the mother alleges that she and potentially her child face danger in South Africa from her own family on account of her sexuality (which she came to recognise after separating from her husband). She has also alleged controlling and abusive behaviour by her (now) ex-husband during and after the marriage.

The English proceedings raised the conflicting priorities of the Hague and Geneva Conventions. The purpose of the Hague Convention is to require the prompt return of abducted children to their state of 'habitual residence', whose courts can then resolve any

substantive family law disputes. The purpose of the Geneva Convention is to prevent the return of individuals to states where they face danger of persecution. To some extent, the Hague Convention can accommodate that purpose, since it allows states to refuse to return children in breach of 'fundamental' human rights principles or where the return poses a 'grave risk' of harm to the child.

However if the Hague Convention is properly interpreted, in light of its object and purpose, an overly broad construction of those exceptions is problematic. Given the potentially prolonged nature of asylum proceedings, there is a concern that in reality asylum claims (including perhaps 'sham' claims) could provide a vehicle for abducting parents to undermine the expedition which the Hague Convention seeks. The Court considered (at [68]) that the Hague Convention sets an expectation of determining applications within 6 weeks, whereas asylum proceedings 'can take months if not years' [3]. The impact of that delay on the relationship between the child and 'left-behind' parent could be profound [3]. Accordingly, the international regime interaction problem here arises within the interplay between the domestic rules for the two distinct types of proceedings.

Protecting non-refoulement

The potential for Hague Convention proceedings to undermine non-refoulement has been noted previously (see here and here). In *G v G*, three arguments to narrow the scope of non-refoulement protection in favour of the Hague regime were rejected.

Firstly, overturning the Court of Appeal, the Court held that if the parent who has taken the child applies for asylum and names the child as a dependant, the child will 'generally' be deemed to have applied for asylum as well [117-118]. This was important since, secondly, the Court held that a child could not be removed under Hague proceedings until their asylum claim was determined (contrary to the argument of one intervener) [129]. The third key decision was that the implementation of a Hague return order must await not only the Home Office determination of the asylum claim but also the conclusion of the in-country appeals process [145-153].

Domestic and retained EU law featured prominently in the Court's reasoning and the arguments on all of these points. However it did not ignore the international law position, including the impact of the questions at issue on the purpose and effectiveness of the relevant obligations. It considered the object and purpose of the Geneva Convention and the substantive position of threat likely to face children named as 'dependants' if returned in determining the first point [117-8]. The need for the Hague and Geneva Conventions to 'operate hand in hand', rather than allowing the Hague process to run its course outside the asylum process, was relevant to its decision on the second [134]. On the third, the Court observed that returning 'a child with a pending in-country asylum appeal would not respect the United Kingdom's international obligations', since an appeal might result in recognition that the child was in fact a refugee and entitled to protection from return [148].

Thus on each point the Supreme Court, focusing on the need for effectiveness of non-refoulement protection, rejected efforts to artificially narrow its scope.

Promoting expeditious return

The Court did not however disregard the Hague Convention's priorities. Although a Hague return order could not be implemented during the asylum proceedings, the Court held that there was no bar to Hague proceedings being undertaken and an order granted [154-159]. It also endorsed the Court of Appeal's view that the courts should be 'slow' to use its discretion to stay the proceedings, drawing on the object and purpose of the Hague Convention in support of that principle [160].

Further, the Court adopted a range of practical suggestions regarding co-ordination and communication between the various governmental and other stakeholders, and the establishment of priority arrangements to ensure the speedy resolution of asylum applications, where there are associated Hague proceedings [163-177]. It noted Home Office proposals for a process addressing the issue which aimed at deciding 'straightforward' asylum cases in 30 days (from notification of the Hague process by the High Court) [6]. However the finding that protection from return extended beyond the Home Office determination, throughout the in-country appeal process, raised a difficulty which could not be so readily surmounted.

Asylum appeals and expedition

The Court openly recognised asylum appeals as the key conflict area. From a timing perspective, barring a Hague return until the appeals process is completed is 'likely to have a devastating impact' on the Hague proceedings, which the Court suggested 'should urgently be addressed by consideration being given as to a legislative solution' [152]. However the court's analysis does not suggest any legitimate route by which legislators might resolve the issue. While the domestic (including 'retained' EU) rules could perhaps be changed to curtail in-country appeal rights, doing so would breach the non-refoulement obligation; it would result in the return of individuals whose asylum rights might be vindicated on appeal.

Since the UK government's commitment to international law has been questioned in recent months, the Court might have spelled out that limitation more clearly when handing the problem over to UK legislators; any legislative solution should only be one which accelerates asylum appeals without compromising the quality of the assessment. It might have been better for the Court to have acknowledged, as the High Court previously has, that otherwise the irreversible harm of a non-refoulement breach outweighs the serious but temporary and mitigable harm of a delayed Hague return, implying that the domestic legislative status quo should remain.

Asylum application confidentiality

The other challenging area of conflict was handed to the lower courts. Since asylum proceedings will delay and might prevent the return of the child, the 'left-behind' parent bringing Hague proceedings for return is likely to have an interest in the asylum

documents. The other parent may well be resistant to disclosure being ordered, especially if the threat underpinning the asylum claim relates to violence by the 'left-behind' parent. The possibility of such disclosure might affect their willingness to provide full details to those examining their asylum case; a UNHCR written intervention emphasised 'the vital importance of confidentiality in the asylum process' [173].

On this point, the Supreme Court adopted the position expressed in the Court of Appeal last year – there is no absolute bar to disclosure of asylum documentation, even if the parent receiving the information (in the Hague or other family court proceedings) is the alleged persecutor in the asylum proceedings. That factor would simply be one of various factors to take into account in a 'balancing exercise' by the court considering whether to order disclosure [170-171]. The Court also recognised 'the systemic importance of maintaining confidentiality in the asylum process', and the interests of the individual parent and child in the confidentiality of their asylum proceedings, as other relevant factors [170-173].

However without offering further guidance on the weight of those factors compared to the rights of the 'left-behind' parent (and potentially the child) in the return proceedings, the asylum-seeking parent and ultimately the courts are left to work out case by case how far the 'the vital importance of confidentiality in the asylum process' will in fact be recognised. On this point, the Court might have taken the opportunity to consider arguments rejected in the lower courts that disclosure should be 'exceptional'; at least in Hague Convention proceedings, which after all are meant to be summary and not involve a full examination of all the evidence.

Conclusion

The Court's pragmatism in finding solutions to the conflicting regimes at issue, without compromising the quality of its interpretation of either, was commendable. The pragmatism with which it addressed the irreconcilable conflicts – passing them to other actors in the domestic constitutional order – was perhaps the only option for a court which was rightly unwilling to stretch the legal analysis to 'solve' such conflicts itself. The difficulties of the tasks it handed over might, however, have been recognised more frankly and accompanied by guidance to assist in their resolution.