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Case No: FD17P00020

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2017

Before :

MR JUSTICE MOSTYN

- -

Between :

Farhan Elatawna	**Applicant**
- and -	
Yasmin Elatawna	**Respondent**
- and -	
Secretary of State for the Home Department	**Intervener**

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- -

Jacqueline Renton (instructed by **The International Family Law Group LLP**) for the **Applicant**
Henry Setright QC & Brian Jubb (instructed by **MSB Solicitors**) for the **Respondent**
Alan Payne & Robert Cohen (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 8 August 2017

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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.

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MR JUSTICE MOSTYN

The judge does not authorise publication of the judgment at this stage, and will receive submissions as to anonymisation.

Mr Justice Mostyn:

1. Does an asylum claim by the subject children halt an application under the 1980 Hague Child Abduction Convention? Surprisingly, this question has apparently never before been determined in England and Wales, although it has been addressed in the USA and Canada. The Home Secretary has intervened in the proceedings, and argues that a grant of asylum to the subject children, if made, would act as an absolute bar to a return order being made under the 1980 Convention. While the application is pending (and for these purposes a pending application is one that has not exhausted all appeal rights) the Home Secretary argues that a return order cannot be implemented. Such an order can only be made, or take effect, where the asylum claim has been refused and where all appeal rights have been exhausted.

2. In fact, in this case the Home Secretary refused the asylum claim of the mother and the children a few days before the hearing before me. The reasons given are extremely careful and extensive. They make compelling reading, and they correspond to my view of the merits of the mother's defence to the father's application under the 1980 Convention. The mother and the children have a right of appeal to the First-tier Tribunal, and that right of appeal has been exercised. At the hearing of those appeals the claims of the mother and the children for asylum will be determined anew, although the decision and reasoning of the Home Secretary will be afforded appropriate weight. If the First-tier Tribunal dismisses the appeal then there is the availability of an appeal on a point of law, and subject to permission, to the Upper Tribunal. Beyond that lie the Court of Appeal and the Supreme Court. If the Upper Tribunal refuses permission to appeal then the appeal rights will be exhausted; the availability of judicial review of such a decision would not, in my opinion, keep alive appeal rights for the purposes of the decision that I have to make.

3. Plainly, for the Home Secretary to determine an asylum application, for that decision to be considered anew by the First-tier Tribunal, and for the legal basis of that decision to be considered by the Upper Tribunal (and perhaps higher still), will take many months. That period of time is incompatible with the command for expedition contained within article 11 of the 1980 Convention, and article 11.3 of the Brussels 2 revised regulation (No. 2201/2003). Those provisions contemplate a decision on an application for a return order being made within six weeks. Article 11.3 of the Brussels 2 revised regulation allows a decision to be made outside that timeframe only in "exceptional circumstances". It is fair to observe, however, that notwithstanding this command, some cases take very much longer than six weeks, especially if they are appealed all the way up to the Supreme Court, as has so often happened in this field.

4. Asylum claims in this country are determined under the 1951 Geneva Convention Relating to the Status of Refugees. That convention is strictly speaking unincorporated in our statute law, although it is referred to, implemented, and given procedural effect by the Asylum and Immigration Appeals Act 1993, the Nationality Immigration and Asylum Act 2002, and by the Immigration Rules made by the Home Secretary and approved by Parliament. Moreover, it is adopted and given further procedural effect by two European directives namely the Qualifications Directive of 2004 (2004/83/EC) and the Procedures Directive of 2005 (2005/85/EC). The 1951 Convention is therefore well and truly part of the fabric of our law, both by Parliamentary reference and by the operation of European law.

5. The 1951 Convention was framed in the aftermath of the Second World War when floods of refugees swept across Europe. Initially, it was limited to protecting European refugees from before 1 January, 1951. However, since then it has been expanded to cover all refugees and has been subscribed to by virtually every country in the world. A key, almost sacred, principle contained within the 1951 Convention is that of non-refoulement as expressed in article 33(1) which reads:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

6. A person who arrives on these shores seeking protection is not confined to claiming relief within the four corners of the 1951 Convention. He or she may also seek protection against threatened violations of articles 2 and 3 of the 1950 European Convention on Human Rights as incorporated in the Human Rights Act 1998. Plainly, the principle of non-refoulement applies equally to a claim mounted under the 1998 Act.

7. It is hardly necessary to spell out the policy reasons that underpin the principle of non-refoulement. If a claimant for protection were returned to the place of persecution while his claim was pending, and, a fortiori, after it were determined in his favour, then there would be a high risk of persecution being re-inflicted on him or her, with possibly irreversible consequences.

8. The non-refoulement principle finds expression in article 21 of the Qualifications Directive. Equivalently, section 77 of the 2002 Act prohibits the removal under the Immigration Acts from this country of a person whose asylum claim is pending.

9. The Procedures Directive in article 4 requires member states to designate an authority with the responsibility for determining asylum claims. That has been given effect in this country by the nomination of the Home Secretary. Article 39(1)(a) requires that member states must ensure that asylum applicants have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum. In this country that has been given effect by granting the right of appeal to the First-tier Tribunal, with the further rights of appeal which I have mentioned above. Article 39(3)(a) provides that member states must provide rules for dealing with the question of whether the right to an effective remedy shall have the effect of allowing applicants to remain in that country pending its outcome. That has been given effect by allowing an in-country appeal to the First-tier Tribunal. There is a procedure under section 94 of the 2002 Act whereby the Home Secretary may certify certain claims as being clearly unfounded, with the consequence that the right of appeal is only exercisable when out of the jurisdiction.

10. The relief that is granted under the 1951 Convention or under the 1998 Act in favour of a persecuted claimant is of a substantive nature. Essentially, it allows the claimant to live here indefinitely with a guarantee that he will not be returned to the place of persecution. A grant of refugee status usually leads to a grant of five years' leave to remain; thereafter a grantee becomes eligible to apply for indefinite leave to remain.

11. The 1980 Hague Convention on the Civil Aspects of International Child Abduction was framed and promulgated in order to challenge the growing phenomenon of the unlawful cross-border removal or retention of children by one of their parents from the other. It was formulated at a time when there was no global Convention on the mutual recognition of custody and other orders regulating parental responsibility. In the same year, however, certain European countries subscribed to the Luxembourg Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children. Since then, in 1996, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children has come into effect, which provides for such a global mutual recognition regime. The recognition and enforcement provisions in the 1996 Convention have been largely reiterated in chapter III of the Brussels 2 revised regulation.

12. The Brussels 2 revised regulation has by recital 17 and article 11 adopted the 1980 Hague Convention. Plainly, the 1980 Convention is part of EU law (see *Opinion 1/13 of the Court of Justice of the European Union*, 14 October 2014). In theory, a clash or conflict could arise between the 1951 and 1980 Conventions, each of which has been adopted by the EU and is part of its law, and therefore ours.

13. The scheme of the 1980 Hague Convention is to return an unlawfully removed or retained child to the country of his or her habitual residence for the courts of that country to make the long-term welfare decisions about him or her. The objective of the Convention, as stated in its preamble, is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence" (emphasis added by me). In the absence of a mutual recognition of custody orders regime one can readily see why such a measure is necessary. If the child were not returned, there would be no guarantee that an order made in the place from where the child was taken ("the home court") would be recognised in the place to which he or she was taken ("the away court"). However, with the subscription of all of the countries of the European Union to the Brussels 2 Regulation (apart from Denmark), and the subscription of many countries (including Denmark) to the 1996 Convention, one can see that the need for the particular relief provided in the 1980 Convention is obsolescent, because the return of the child can be ordered by the home court either on an interim or final basis as part of the welfare proceedings, and that decision will be recognised and enforced in the away court. But old habits die hard and it does seem that relief in the away court under the 1980 Convention is far more commonly sought than the obtainment of a return order in the home court followed by an order for recognition and enforcement in the away court. The availability of legal aid plainly has a lot to do with this. And, of course, there are plenty of countries outside Europe which have not yet signed up to the 1996 Convention but which have signed the 1980 Convention. Israel, with which I am directly concerned, is one of those countries.

14. It is therefore important to recognise that the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does no more than to return the child to the home country for the courts of that country to determine his or her long-term future. The relief granted under the Convention does not make any long-term substantive welfare decisions in relation to the subject child.

If one were to draw an analogy with a financial dispute the relief is akin to a freezing order coupled with a direction that the assets the subject of the dispute be placed within the jurisdiction of the *forum conveniens*.

15. It is for this reason that the procedure for a claim under the 1980 Convention is summary. Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought. Controversial issues of fact need not be decided. If the court is satisfied that there are sufficient safeguards in place in the home country, then issues of risk of harm fall away. All this is trite law.

16. Obviously, justice delayed is a bad thing whatever the subject matter of the dispute, but it is especially bad if the dispute is about a child. So, the provisions in the 1980 Convention and in the Brussels 2 revised regulation commanding expedition are hardly surprising. But breach of that command is hardly likely to give to the kind of risks that might arise if the principle of non-refoulement is breached. There will be temporal disturbance, for sure, but this is of its nature curable and can be mitigated by access/contact in the meantime (as has happened in this case). The potential harm that may arise as a result of the breach of the expedition command is of an entirely different scale and nature to that which may arise from a breach of the principle of non-refoulement. It is this difference that is, in my judgment, decisive of the matter.

17. Approaching the matter from first principles I have no hesitation in concluding that where a grant of asylum has been made by the Home Secretary it is impossible for the court later to order a return of the subject child under the 1980 Hague Convention. Equally, it is impossible for a return order to be made while an asylum claim is pending. Such an order would place this country in direct breach of the principle of non-refoulement. It is impossible to conceive that the framers of the 1980 or 1996 Hague Conventions could have intended that orders of an interim procedural nature could be made thereunder in direct conflict with that key principle. In my judgment, the existence and resolution of the asylum claim amount to "exceptional circumstances" within the terms of article 11.3 of the Brussels 2 revised regulation.

18. If I needed to find a source of the power to refuse to make an order in such circumstances it would be article 20 of the 1980 Convention, which is plainly part of our national law notwithstanding that it escaped incorporation by the Child Abduction and Custody Act 1985.

19. If an asylum claim has been refused but an appeal has been mounted, then it is possible, indeed desirable, for the court to hear the return application but to provide that no return order shall take effect until, at the earliest, 15 days after the promulgation of the decision by the tribunal (that is one day more than the time allowed for seeking a further appeal). That is what I have ordered in this case. I believe that the tribunal would be assisted by my view of the merits of the mother's defences. If the appeal were allowed, then it would be necessary for a stay to be imposed on the return order. Plainly, the court has power to impose a stay in such circumstances under section 49(3) Senior Courts Act 1981, as well as FPR 4.1(3)(g). If the appeal were dismissed, but the claimant for asylum signified an intention to seek leave to appeal to the Upper Tribunal, the court can legitimately assess the prospects of success of the application for leave to appeal before deciding whether to allow the return order to be implemented, or for it to be further stayed. In my

judgment, the court pays proper respect to the terms of Article 39(1)(a) of the Procedures Directive by recognising an absolute bar up to and including the conclusion of the appeal to the First-tier Tribunal. Beyond that it becomes a matter for the discretion of the court.

20. Where there is an application under the Hague Convention 1980 running in parallel with an application for asylum it is vital that the Home Secretary is informed of this at the earliest opportunity and is invited and encouraged to deal with the asylum claim with maximum speed. Similarly, where the asylum claim has been determined prior to the hearing under the Convention, but where an appeal is being mounted, it is highly important that the First-tier Tribunal is invited and encouraged, indeed urged, to deal with the appeal as soon as possible. Only in this way can transgression of the command for expedition be mitigated.

21. The conclusion I have reached accords with the interesting and erudite decision of Mr Justice Hayden in *F v M & Anor* [2017] EWHC 949 (Fam). In that case the question was whether the court should exercise its powers under the inherent jurisdiction of the High Court to order a summary return of a child, who had been granted asylum, to Pakistan. In paragraph 44 he stated: "it seems clear that the grant of refugee status to a child by the SSHD is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction." I fully agree with this. In my judgment, it matters not whether the power that is sought to be deployed to effect a return is pursuant to the inherent jurisdiction or to the 1980 Hague Convention. Either way, a return order would breach the principle of non-refoulement.

22. My decision varies somewhat from that of the Court of Appeal for Ontario in *AMRI v KER* [2011] ONCA 417. There an (unopposed) return order to Mexico had been made and implemented in respect of a (by then) 14-year-old girl, notwithstanding that she had been granted refugee status. Somehow, the girl ran away from her mother and got back to Canada by the time that the decision of the Appeal Court was given. The Court of Appeal rightly recognised the centrality of the principle of non-refoulement, which it described as the cornerstone of the international refugee protection regime (see paragraph 55). It rightly held at paragraph 67 that the Hague Convention did not purport to elevate its mandatory return policy above the principle of non-refoulement. It rightly held at paragraph 68 that the Hague Convention contemplated respect for, and fulfilment, of a state's non-refoulement obligations. However, it allowed that the Hague court could make a return order, notwithstanding the existence of the grant of asylum. In effect, it mandated that the Hague court could examine anew the basis for the grant, on this occasion having heard from both parents rather than just one (as would have been the case for the purposes of the grant of asylum). It held that for the purposes of the Hague Convention a child has no more than a prima facie entitlement to protection against refoulement - that the grant of asylum gave rise to a "rebuttable presumption" of the existence of the risk of harm (see paragraphs 74, 77 and 78).

23. I do not agree with this approach. First, I cannot see how in summary proceedings a court could validly substitute the view of the duly designated decision-maker that there existed a risk of persecution with its own view. But even if that were possible, the approach of the Canadian court could simply not work here, because the sole lawful determiner of the asylum claim is the Home Secretary, and on appeal the First-tier Tribunal. The Procedures Directive requires us to nominate a decision-maker and

that person is the Home Secretary and I simply cannot see how the court could step into her shoes and make a different decision to that exclusively entrusted to her.

24. Neither do I agree with the approach of the US Court of Appeals for the Fifth Circuit in *Sanchez v RGL* (2015) 761 F.3d 495. There the court held that a grant of asylum would only bind the executive, but not the judicial, arm of the state. Therefore, the grant, while relevant, was not determinative. In my opinion the state is the state and cannot be cleverly sub-divided for these purposes. Moreover, it is apparent that the court was not given argument about the prohibition against refoulement which plainly binds all arms of the state.

25. Miss Renton has raised the spectre of floodgates. She foresees many Hague cases being derailed by late claims for asylum. I believe that her fears are overstated. Most Hague cases here seem to emanate within Europe, and asylum claims are possible within the European Union only in highly exceptional cases. Most Hague cases seem to be for economic migration reasons, where an asylum claim would be impossible anyway. If a spurious asylum claim is made, the Home Secretary has power, as I have stated, to certify it as clearly unfounded. But if a bona fide asylum claim is made, even late in the day, then I am afraid that the Hague process will have to be paused while the asylum claim is dealt with. It is a clear instance of principle not being sacrificed on the altar of expediency.

26. Having dealt with the legal issues I now turn, summarily, to the facts of this case, and the mother's defences, apart from what her counsel Mr Setright QC called the "jurisdictional issue", which I have dealt with above.

27. The father is Israeli and aged 54. He works as a building engineer and is of reasonable means. The mother is also Israeli and aged 41. Both parents are ethnically Arab, specifically Bedouin. They were married in June 1993 and have four children. Their elder two children, a son aged 22 and a daughter aged 20 live with the father in Israel, in a place near Beersheba. The daughter in fact came to this country in June 2016 with the mother and her younger siblings, but has since returned voluntarily to live with her father in Israel.

28. The subject children are twins, a girl and a boy, now aged seven.

29. Although the mother makes some allegations against the father (which I believe to be untrue) her principal complaints are levelled against members of her own family. She says that she comes from a very large family and that from her birth she has been grossly mistreated by her father and her brothers. She said that this is endemic in the culture from which she comes and that the authorities favour Jewish citizens and turn a blind eye to so-called "honour violence" meted out to Arab citizens. She describes in graphic detail the treatment of her and indeed of her sisters which culminated, she says, in one of her brothers murdering one of her sisters. Two of her sisters have relocated to Canada where they were granted, she says, asylum. One of those sisters has made a witness statement corroborating the mother's case about the treatment she received at the hands of her own family. The mother herself in 2012 went to Canada and when there applied for asylum, but that was refused, and she returned voluntarily to Israel in 2014. She did not seek refuge in another country.

30. It is perhaps not surprising that the claim was refused because on her own case since her marriage to her husband the mother has been largely insulated from violence from and mistreatment by her own family. She has been allowed to live a free and emancipated life, in very comfortable circumstances. She has been allowed to travel without let or hindrance on holidays in Europe and the Far East. Indeed, she enjoyed just such a holiday in France and in the UK in 2015 following which she returned home to Israel. If she had been as fearful as she now says she is it is hard to see why she did not claim asylum in France or the UK at that point. It is noteworthy that since her arrival here in June 2016 she has emailed her husband saying "you were a good man, a good husband and a good father."

31. In June 2016, the mother, the daughter and the twins went on holiday to Thailand. They did not return when booked to do so on 8 July, 2016. Instead they travelled to London arriving here later that month. It was in that month that the mother applied for asylum for herself, listing the children as dependants. She made asylum claims for the children in their own right somewhat later. The father initially attempted to persuade the mother to return home but, on failing to do so, issued these Hague proceedings on 13 January, 2017. The Home Secretary has intervened in the proceedings. The reason they have taken so long to come to trial is because it was rightly agreed that the case would not be heard until the Home Secretary had issued her decision on the asylum claims, which she did on 4 August, 2017.

32. The mother's case as to the apprehended violence that she fears at the hands of her family is augmented by two further revelations that she has made. First, she says that the father is not in fact the biological father of the twins; they were the product of a fleeting affair she had when she was on holiday eight years ago. Second, she says that she has converted to Christianity. She says that when her family finds out about these things, their fury will know no bounds.

33. The Home Secretary's official has comprehensively anatomised the mother's asylum claim, which has a very considerable overlap with her defences in these Hague proceedings. The official has demonstrated why in numerous respects the mother's credibility is fatally compromised. For example, he demonstrates that the claim that the mother has become a Christian convert is hard to believe in circumstances where she does not know the name of any of the evangelists, and has no idea what Easter is for or about. He demonstrates that the claim the father is not the biological parent of the twins is hard to credit in circumstances where the mother was unable to recall the name of the true father. On a scrupulous analysis of the evidence he rightly, in my opinion, rejects the mother's claim that her brother murdered her sister, although it is true that the sister has gone missing.

34. My summary adjudication of the mother's case, which is made without having the benefit of hearing oral evidence, is that her fears have no objective foundation. Moreover, I am not satisfied that she has a genuine subjective fear.

35. The official goes on to demonstrate that that even if the mother's fears had objective justification there is ample legislative protection afforded to women in danger in Israel, which is not merely a theoretical right but which is fully available in practical terms. In my judgment, that assessment was entirely correct and the joint statement which I ordered to be prepared on this subject shows beyond any doubt that not only will the mother be fully protected by Israeli domestic violence measures but will also

have the facility to relocate to the other end of the country, if she so wished, without any hindrance. I am wholly satisfied that even if the mother's claims are true (which I doubt very much) then there are safeguards in existence which entirely neutralise the risks and dangers pleaded by her.

36. For these reasons the mother's defences are rejected. I order that the children be returned to Israel, but that this order shall not take effect until 15 days after the promulgation by the First-tier Tribunal of its decision on the appeal by the mother and the children against the refusal of the grant of asylum by the Home Secretary. If the First-tier Tribunal allows the appeal then the return order will be stayed. If the First-tier Tribunal dismisses the appeal, but the mother signifies an intention seeking leave to appeal on a point of law, then the case must be returned to me to decide if the return order should be stayed further, or if it should be implemented. That decision will depend on my appraisal of the strength or otherwise of her grounds of appeal.

37. That concludes this judgment.