Neutral Citation Number: [2024] EWFC 110 (Fam)

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2024

Before:

MRS JUSTICE GWYNNETH KNOWLES

- -

Between:

A Local Authority	**Applicant**
- and -	
A Mother	**Respondent**
and	
A Father	
And	
Others	

- -
- -

Mr Edward Devereux KC for the local authority
Mr Michael Gration KC and Miss Mai-Ling Savage for the mother
Mr Mark Twomey KC and Ms Rebekah Wilson for the father
Mr Christopher Hames KC and Mr Andrew Powell for the paternal grandmother
Miss Gemma Farrington KC and Miss Kate Kochnari for the children by their children's guardian

Hearing dates: 11 and 12 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 23 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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 Gwynneth Knowles:

Introduction

1. I am concerned with care proceedings issued in October 2023 with respect to four boys: A, aged 12; B, aged 10; C, aged 9; and D, aged 7. All four children have been accommodated in foster care pursuant to section 20 of the Children Act 1989 since 14 June 2023. The hearing before me was listed to determine (a) jurisdiction; (b) the local authority's application for an interim care order; and (c) whether the children should be returned to Austria. For reasons which will become clear in this judgment, I was unable to determine whether a return to Austria – contended for by the local authority and the children's guardian - was in the best interests of the children. Following oral submissions, I made interim care orders with respect to the children and gave my reasons for doing so in an ex tempore ruling, separate from the matters with which this judgment is concerned.

2. This judgment is in two parts: the first part concerns itself with the relevant background and my determination as to whether the children are habitually resident in this jurisdiction; and the second part addresses what steps this court can take either to determine and/or to implement welfare decisions when all four children remain the subject of an as yet undetermined application for asylum in this jurisdiction.

3. The parties to the proceedings are the children's mother ("the mother"); the children's father ("the father"); and the paternal grandmother ("the grandmother"). The mother is of Syrian origin and lives in Vienna, Austria. The father was born in Syria and is presently in immigration detention in this jurisdiction, following his release from prison in March 2024. The father served a custodial sentence for facilitating the illegal entry of the children to this country, having been sentenced in early October 2023 for a period of eighteen months. On 21 November 2023, the father was notified of his liability for deportation. The grandmother lives in Vienna with her husband. None of the adult parties to the proceedings speaks English. The children are parties to the proceedings through their children's guardian.

4. In coming to my decision, I have read the material in the court bundle as well as some additional documents produced by the local authority at the start of the hearing. I heard briefly the oral evidence of the Austrian immigration law expert Mag. Clemens Ladner. I also had the benefit of detailed written and oral submissions from counsel. I have been greatly assisted by the advocates in a case not without some complexity.

Background

5. What follows is a summary of the factual background pertinent to the issues in this case.

6. The mother and father were born in Syria and married in 2010, divorcing in November 2023. In 2014, the father travelled to Austria and the mother joined him there with A, B and C in April 2015. At some point, the date of which is unclear, the entire family were granted asylum in Austria.

7. The family have been known to the child welfare authorities in Austria since 2016 because of concerns about the physical abuse and neglect of the children. Following

concerns raised by B's kindergarten about possible physical abuse, A and B were examined at hospital and, thereafter, social workers visited the family for about 6 months. According to the mother, the involvement of child welfare services ceased because there were no concerns about the parenting received by the children.

8. In June 2021, child welfare services once more became involved following two accidents involving C and D in which both sustained injuries. The children were assessed in hospital and, according to the mother, were found to be suffering from vitamin D deficiency. They were removed from the parents' care and placed in foster care for about three weeks. A statement from the social worker in Vienna, Ms Z, provided in support of a subsequent application made by the grandmother for custody of C and D, stated that there was *"suspicion of repeated violence against the children and gross neglect had to be assumed"*. Those concerns led to the children's removal and placement in *"crisis centres"*. Ms Z's statement explained that, during the course of the crisis centre placements, *"numerous strains on the children were identified (war trauma, integration problems, injuries with suspected violence in the past, medical deficiencies (iron and vitamin D), developmental problems in the children, noticeable unfocused and aggressive behaviour in the children, problems in their cognitive ability, various physical impairments)"*. Despite these professional observations, A and B returned to live with their mother and father whilst C and D went to live with the paternal grandparents. The entire family was provided with extensive child welfare support. On 22 August 2022, a grant of custody in respect of C and D was made by a family court in favour of the grandmother.

9. It is noteworthy that the father has an extensive criminal past with a number of convictions in Austria for forgery (2018); smuggling of migrants (2018 and 2021); and money laundering (2021). He appears to have served a prison sentence from late 2021 and was released on probation in March 2023. Following his release, the child welfare authorities reported that A and B's situation had deteriorated and, once more, those children were placed in a crisis centre in April 2023. However, A and B went missing on a number of occasions but they were eventually returned to their father's care. At this time, the father asserted to child welfare services that he had separated from the mother because she was violent and negligent towards the children. Finally, the mother herself separated from the father and moved into a women's shelter on 29 April 2023.

10. On or about 21 May 2023, the Austrian authorities suggested that the father had removed all of the children from that jurisdiction. This was the day that the mother last saw all the children and she made a complaint about their abduction to the police in Vienna on 23 May 2023. The Austrian authorities recorded that the father took the children abroad without the consent of the mother and the grandmother. The mother said that she did not consent to the children's removal from Austria though the father asserted that she did and that she supported his plan to move the children to England. In her statement, the mother said that the father telephoned her on 26 May 2023, telling her that he was in France with the children and was hoping to try and settle in England because life and education for the children were better there. He was prepared to settle in France if this was not possible. The father told the mother that he had told the children to refuse contact with her and say bad things about her. He did not want the children to be in Austria because he did not want them to be removed by the child welfare authorities. He told the mother that he was going to destroy his

telephone SIM card so that, if the mother went to the police and children's services, they would be unable to find him. The mother informed the police and children's services about this call. The grandmother also asserted that C and D had left Austria without her consent. C and D's passports remained in her possession.

11. On or around 14 June 2023, the children arrived in this jurisdiction with their father, having travelled in a *"dinghy"* across the channel with 61 other people. C later said that he had sustained *"some burn injury"* during this journey. According to the asylum application made by the father at that time, the crossing had been facilitated by a people smuggler. On 15 June 2023, the children were interviewed with the assistance of an interpreter and made allegations of physical abuse whilst in the care of their parents. The children spent two nights in an emergency placement and moved to their current foster home on 16 June 2023.

12. The father made a claim for asylum on or about 14 June 2023. In his claim, he stated that the mother suffered from a number of mental health issues and had abandoned all of the children, asserting that she was no longer willing or capable of taking care for them. He also maintained that the mother had left Austria and gone to Dubai where she intended to live permanently. The father said that he had decided to travel to the UK where he had extended family so that they could help him look after the children and find work. He failed to mention any criminal convictions in his asylum claim. The claim for asylum was made by the father on his own account and on behalf of all four children.

13. On 4 July 2023, the mother obtained court orders in relation to A and B, withdrawing custody from the father and assigning it to her. The Austrian court was aware of the children's presence in this jurisdiction when those orders in the mother's favour were made. The Federal Ministry of Justice for Austria has confirmed that the order dated 4 July 2023:

> *"is a provisional order and is binding and enforceable, but not legally binding because it could not be served [on] the father. The custody proceedings were interrupted because the return of the children to Austria is awaited. If the children are back in Austria, the proceedings in which the mother has applied for sole custody to be transferred to her will be continued."*

On 13 September 2023, the mother spoke to Ms Z and told her that she agreed to the children returning to Austria even if, as a preliminary step, that meant the children being in the care of the child welfare services before they could return to her care.

14. In early October 2023, the father was sentenced to a term of imprisonment for 5 offences, all of which related to the manner in which the children were brought to this jurisdiction. At the same time as the father was sentenced, the local authority completed an assessment of the paternal uncle which concluded that placement of the children with him was not a viable option.

15. The local authority issued its application for care orders with respect to all four children on 23 October 2023. On 24 November 2023, the court allocated these proceedings to the High Court and listed the matter for a further hearing, having invited representatives from the Austrian Embassy, the Austrian Central Authority,

Austrian children's services and the paternal grandmother to attend. Eventually, these proceedings were allocated to me and, at a hearing on 6 February 2024, the grandmother was joined as a party and directions were made with the aim of obtaining further information about the father's asylum claim, his criminal record and the involvement of the Austrian child welfare services with the family. Expert evidence was permitted to provide opinion as to the effect of Austrian family and immigration law on the children's situation.

16. This matter returned before the court on 5 March 2024. The recital to the order made on that occasion recorded that the parties agreed and the court had determined that:

a) the asylum claims that had been made by the father and on behalf of the children in this jurisdiction were in respect of fear of persecution from Syria. Therefore, the principles in G v G [2022] AC 544 were unlikely to be engaged in respect of any return to Austria; and

b) the court had jurisdiction to make an interim care order on the basis of the children's presence in this jurisdiction (Parental Responsibility Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) 2010, regulation 5).

17. The Secretary of State for the Home Department ("SSHD") has provided information to the court, confirming the existence of an as yet undetermined application for asylum made by the father on his behalf and that of all four children. Immigration detention has been authorised for the father pending the identification of a suitable address but, once such an address had been identified, a release referral would be completed in respect of the father.

Expert Reports

18. An expert report dated 21 February 2024 was prepared by Dr Marco Nademleinsky which considered the impact of Austrian family court orders on the mother's, the father's, and the grandmother's rights relating to the children. Its principal conclusions were as follows:

a) the order dated 22 August 2022 withdrew the parents' custodial rights for C and D and entrusted the grandmother with custody for both children;

b) this decision gave the grandmother *"rights of custody"*;

c) the decision meant that the grandmother's consent was needed for the children to be removed from her care and from Austria, provided that the decision had become final;

d) the parents had *"no more custody rights"* for C and D;

e) the order dated 4 July 2023 gave the mother temporary sole custody of A and B for the further duration of the custody proceedings.

19. With respect to immigration matters, Mag. Clemens Ladner provided a report dated 7 April 2024 together with a follow-up email. The principal conclusions of that report and email were as follows:

a) It was very likely, almost certain, that the Federal Office for Aliens Affairs and Asylum (referred to in his report as "the BFA") had been informed of the father's criminal conviction and imprisonment and had initiated proceedings to examine whether his asylum status should be revoked; and the father's asylum status could be (or may already have been) revoked (i) on the grounds that the father was convicted of a very serious crime and thus posed a threat to society or (ii) on the grounds that he had taken up legal residence in the UK;

b) The children's immigration status in Austria could be impacted by a change in or by a revocation of the father's rights to reside in Austria. The BFA had likely examined whether it should initiate administrative proceedings in order to revoke or change the status of the children in Austria. However, the criminal conviction of the father and even a possible revocation of the asylum status of the father in and of itself would not constitute legal grounds to revoke the asylum status of the children in Austria since they had been granted asylum status more than five years ago. The children's mere presence in the UK would not constitute legal grounds to revoke their status in Austria at this time;

c) If the BFA had not revoked the children's status in Austria, they still enjoyed asylum status there; and

d) the mother continued to enjoy asylum status in Austria.

20. Mag. Ladner gave brief oral evidence to me. He did not depart in any significant respect from the conclusions reached in his report. He confirmed that the grant of asylum status to the children in the UK would be rendered academic if the children returned to Austria, if it was affirmed that the centre of their lives was in that latter jurisdiction. Clearly, if the children remained lawfully in the UK, the BFA could initiate proceedings to revoke their status in Austria but Mag. Ladner thought this was very unlikely at the present time given the uncertainty about the children's status in this jurisdiction.

Positions of the Parties

21. What follows summarises the parties' positions on the issue of habitual residence. No party disputed that the court had jurisdiction to make interim orders based on the children's presence in this jurisdiction as recorded in the recital to the order made on 5 March 2024.

22. On behalf of the local authority, Mr Devereux KC submitted that the children remained habitually resident in Austria. He drew attention to their deep roots in Vienna since 2015 and the absence of consent from the mother and grandmother to their move here. Not only did the children have strong roots in Vienna but their life in this jurisdiction lacked the requisite elements of stability necessary for the children to acquire habitual residence here. By reference to the children's personal education plans, child in care reviews and their initial health assessment conducted in early July 2023, Mr Devereux KC emphasised that, though the children attended school and appeared to have settled in their foster home, the signs of their integration here were superficial at best. Their relationship with their primary carers – the mother and the grandmother – had been severed and they had barely had any contact with their father

because of his imprisonment. Their behaviour in placement was consistent with children who had experienced trauma and abandonment. In school, all the children – with the exception of D – experienced significant problems forming friendships and had behavioural or other challenges which interfered with their learning and required a significant degree of educational and social support. Put bluntly, the evidence of stability was insufficient for the children to have acquired habitual residence in this jurisdiction.

23. On behalf of the mother, Mr Gration KC submitted that the children were habitually resident in this jurisdiction. The children were placed together in a foster home with carers who could speak Arabic and who shared their Muslim faith. The children were receiving health treatment and were registered with a GP. All the children attended schools and, though they all had problems in that setting, they were making some progress. Though their circumstances here had a certain temporary quality because of the local authority's plan that they should be returned to Austria, this would not have prevented the children acquiring habitual residence here. Their lives in Austria had also been unstable, characterised by changes of placement and difficulties within their family.

24. On behalf of the father, Mr Twomey KC also contended that the children were habitually resident in this jurisdiction. He drew attention to the 2021 judgment of the child welfare authorities in Austria that the children had integration problems. This was consistent with the evidence from that jurisdiction of changes in their care and education occasioned by parental problems. Their current situation – over a ten month period – showed children living together and benefitting from mutual support as a sibling group.

25. On behalf of the grandmother, Mr Hames KC echoed the submissions made by Mr Gration KC and Mr Twomey KC. He contended that, since mid-June 2023, the children had clearly achieved some degree of integration into their social and family environment, sufficient for them to have become habitually resident at the date of this hearing.

26. Finally, on behalf of the children's guardian, Miss Harrington KC adopted the submissions made by the local authority, submitting that the children's residence here had an impermanent quality in contrast to their lives in Austria.

The Legal Framework

27. As Mr Devereux KC noted in the local authority's skeleton argument, the legal position was not altogether uncomplicated. What follows represents my assessment of the jurisdictional and legal framework relevant to the issue of habitual residence in this particular case.

The 1996 Hague Convention

28. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention") is incorporated into domestic law by the Private International Law (Implementation of Agreements) Act 2020 which amended the Civil Jurisdiction and Judgments Act 1982. Section 3(1) of the

Civil Jurisdiction and Judgments Act 1982 provides that the 1996 Convention shall have the force of law in the UK.

29. One of the principal objects of the 1996 Convention, as set out in Article 1, is *"(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child"*. The measures included within the scope of the 1996 Convention are broadly defined by Article 3 and include the placement of a child in a foster family or an institutional care or the provision of care by kafala or an analogous institution. In London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention) [2023] EWCA Civ 1213, the Court of Appeal affirmed that the 1996 Convention applied to public law proceedings under Part IV of the Children Act 1989 ("CA 1989") (see paragraphs 41-42).

30. The primary article under the 1996 Convention concerning jurisdiction is Article 5 which provides as follows:

> *"(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*
>
> *(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."*

Thus, in all international cases where there is a dispute about jurisdiction, the starting point is to determine the habitual residence of the relevant party, and in this case, the relevant parties are the children. Further, Article 7(1)(b) demonstrates that, even in respect of an abduction, a change in a child's habitual residence can lead to jurisdiction under the 1996 Convention changing.

31. The relevant date for the purposes of Article 5 was considered by the Court of Appeal in London Borough of Hackney v P (see above). In paragraph 125, Lord Justice Moylan summarised his conclusions as follows:

i) the 1996 Convention applies to proceedings for an order under Part IV of the CA 1989;

ii) the court must determine the issue of jurisdiction at the outset of the proceedings by reference to the date on which the proceedings were commenced;

iii) jurisdiction under the 1996 Convention can be lost during the course of proceedings, if it was based on habitual residence and the child has ceased to be habitually resident in England and Wales. Accordingly, the court must be satisfied that it retains jurisdiction at the final hearing;

iv) jurisdiction is acquired under Article 5 from the date on which a child becomes habitually resident in England and Wales; the effect of this on existing proceedings will depend on the circumstances of the case;

v) the court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 when the child is habitually resident in a Contracting State;

vi) the courts in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 and will also have substantive jurisdiction based on a child's presence here when the child is habitually resident in a non-contracting State.

32. In London Borough of Hackney v P, Lord Justice Moylan deprecated delay in decision-making in international cases which engaged the 1996 Convention since this was always contrary to the best interests of children. In paragraph 90, he stated:

"…The longer the determination of any jurisdictional issue is delayed, the more established the child's situation becomes. It would be wrong for this delay to be the cause of the jurisdictional picture changing or, even, becoming determinative of that issue. I would, however, point out that the court can moderate the impact of this, in the appropriate case, by using the transfer of jurisdiction provisions in the 1996 Convention to ensure that the Contracting State better placed to make welfare decisions is able to do so. There is also the power, again in the appropriate case, to make a summary return order in respect of both a Contracting and a non-Contracting State…".

33. Thus, if a child is habitually resident in another Contracting State, that State has substantive jurisdiction under Article 5. It would be open to the English court to request the transfer of jurisdiction under Article 9. Conversely, if the child was habitually resident in England and Wales, the courts have substantive jurisdiction under Article 5. It would be open to the English court to make a request under Article 8 that another Contracting State assume jurisdiction (see paragraph 95 of London Borough of Hackney v P).

34. It follows that a child's habitual residence may change during the course of proceedings, often because there has been a delay in determining where a child is habitually resident. In London Borough of Hackney v P, Lord Justice Moylan acknowledged that, whatever the reason for the delay, where a child has become habitually resident in this jurisdiction during the course of proceedings, it was clear that the English court will have acquired substantive jurisdiction under Article 5 (see paragraph 119).

Habitual Residence

35. The meaning of *"habitual residence"* in relation to children matters has been considered by the Supreme Court in five decisions:

i) A v A (Children: Habitual Residence) [2013] UKSC 60 ("A v A");

ii) Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75 ("Re KL")

iii) Re LC (Abduction: Habitual Residence: State of Mind) [2014] UKSC 1 ("Re LC");

iv) Re R (Children) [2015] UKSC 35 ("Re R") and

v) Re B (A Child) [2016] UKSC 4 ("Re B").

These cases are founded upon two binding decisions of the Court of Justice of the European Union, namely Proceedings brought by A (Case C-523/07) [2010] Fam 42 and Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22.

36. Overall, the approach to an assessment of habitual residence is plain and can be seen most clearly from two statements in the leading judgement of Lady Hale in A v A (paragraph 54):

> *"iii The test adopted by the European Court is 'the place which reflects some degree of integration in a social and family environment' in the country concerned. This depends on numerous factors, including the reasons for the family's stay in the country in question."*

and

> *"v In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors."*

37. However, as Lord Justice Moylan recently emphasised at paragraph 42 of Re A (Habitual Residence: 1996 Hague Child Protection Convention) [2023] EWCA Civ 659, care needs to be taken with any *"shorthand summary"* because *"... 'some degree of integration' is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open ended, not a closed, list of potentially relevant factors"*. In Re A, Lord Justice Moylan preferred the formulation set out by Lady Hale in Re LC at paragraphs 59-60 where she respectively used the phrases *"the necessary degree of stability*" and *"a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'"* (see paragraph 44). In paragraph 46 of Re A, Lord Justice Moylan noted that, *"self-evidently, a test of whether a child had 'some degree of integration' in any one country cannot be sufficient when a child might be said to have some degree of integration in more than once State"*. Referring to his judgment in Re G-E (Hague Convention 1980: Repudiatory Retention and Habitual Residence) [2019] EWCA Civ 283, Lord Justice Moylan emphasised in paragraph 46 of Re A that *"the comparative nature of the exercise"* required the court:

> *"... to consider the factors which connect the child to each State where they are alleged to be habitually resident..."*

38. A useful summary of factors relevant to the determination of habitual residence was set out by Mr Justice Hayden at paragraph 17 of Re B (A Minor: Habitual Residence) [2016] EWHC 2174 (Fam). I have reproduced those factors below, omitting subparagraph (viii) in accordance with paragraph 63 of Re M (Habitual Residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105 where Lord Justice Moylan stated that this subparagraph ought to be omitted so that the court was not diverted from applying a keen focus to the child's situation at the relevant date. Accordingly and as amended, the list of factors identified by Mr Justice Hayden reads as follows:

i) the habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test);

ii) the test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that are most likely to illuminate his habitual residence (A v A, Re KL);

iii) in common with the other rules of jurisdiction in Brussels IIR, its meaning *'is shaped in the light of the best interests of the child, in particular on the criterion of proximity'*. Proximity in this context means *'the practical connection between the child and the country concerned'* (A v A (para 80(ii)); Re B (para 42 applying Mercredi v Chaffe at para 46);

iv) it is possible for a parent unilaterally to cause a child to change habitual residence by removing a child to another jurisdiction without the consent of the other parent (Re R);

v) a child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows that the child's integration which is under consideration;

vi) parental intention is relevant to the assessment but is not determinative (Re KL, Re R and Re B);

vii) it will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (Re B);

ix) it is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

x) the relevant question is whether a child has achieved some degree of integration in a social and family environment; it is not necessary for the child to be fully integrated before becoming habitually resident (Re R);

xi) the requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within three months). It is possible to acquire a new habitual residence within a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) to those *'first roots'* which represent the requisite degree of integration and which a child will *'probably'* put down *'quite quickly'* following a move;

xii) habitual residence was a question of fact focused on the situation of the child with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been

resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R); and

xiii) the structure of Brussels IIA, and particularly recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely albeit possible (to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; as such, *'if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has a habitual residence and, alternatively, that he lacks any habitual residence, the court should adopt the former'* (Re B).

Analysis: Habitual Residence

39. The essential question for the court is whether the children – at the date of this hearing – had achieved a sufficient degree of integration into a social and family environment in England such that their residence here was habitual. The court's focus must necessarily be on present circumstances but an understanding of the children's past experiences feeds into a holistic analysis of their current situation.

40. The older children – A, B and C – have experienced trauma arising from their experiences of the Syrian civil war and are refugees from the country of their birth, moving to Austria in 2015 with their mother. The health assessment of B conducted in July 2023 noted that he had marks on his shoulder caused by a *"past bomb explosion"*. The Austrian child welfare authorities identified in 2021 that the children had experienced war trauma and it is reasonable to infer that this has affected the older children emotionally and behaviourally.

41. The children lived their entire lives in Vienna from April 2015 to about 21 May 2023 when their father is said to have taken them from Austria. They all spoke German and attended schools and medical appointments in Vienna. Their mother and paternal grandmother did not have advance knowledge about the father's plan to take the children to the UK and were absolutely clear that they had not consented to the same. I have placed little reliance on the father's account of how the children came here because there are inconsistencies in what he has told this court and what he told those who interviewed him in connection with his asylum claim. Further, the children's personal effects were left in Austria and it seems as if there was little, if any, pre-planning prior to their removal. They had no opportunity to say goodbye either to those who cared for them or to their friends, let alone accommodate themselves to an uncertain future as unlawful migrants in a country which they had never visited before. Their mother and paternal grandmother remain in Austria but the children have had almost no contact with them since May 2023.

42. However, the children's lives in Vienna were also affected by suspected physical abuse and neglect at the hands of their parents which necessitated the involvement of child welfare services. In June 2021, the children were removed from the care of their parents for several weeks and thereafter they never lived together again as a sibling group in Austria. The two older boys lived with their parents whilst C and D lived with the paternal grandmother. A and B also experienced a lengthy period of time from November 2021 until March 2023 when their father was in prison and their mother cared for them alone. In April 2023, family care for A and B fell apart when

they were once more placed away from their parents following the intervention of the child welfare authorities. That placement was not successful as both A and B went missing on several occasions. Additionally, their mother separated from the father and moved into a women's shelter on 29 April 2023, alleging a long history of domestic abuse from the father. A and B returned to their father's care and he alleged that they had suffered physical abuse and neglect from the mother. Thus, the lives of all the children were impacted by allegedly neglectful and abusive care which caused their separation as a sibling group. Parental criminality and unstable care arrangements immediately prior to A and B's removal from Austria are likely to have compounded their behavioural and emotional difficulties which were obvious to child welfare services. In fact, all four children were described as having *"unfocussed"* and aggressive behaviour together with cognitive and developmental problems (June 2021). The children's guardian's analysis noted the children's reported fear of their mother hitting and beating them and domestic abuse being a longstanding feature of their lives.

43. As described above, the children's history is relevant to an assessment of their current circumstances. I have already referred to the children being unlawful migrants since their application for asylum has not yet been determined. This factor imports an over-arching uncertainty as to their status and residence here. Within that context, they have had almost no contact with their mother and grandmother. The social work assessment in January 2024 was that the children were struggling with feelings of rejection and abandonment from their mother and could not speak positively about their memories of her or of having contact with her. Because of his incarceration, the children have had little contact with their father though all four want to see him and to live with him. His own position here is precarious as he is liable for deportation and is presently in immigration detention. Even if released on immigration bail, the father appears to have no accommodation available to him other than an overcrowded property in which his brother lives.

44. However, the children have been living together as a sibling group since 16 June 2023. Their foster carers practise the Muslim faith and one speaks Arabic, both of which factors have undoubtedly helped the children to settle. I note that the foster carers receive regular respite care because of the challenges of managing the children's behavioural and emotional needs. When initially placed in foster care, the children fought each other and had no routine or ability to complete basic self-care tasks such as washing or brushing their teeth. By August 2023, according to the social worker, there had been a significant improvement in their self-care and the children had adjusted well to routine and consistent boundaries. All were calmer and more manageable. Though they still fought each other, the children were described as being a great support and comfort to each other. According to the recent analysis of the children's guardian, A is settled in the foster home; B continues to soil and wet himself but he engages with the foster carers in activities; C likes his foster home and is markedly clingy with his foster carers, indicating an insecure attachment; and D is settled with his carers. In the local authority documentation, the female foster carer reported that D had told B that his foster carers were his parents and that he wanted to stay with his carers forever. Finally, all the children are registered with a GP and receiving medical treatment when this is required.

45. Not only are the children living together and benefitting from good quality emotional and physical care but they have all learned to speak English fluently according to the children's guardian. She noted in her analysis that they *"do not recall German"*. All four continue to speak Arabic together and with one of their foster carers. Whilst A's and D's command of the English language was said to cause some problems with their understanding of school lessons, I note from their Personal Education Plans that this was not so poor for them to require language tuition in English.

46. A large part of the children's lives is spent in school. All four attend regularly but all four struggle with learning and/or relationships in school. Those difficulties are, in my view, understandable given the children's past experiences which include the dislocation caused by being abducted to the UK in the way I have earlier described. All the children were described as having a degree of developmental and cognitive delay. In their current school, A's behaviour is poor though I note his March 2024 Personal Education Plan showed him to have more positive behaviour points (71) than negative behaviour points (64). It was recommended that A spend time at a specialist provision for children with social, education and mental health needs. However, A spoke about enjoying sports with his friends in school and his Personal Education Plan did not mention difficulties forming friendships with others in his year. B had made little progress in school but is responding well to specialist education therapy. He struggled to interact appropriately with other pupils in a classroom setting, needing significant adult support. C also struggled to learn without the support of an adult and had not been able to make friends because of his behaviour. He was thought to have undiagnosed autistic spectrum disorder. D, however, was said to be managing well in school but his English was not so good. He had friendships and was described as happy and excited about school. He was making progress and his level of engagement in school had improved greatly.

47. Both the local authority and the children's guardian submitted that, though the children attended school and appeared to have settled in their foster home, the evidence of stability was insufficient for them to have acquired habitual residence in this jurisdiction. I have thought very carefully about this submission made by those currently most directly involved with the children. Nevertheless, I reject it and, on the basis of my holistic appraisal of the children's present situation, I have concluded that the children have now acquired habitual residence in this jurisdiction. Whilst I acknowledge that these children have, together and individually, a constellation of behavioural and emotional problems which impinge on their daily lives, I observe the majority of those problems were evident during their time in Austria where they were undoubtedly habitually resident. It is not necessary for a child to demonstrate full integration into a social and family environment and the children do not all have to show they are making progress to become habitually resident. Despite the children's problems, their foster home is stable notwithstanding the undoubted strains the foster carers experience in caring for them. Crucially, all four children are together under one roof and are negotiating their relationship as siblings once more in terms about which their foster carers are, on the whole, positive. They have a family life together and with their carers even though they presently have very little contact with their parents and grandmother. Outside the foster home, the children have learned to communicate in another language so as to participate in school and form friendships/relationships with other children and with those educating them (to a greater or lesser degree). All attend school and have been integrated into an

educational environment which is responding to their individual needs with varying degrees of support and therapy. Though their status in this jurisdiction is uncertain, this factor does not of itself operate to prevent the children becoming habitually resident according to the authorities to which I have paid careful attention. Thus, standing back and looking at the children's present situation, it demonstrates the necessary degree of stability and sufficient integration into a social and family environment to be described as habitual.

48. In coming to this conclusion, I have considered the children's situation by looking at their individual circumstances as well as their experiences as a sibling group. No party invited me to distinguish between the individual children and to come to potentially different conclusions about the habitual residence of each child. Though I recognise it might be theoretically possible to reach different conclusions about the habitual residence of each child, these children share more together than anything which might separate them for this purpose.

Determination and Implementation of Future Welfare Decisions

Background

49. All four children are the subjects of an as yet undetermined application for asylum in this jurisdiction made by their father on arrival in this jurisdiction. The information provided by the SSHD dated 18 March 2024 stated that this application had been made on 13 June 2023. That date conflicts with other information which has the children and their father arriving in the UK on 14 June 2023 but nothing turns on this slight discrepancy. It appears to be accepted that an application for asylum was made by the father on his arrival in the UK. Further, information disclosed by the SSHD revealed that the father claimed asylum on the basis that his life and that of the children would be at risk in Syria and that they would be killed by the Russians operating in that country. Subsequently, in an undated letter written from prison, the father explained to the SSHD that he had posted criticisms of the Syrian and Russian Presidents which had been seen by the authorities (unspecific). He suggested that, as a result, he and his family were targets for the authorities who wanted to kill them. He referred to relatives who had been killed but gave no further details about how they died and who was responsible. The father blamed his departure from Austria on his wife's abusive behaviour towards the children which he implied had been allowed to continue by the Austrian child welfare agencies. In short, he had come to the UK to ensure his children were safe. Finally, he referred to a request made by the Austrian authorities to the local authority for the children to be returned to Austria as adding substance to his concerns about the children.

50. All four children were granted immigration bail on 14 June 2023 and the father is presently in immigration detention though it seems likely that he may be granted immigration bail subject to him having a suitable address. There is presently no timescale forthcoming from the SSHD as to when the asylum application will be determined and I await confirmation from the SSHD that, in accordance with the suggested case management steps set out in paragraph 174 and Appendix 2 of G v G [2020] UKSC 9, the case has been allocated to the Expedited Team by the SSHD.

51. The decision of the Supreme Court in G v G is authority for the proposition that an applicant for asylum has protection from refoulement pending the determination of

that application. Thus, in 1980 Hague Convention proceedings, a return order pursuant to that Convention cannot be implemented until the request for international protection has been determined. Refoulement is the expulsion or return of an individual 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 (Article 33 of the 1951 Geneva Convention, quoted in full in paragraph 80 of G v G). G v G is also clear that an application has been determined once all legal challenges to the decision of the SSHD in respect of which there is an in-country appellate process have been exhausted (see paragraph 152).

52. Applied to proceedings under the 1996 Convention, these principles would appear to prevent the movement of the children outside this jurisdiction – were this to be the court's welfare decision – until such time as their asylum application has been determined. Nothing in G v G prevents the court from making a welfare decision about the children prior to any decision reserved to the SSHD but the court appears to be unable to implement its decision until the claim for international protection has been determined (see paragraphs 154-159 of G v G). No party suggested that I could not make welfare determinations pursuant to the 1996 Convention in any event once the question of habitual residence had been determined.

53. I invited submissions from the parties as to whether the existence of an undetermined asylum claim prevented implementation of any welfare decision concerning the children. This invitation was in the context of the local authority's contention that the children should be returned to Austria as soon as practicable, either pursuant to an Article 8 transfer request or to a request pursuant to Article 9 of the 1996 Convention if they were found not to be habitually resident here. It was also to provide clarity in respect of the recital on the face of the court's order dated 5 March 2024 that the principles in G v G were **unlikely** to be engaged in respect of any return to Austria.

54. Mr Devereux KC made submissions with which the other parties agreed though with some hesitation on behalf of the father. All were in agreement that there was no guidance relating to public law proceedings which engaged the 1996 Convention unlike proceedings pursuant to the 1980 Hague Convention (see the President's Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings (updated and issued on 1 March 2023)). Appendix Two of the Guidance concerns itself with cases involving a protection claim or protection status. The parties invited me to give such guidance as I felt able which might assist in public law proceedings originating in the international movement of children where the children concerned are the subject of an undetermined asylum claim.

55. The circumstances of this case are distinguishable from G v G on its facts in that a third country is involved which affords safety from persecution upon which the claim for asylum is based. That country is Austria where the children have been granted asylum and where that status has apparently not been compromised either by the circumstances of their removal to this jurisdiction, or by the length of their time here, or by the asylum claim made on their behalf.

The Legal Framework

56. In G v G, Lord Stephens set out the legal landscape governing asylum applications in paragraphs 77-114, describing it as a *"patchwork of different sources including the*

1951 Geneva Convention, EU law, domestic legislation, regulations and rules and domestic law incorporating EU and ECHR legal obligations" (paragraph 77). The 1951 Geneva Convention is the starting point for the reasons explained in paragraph 78 of G v G. Article 1(A)(2) of the 1951 Geneva Convention contains the following definition of a refugee:

"[T]he term 'refugee' shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

An individual who satisfies the definition set out above has, subject to limited exceptions, the right not to be re-fouled. Refoulement is prohibited by Article 33 of the 1951 Geneva Convention. In paragraph 81 of G v G, Lord Stephens noted that a refugee was protected from refoulement from the moment that person entered the territory of a Contracting State whilst the state considered whether they should be granted refugee status.

58. The exposition of the legal landscape relating to asylum applications in G v G also relied on the SSHD's acceptance that the relevant provisions of the EU Qualification Directive and the EU Procedures Directive were directly effective and remained extant in domestic law as *"retained EU law"* after the United Kingdom's withdrawal from the EU. Protection from refoulement whilst a claim for asylum was being considered by the SSHD is provided by article 7(1) of the Procedures Directive, thus an *"applicant shall be allowed to remain in the member state, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III…."*. Lord Stephens noted in paragraph 94 of G v G that this article imposed a positive obligation to allow *"applicants"* to remain. Article 21 of the Qualification Directive incorporated article 33 of the 1951 Geneva Convention which was expressed as a negative duty not to remove or refoule a *"refugee"*. The analysis in G v G then demonstrated how deeply embedded the Qualification and Procedures Directives were in domestic law by means of amendments to the Immigration Rules, the contents of various guidance documents, and Asylum Policy Instructions.

59. In paragraphs 112-114, Lord Stephens drew attention to the case of In re S (Children) (Child Abduction: Asylum Appeal) [2002] EWCA Civ 842 ("In re S 2002") in which the Court of Appeal considered the interface between applications under the 1980 Hague Convention and applications for asylum by the taking parent and/or child. In that decision, the Court of Appeal considered section 15 of the Immigration and Asylum Act 1999 which provided that, during the period beginning when a person made a claim for asylum and ending when the SSHD gave him notice of the decision on the claim, that person may not be removed from or required to leave the United Kingdom. In paragraph 21 of its decision, the Court of Appeal held that the *"language of 'remove' and 'required to leave'"* were terms of art in the law of immigration such that the prohibition on removal was directed towards the immigration authorities alone. Section 15 was held by the Court of Appeal not to create a substantial exception or any exception to the obligations arising under article

12 of the Hague Convention and was not intended to circumscribe the duty and discretion of the judge exercising the wardship jurisdiction. Further, in In re S 2002, the Court of Appeal considered paragraph 329 of the Immigration Rules which protected dependents from being required by the executive to leave pending determination of an asylum application and to the practice of the SSHD not to remove dependents pending an appeal by the principal asylum seeker. The Court of Appeal noted that the practice of the SSHD, absent some wholly exceptional justification for a departure from it, would no doubt also be protected by the courts either under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, or as a matter of legitimate expectation or both.

60. In G v G, the analysis as to whether a dependent to an asylum claim was entitled to protection from refoulement pending the determination of that claim so that a return order pursuant to the 1980 Hague Convention could not be implemented was heavily reliant on the Qualification Directive and the Procedures Directive being effective as a matter of retained EU law and as conceded by the SSHD. Thus, paragraph 124 stated that *"the protection in article 7 continues until the decision at first instance is taken by the Secretary of State which decision must be in accordance with 'the procedures at first instance'"*. In paragraph 129, Lord Stephens dismissed a submission made on behalf of Reunite that a return order pursuant to the 1980 Hague Convention was not a form of refoulement but rather the court determining whether the child wished to remain in the United Kingdom. In so doing he said:

"[129] ... I do not consider such an approach can be correct as it ignores the substantive effect of a return order which is that the child is being returned to the country from which they seek refuge. I consider that the obligation in article 7 binds the State in its entirety so as to preclude any emanation of the State (including the High Court) from implementing a return order so as to require an applicant to leave the United Kingdom whilst there asylum claim is being considered by the 'determining authority'".

[130] Accordingly, a dependent who can objectively be understood as being an applicant is entitled to rely on article 7 of the Procedures Directive which ensures non-refoulement of a refugee who is awaiting a decision so that a return order cannot be implemented pending determination by the Secretary of State.

[131] I also consider that such a dependent can rely on paragraph 329 of the Immigration Rules which does relate to the rights of a refugee and is not solely an emanation of the duty to have proper respect for family life. I agree that if, on some exceptional basis, naming a child as a dependent cannot objectively be understood to be a request for refugee status for the child then paragraph 329 is an emanation of the duty to have proper respect for family life. However, where an application for international protection can objectively be understood as a request for international protection by a dependent, then I consider that paragraph 329 is an emanation of the duty not to refoule a refugee under article 7 of the Procedures Directive. So, in addition to relying on article 7 of the Procedures Directive, a dependent who objectively can be understood to be making a request for international protection is entitled to rely on paragraph 329 which requires that no action will be taken to require his or her departure from the United Kingdom prior to the determination of the application by the Secretary of State.

[132] I do not consider that Laws LJ in In Re S 2002 'intimated' that paragraph 329 of the Immigration Rules does not relate to the rights of a refugee. At para 27 (quoted at para 114 above), Laws LJ recognised by reference to paragraph 329 that "Dependents are indeed protected by the law when a claim for asylum is made by mother or father". Rather, his reference to family life and article 8 of the ECHR was in relation to "the position of such dependents pending an appeal by the principal asylum seeker".

[133] I agree with the Court of Appeal judgment at para 130 that it is not now possible to construe section 77 of the 2002 Act as fully transposing article 7 of the Procedures Directive. Section 77 did adopt the construction of section 15 of the Immigration and Asylum Act 1999 set out in In re S 2002 by the insertion into section 77, after the reference to removal etc, of the words "in accordance with a provision of the Immigration Acts". However, asylum applicants are able to rely upon the rights within article 7 of the Procedures Directive to be allowed to reside in the UK during the pendency of their application on the basis of the Marleasing principle. It is a right arising from a Directive which has been recognised by our courts, so the position has not been changed by the United Kingdom's exit from the EU.

[134] I consider that an applicant has protection from refoulement pending the determination of that application so that until the request for international protection is determined by the Secretary of State a return order in the 1980 Hague Convention proceedings cannot be implemented. The two Conventions are not independent of each other but rather must operate hand in hand."

61. In a recent decision - In R (AAA (Syria)) v Home Secretary (SC(E)) [2023] UKSC 42 ("R (AAA)") - Lord Reed PSC and Lord Lloyd-Jones DPSC - delivering a joint judgment with which the remainder of the court agreed - made reference to the decision in G v G, noting the concession made by the SSHD in paragraph 84 of G v G that the Procedures Directive and the Qualifications Directive were directly effective and remained extant in domestic law following the withdrawal of the United Kingdom from the EU. In paragraph 147 of R (AAA), Lord Reed PSC and Lord Lloyd Jones DPSC noted that argument in G v G had proceeded on the basis of that concession. They observed that the Supreme Court had heard no argument on that point and that no reference had been made to the provisions of the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 ("the 2020 Act"). Lords Reed and Lloyd Jones concluded that this omission occurred by oversight as the 2020 Act came into force between the time of the Court of Appeal's decision in G v G and the hearing before the Supreme Court. Having itself heard full argument on the point, the Supreme Court in R (AAA) came to the clear conclusion that Articles 25 and 27 of the Procedures Directive did not have the effect in the domestic law of the United Kingdom as retained EU law. In so doing, Lords Reed and Lloyd Jones accepted the submissions made on behalf of the SSHD that the 2020 Act was designed to repeal retained EU law relating to immigration. The decision in R (AAA) appears to undermine the basis upon which G v G decided that a dependent child could not be required to leave or be removed from the UK until such time as the asylum claim had been determined, namely that article 7 of the Procedures Directive as retained EU law continued to have effect.

62. A recent decision of the Court of Appeal in Northern Ireland - In the matter of AB (A Minor) [2023] NICA 37 ("AB") – considered the effect of an undetermined asylum

claim upon the court's powers to take effective decisions pursuant to the 1980 Hague Convention. AB concerned a child who was habitually resident in Switzerland and who had been abducted to Northern Ireland by his mother who then made a claim for asylum, naming him as her dependent. The claim was made on the basis that the mother was at risk of persecution in Eritrea, her country of origin. Exercising the 1980 Hague Convention jurisdiction, the first instance judge refused to implement a return order to Switzerland until the mother's asylum application had been determined. By the time the matter came before the Court of Appeal, the mother and child had been granted asylum though there was agreement that both she and the child would return to Switzerland so that the Swiss courts could determine the best arrangements for the children's care.

63. Keegan LCJ gave the judgment of the court, beginning by noting the presumption of an expeditious return to the country of habitual residence in child abduction cases. She went on to say that, in a small number of cases, asylum applications have the potential to frustrate that aim and affect the good operation of the 1980 Hague Convention. She drew attention to the remarks of Lord Stephens in paragraph 3 of G v G that the time taken to determine an asylum application – even if genuine – could be months if not years. This degree of delay could frustrate the return of children pursuant to the 1980 Hague Convention because by the time the asylum application had been determined, the relationship between the child and the left-behind parent might be harmed beyond repair. Keegan LCJ set out the reasoning in G v G supporting the Supreme Court's conclusion that a child could not be returned where an asylum claim was pending and then stated that the facts in AB were distinguishable from G v G because a third country was involved which afforded safety from the persecution upon which the asylum claim was based, namely Switzerland. In paragraph 47, she said:

"…the simple point to make in this case is that a return of the child is sought to Switzerland not Eritrea. Therefore, it cannot be realistically argued that a return breaches the principle of non-refoulement…"

The Swiss authorities had provided reassurance that the mother and child did not face refoulement and would be afforded sufficient protections and support in Switzerland. In those circumstances, Keegan LCJ held that *"any argument against a return order in these circumstances renders the Hague Convention totally redundant and meaningless"*.

64. Whilst the question of a stay had been rendered academic in AB by the grant of asylum, Keegan LCJ expressed the view that a stay should not have been granted pending the determination of the asylum claim in the circumstances of this case which differed from those in G v G. That view was based primarily on the fact that refoulement to Eritrea was not presented as a risk at any stage in the Convention proceedings. Additionally, the court was of the view that (a) the Immigration Rules did not preclude a return under the Hague Convention, this being what Laws LJ found in Re S (Children) (Child Abduction: Asylum Appeal) [2002] EWCA Civ 843 in relation to the previous immigration rules, and (b) on the basis that the Procedures Directive was no longer part of retained EU law (paragraph 50). Though Keegan LCJ stressed that the court had not heard detailed legal argument given how the appeal unfolded, she made some observations about how matters might have changed since the decision in G v G.

65. First, and by reference to an earlier stage of the litigation in R (AAA), she noted that the SSHD no longer maintained his concession that the Procedures Directive was part of retained EU law. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, section 1 and Schedule 1 now applied. Second, section 77 of the Nationality, Immigration and Asylum Act 2002 was the domestic law which applied to the asylum application at the relevant time and the court noted that, by reason of the Nationality and Borders Act 2022, section 77 had been amended for all claims made after 28 June 2022 and provided (subject to ongoing legal challenges) that refugees may be removed to a safe third country pending the determination of asylum claims. Third, the relevant paragraph 329 of the Immigration Rules was in the same terms as that considered by Lord Stephens in G v G (paragraph 131). However, Keegan LCJ noted that paragraph 329 had also been subsequently amended to state as follows:

"For so long as an asylum applicant cannot be removed from or required to leave the UK because section 77 of the Nationality, Immigration and Asylum Act 2002 applies, any dependents who meet the definition under paragraph 349 must also not be removed from or required to leave the UK".

The language of the amended rule 329 was in similar negative terms as section 77 of the 2002 Act as opposed to the positive obligation that was apparent from article 7 of the Procedures Directive. The dicta in paragraph 113 of G v G analysed the true ambit of the protection offered by section 77 of the 2002 Act as set out by Laws LJ in In re S 2002. Thus, safeguards within the immigration process did not extend beyond that process and did not fetter a judge considering an application under the Hague Convention (paragraph 58 of AB).

Discussion

66 My analysis is subject to a number of important caveats. First, I have heard no submissions from the SSHD as to the effect of immigration and asylum law in the circumstances of this case. Thus, I am somewhat wary of coming to a firmly concluded view on this complex and highly technical issue. Second, I have not yet been invited to make a welfare decision about what should happen to the children and so the question of whether any welfare decision could not be implemented pending the determination of the asylum claim remains a moot point. At best, all I can do presently is indicate my current and provisional thinking in the hope that this might inform any future welfare decisions. Finally, I note that it is not beyond the bounds of probability that, if the asylum application is allocated to the expedited team as envisaged in G v G, the SSHD might well have determined it by the time I make any welfare decision for the children which requires to be implemented. I recognise that such determination would not preclude a challenge to the SSHD's decision by the father either on his own account or on the children's.

67. I am very grateful to Mr Devereux KC for setting out the case law with such care and attention and to Mr Twomey KC for making realistic submissions on behalf of the father that drew attention to the reality of requests to assume jurisdiction made pursuant to Articles 8 and 9 of the 1996 Convention, namely that once such requests had been made, there was no turning back which might accommodate the reality of an undetermined application for asylum or a decision by the SSHD which was challenged.

68. As the recital on the order dated 5 March 2024 indicated, the principles in G v G are unlikely to be engaged in respect of any return to Austria when the asylum claim made by the father on behalf of the children was based on fear of persecution in Syria, being his and the children's country of origin. As with AB, this case is distinguishable from G v G because Austria is a country which affords safety from persecution for the children and because it cannot be cogently argued that a return to Austria would breach the principle of non-refoulement. This is particularly so in circumstances where all four children already have the benefit of full asylum status in that country and where the expert evidence is that this status has been retained despite the children's abduction to the UK and the time they have already spent here. If it was necessary to provide complete reassurance as to the risk of refoulement, the Austrian authorities could be asked to formally confirm the children's status in that jurisdiction as a precursor to any welfare determination.

69. I find myself drawn to the analysis in AB which recognises a different reality now applying to the determination of asylum claims from that which Lord Stephens considered in G v G in early 2021. Though the decision in AB is not binding on me, it is highly persuasive, emanating as it does from the Lady Chief Justice of Northern Ireland. The analysis of immigration law in AB is also likely to be on all fours with that in England and Wales which adds to the importance of that decision. Though I have not heard detailed argument on the point, AB is authority for the proposition that, as appears from the Supreme Court's decision in R (AAA), the Procedures Directive is no longer part of retained EU law in this jurisdiction. Thus, the reliance by Lord Stephens on article 7 of that Directive may no longer be sustainable as a matter of statute. Further, the amendments to section 77 of the Nationality, Immigration and Asylum Act 2002 which came into effect from 28 June 2022 and the amended paragraph 329 of the Immigration Rules operate together to rescind the positive obligations flowing from article 7 of the Procedures Directive which played so significant a role in Lord Stephen's decision. The interlocking effect of these developments appears to confine safeguards in the immigration process to that process alone so that, as In re S 2002 held, those safeguards do not fetter a judge considering an application under the Hague Convention. Thus, the dicta from *In re S 2002* cited in paragraph 113 of G v G appear to have been given new life by developments since G v G was decided.

70. I am of course concerned with the operation of the 1996 Convention when faced with a child subject to an undetermined asylum claim rather than the 1980 Hague Convention. I have not heard detailed argument on this point but nothing in the jurisprudence relating to the need to determine 1980 Hague Convention applications without delay suggests that this does not apply equally to the 1996 Convention. This is of particular importance for public law proceedings invoked in relation to children who have been taken from one jurisdiction to another in circumstances which give rise to a risk of significant harm to their wellbeing. Avoiding delay in decision-making is crucial for children in the care of the state who may have been separated from their family of origin for some considerable time and for whom there is uncertainty about any welfare determination.

71. Thus, I am provisionally of the view that the operation of immigration and asylum law does not prevent this court from implementing a welfare decision which might result in the return of these children to Austria before their application for asylum in

this jurisdiction has been determined. Whether such a decision should be made or implemented will be a matter for wide-ranging argument in due course which will need, for example, to address the court's duty to have proper respect for the Article 8 rights of the children, their father, their mother, and their grandmother.

Conclusion

72. I have resisted the temptation to give guidance on public law cases which originate in the international movement of children, whether or not these are associated with a claim for asylum. In my view, practice and procedure in such cases is not adequately addressed either in rule 12 of the Family Procedure Rules 2010 or in practice direction 12A which relates to public law proceedings, or, indeed, in practice direction 12F which relates to international child abduction. Cases such as this one are increasingly common and often much delayed before reaching a judge of the Division because the complexities posed by such cases have been insufficiently appreciated by all involved, including the Family Court. It seems to me that there is scope for a more detailed exposition of good practice in such public law cases within the context of the 1996 Convention. Whether the place for this is within the Family Procedure Rules 2010 or in guidance from the President of the Family Division is a matter for others to decide. I propose to draw the attention of Lord Justice Moylan, the Head of International Family Justice, and Mr Justice MacDonald, his deputy, to the issues in this case by sending them a copy of this judgment.

73. This matter will be listed for further directions and for a welfare hearing in mid-June 2024.

74. That is my decision.