Neutral Citation Number: [2021] EWCA Civ 1131

Case No: C4/2021/0734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
Mr Justice Chamberlain
CO/328/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
-and-	
(1) GA **(2) – (5) QA, RA, SA and ZA** **(Children, by GA as litigation friend)**	**Respondents**

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Edward Devereux QC and **Claire van Overdijk** (instructed by **Government Legal Department**) for the **Appellant**
Sam Grodzinski QC, Mehvish Chaudhry, and **Rachel Jones** (instructed by **Bindmans LLP**) for the **Respondents**

Hearing date: 15 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 23 July 2021.

An Order has been made preventing the identification of the Respondents

Lord Justice Peter Jackson:

Introduction

1. The Appellant Secretary of State is responsible for Her Majesty's Passport Office ('HMPO'). The Respondents are a mother and four children, British citizens currently living in Country X. In December 2019, the mother applied to HMPO for British passports for the older three children, the fourth child having been issued with her British passport in late 2020 after being born in England earlier that year. In a decision communicated by letter of 7 January 2020, HMPO refused to accept the applications because it required them to be supported by evidence of the consent of a person with parental responsibility under the law of Country X. It considered that person to be the children's father alone. The mother was not considered to have any status at all.

2. The difficulty with that response is that it was either unsafe or impossible for the mother to obtain the father's consent. In making the applications she had explained that he had recently been arrested after:

> "months of extremely serious physical and psychological abuse including torture of me – much of this witnessed by the children – when he isolated us".

In subsequent correspondence with HMPO and in her statement in these proceedings the mother described how the father had become mentally unwell. He had interrogated and beaten her, sometimes knocking her unconscious. He had broken her nose, burned her, repeatedly threatened to kill her and the children and, on occasion, been violent towards them. There had been criminal proceedings against the father in Country X and in the course of those proceedings, he had admitted causing her bodily harm. Before the court, he had signed a declaration in these terms, which formed part of a sealed order:

> *"I confirm that I have no objection against the travel of my children [full names] accompanied by their mother [full name] to visit her parents outside the country."*

When this was provided to HMPO, it replied:

> "The letter provided did not specifically authorise the issue of the children's British passports. We need you to provide a new letter from father – consenting to the passports being issued and the consent of travel."

3. The mother was unable to obtain the required document and in January 2021, she issued judicial review proceedings. The outcome was that Chamberlain J ('the Judge') quashed HMPO's decision to refuse to process the applications for reasons given in a judgment dated 12 April 2021 and reported at [2021] EWHC 868 (Admin). The Secretary of State now appeals.

4. I am in no doubt that the appeal should be dismissed and that the Judge's decision is right for the reasons he gave. I can therefore explain my conclusions relatively shortly. I will set out what the Judge decided, identifying rather than repeating paragraphs in his judgment, and will then address the grounds of appeal.

What the Judge decided

5. The Judge's analysis begins with a survey of HMPO's policy guidance at [23-35]. There are three relevant policies to assist decision-makers. The most recent editions of these sometimes overlapping documents were issued in September 2020. They concern 'Authorisation and consent', 'Children' and 'Vulnerability considerations for passports'. There is also a 'Country Profile' in relation to Country X.

6. Because HMPO considers itself bound by the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague in 1996 ("the 1996 Hague Convention"), the judgment sets out its relevant articles at [36-44] and refers to the accompanying Explanatory Report. Of importance in this case are the provisions of Chapter III relating to 'Applicable law', and in particular Article 16 (attribution of parental responsibility is governed by the law of the state of the child's habitual residence) and Article 22 (application of the applicable law provisions can only be refused if it would be manifestly contrary to public policy, taking into account the best interests of the child). The Judge also refers to the UN Convention on the Rights of the Child and to s. 55(1) of the Borders, Citizenship and Nationality Act 2009, whereby any function of the Secretary of State in relation to nationality must be discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The Secretary of State accepts that dealing with passport applications is a function relating to nationality and has not suggested that the children's current residence in Country X disapplies the duty.

7. The Judge then sets out the correspondence leading to the litigation and describes the grounds for judicial review and HMPO's response at [45-60]. He summarises the evidence filed by the mother and by Jonathan Wharton, the Passport Policy Lead for HMPO at [61-68]. He addresses competing submissions at [69-95] and sets out his conclusions at [96-134].

8. His essential findings are as follows:

   (1) HMPO was acting in accordance with its internal guidance by refusing to process the passport applications for the children unless there was consent from a person with parental responsibility for them. [101]

   (2) The Secretary of State could properly decide that questions of parental responsibility arising in connection with passport applications should be decided in accordance with the 1996 Hague Convention. [103]

   (3) In the light of the father's declaration before the court of Country X, HMPO's position, based only on the Country Profile, that the mother lacked authority to apply for British passports was speculative and not rationally sustainable, justifying a quashing order. [120-121]

(4) If, contrary to (3), the father has sole parental responsibility under the law of Country X, HMPO's argument that it has no power to issue passports without his consent is rejected. In particular, and contrary to HMPO's case: (a) when applying Article 16, HMPO is also required to apply Article 22; (b) Article 22 may be applied by administrative authorities as well as courts; and (c) as between divisions of the High Court, decisions under Article 22 can be taken by the Administrative Court and are not reserved to the Family Division. [125-126]

(5) If the law of Country X requires the father to consent to any application for British passports, it would be manifestly contrary to public policy to apply that law in this case, taking into account the best interests of the children. [129]

(6) It is not now open to HMPO to apply the law of Country X because to do so would involve unjustifiable direct discrimination on the basis of sex, amounting to a continuing breach of Article 14 of the European Convention on Human Rights ('ECHR'), read in conjunction with Article 8, and therefore contrary to s. 6(1) Human Rights Act 1998. The breach must be remedied by applying the law of England and Wales, under which the mother has authority to make the application. [131]

9. The Judge summarises his conclusions at [133]:

> "(a) HMPO erred in refusing to process GA's applications for passports for QA, RA and SA without the consent of their father because:
>
> (i) there was no rational evidential basis for concluding that, under the law of Country X, the father had to consent to the applications in this case;
>
> (ii) it failed to consider whether (if the law of Country X required the father's consent) Article 22 of the 1996 Hague Convention applied; and
>
> (iii) Article 22 did apply and accordingly HMPO was entitled to refuse to apply the law of Country X.
>
> (b) By applying the law of Country X, HMPO acted incompatibly with GA's rights under Article 14 read with Article 8 ECHR and therefore contrary to s. 6(1) of the Human Rights Act 1998. Accordingly, HMPO was and is obliged to apply the law of England and Wales, under which GA had authority to make the applications on behalf of QA, RA and SA."

A prior question

10. Before turning to the grounds of appeal, I will clear some ground in relation to the application of the 1996 Hague Convention in relation to passport decisions. The UK signed the Convention in 2003 and ratified it in 2012. (Country X has not signed it.) The Judge concluded at [43] and [103] that at the time when the decision not to process the mother's applications was first communicated, there was no domestic law giving

effect to the conflict of laws rules found in Chapter III, but the Chapter was nonetheless binding on the UK as a matter of international law and the Secretary of State could properly decide that questions of parental responsibility arising in connection with passport applications should be decided in accordance with it. It may in fact be the case that the 1996 Hague Convention did have direct effect at that time, as a result of the declaration in the European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2010 that the Convention is to be regarded as one of the EU Treaties, as defined in section 1(2) of the European Communities Act 1972. However, we heard no argument on that question, and it has no consequences for this appeal. Moreover, with effect from 31 December 2020, the Private International Law (Implementation of Agreements) Act 2020 inserts s. 3C into the Civil Jurisdiction and Judgments Act 1982 and explicitly provides that the 1996 Hague Convention "shall have the force of law in the United Kingdom".

11. I agree with the Judge that the Secretary of State could properly decide to apply the 1996 Hague Convention as a basis for the exercise of the royal prerogative in relation to granting or withholding a British passport. But I would make two observations about this. The first is that we are not to be taken as deciding that as a matter of law the Secretary of State is obliged to adopt this policy. The Convention defines its scope in Chapter I; these provisions are set out by the Judge at [36-39]. It has been assumed in these proceedings that they apply to the issuing of passports. Here, nothing turns on the assumption, because the Secretary of State is obliged to apply a policy of some kind and no complaint is made about the decision to apply the Convention, but there may be an argument that the Convention is not intended to bind those making passport decisions concerning children. In short, the Convention is in this context concerned with determining the law applicable to parental responsibility, but there is no inevitable link between parental responsibility and the issuing of passports. However, this question did not arise before the Judge and again it was not argued before us, so I say no more about it.

12. My second observation is that the Secretary of State now accepts that if the conflict of laws rules in Chapter III are adopted as a basis for decision-making, they must be applied in full. The Judge held at [125] that insofar as HMPO's internal guidance suggests that staff must apply Article 16 but not Article 22, it misstates the law. This was rightly conceded by the Secretary of State in argument before us, indeed the contrary would be perverse.

The appeal

13. The Secretary of State has four grounds of appeal:

> "(1) On the information available to it, and on the basis of Article 16 of the 1996 Hague Convention, HMPO was entitled to come to the conclusion that the father should be asked for his consent in relation to the application for passports made on behalf of the three eldest children (contrary to the Judge's conclusion at paragraph [133] (a)(i)); in the event that there was a dispute about the extent of a person's parental responsibility that was a dispute that, exclusively, should be resolved by a Judge of the High Court sitting in the Family Division and not HMPO;

> (2) HMPO were not obliged to consider, and should not have considered, Article 22 of the 1996 Hague Convention (contrary to the Judge's conclusion at paragraph [133] (a) (ii) and (iii) of his judgment): whether Article 22 applied was, in relation to the present dispute as to the attribution of parental responsibility, a matter that, in accordance with the procedural route under rule 12.71 of the Family Procedure Rules 2010, could only be determined by a Judge of the High Court sitting in the Family Division; indeed, the Judge's reliance (at paragraph [125] of his judgment) on the words "administrative authorities" within the 1996 Hague Convention was misconceived;
>
> (3) In circumstances of this case, where the mother had evinced a clear intention to HMPO to remove the children from Country X without the father's knowledge or agreement, and where the letter signed by the father did not directly address the issuing of British passports (which would have facilitated a likely permanent removal of the children from Country X without the father's knowledge or agreement), HMPO was entitled to conclude that the father should be asked for his consent in relation to the application for passports made on behalf of the three eldest children;
>
> (4) The application by HMPO of the law of Country X was simply a result of the proper interpretation and application of Article 16 of the 1996 Hague Convention; insofar as the relevant and rival engaged rights (of the mother, the father and the children) under the European Convention required the dis-application of the applicable law pursuant to Article 16, that was a matter that was, again, properly to be considered by a Judge of the High Court sitting in the Family Division."

14. In view of the nature and importance of the case, permission to appeal was granted by Moylan LJ on 25 May 2021 on Grounds 1, 2 and 4, with the application in respect of Ground 3 being listed with the appeal.

15. By a Respondent's Notice, the Respondents seek to uphold the Judge's decision on an additional basis:

> "The application to this case of the Home Secretary's 'blanket' policy of insisting on primary consent from a person with 'parental responsibility', where that enables domestic violence, irrespective of the safety and well-being of the applicant parent and/or her children, is unlawful, irrational and inconsistent with common law rights: *R (ota Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, §65-66."

16. Mr Devereux QC and Ms van Overdijk make three introductory points. First, the Secretary of State acknowledges the evidence that the mother is a victim of serious domestic abuse in Country X. That evidence is found in the statement and medical report in the proceedings against the father in that country and in his admission of guilt

before the court. Second, the provision of a passport for a child without the knowledge of a parent can have profound consequences, extending to child abduction that terminates a parental relationship. The issuing of a passport allows for wide freedom of travel that extends beyond the scope of the father's agreement to visiting the mother's parents. Third, the effect of the Judge's decision will have far-reaching implications for HMPO. Caseworkers are not international lawyers and they will be expected to interpret the domestic law of other countries without access to expert opinion. It is particularly unworkable to expect a caseworker to apply Article 22.

17. The first of these points is a concession well made. There is no appeal from the Judge's extensive conclusions at [129]. He found that there is no reason to doubt the evidence filed by the Respondents. There was abundant evidence upon which he was entitled to find that the situation of the mother and children in Country X is perilous and that the mother has a well-founded fear that the initiation of further proceedings before the courts of Country X may trigger further violence and abuse.

18. HMPO guidance requires decisions-makers to treat domestic abuse seriously. The 'Vulnerability' guidance includes these statements:

> "We must act when we confirm a customer is… suffering from domestic or other forms of abuse (including threats to harm parent or child that are linked to providing or seeking consent)."
>
> "If we identify the vulnerability, we will try to provide support and may (depending on the circumstances) decide not to issue a passport or cancel an existing one."

The latter statement clearly envisages the need to protect against outgoing child abduction, but the tenor of the guidance shows that HMPO rightly recognises the need to take account of domestic abuse in all its decision-making. The crux of this case is that its misinterpretation of its legal obligations left it unable to apply this guidance in the circumstances of this case.

19. The second introductory observation does not assist HMPO. It is obviously the case that the issue of a passport can facilitate child abduction, but it can also facilitate child protection. And as Moylan LJ observed during the hearing, a passport may be issued on the application of a single holder of parental responsibility whose intentions are unknown.

20. The third argument about the effect of the Judge's decision on HMPO practice is entirely unpersuasive. A case of this kind will be uncommon and a caseworker should readily be able to refer it up the chain of command, as happened with the intervention of a senior official, Mr Wharton, in September 2020. Where appropriate, a decision under Article 22 might even be considered at ministerial level. HMPO cannot avoid responsibility for the decision by supposing that it will be misallocated.

21. Grounds of appeal 1, 2 and 4 raise both procedural and substantive questions. I will address the procedural arguments first. These are, as noted by the Judge at [123], first, that a decision about the application of Article 22 can only be made by a court and not by an administrative authority such as HMPO, and, second, that, given the reference in Article 22 to the best interests of the child, a decision as to whether the article applies

cannot be undertaken by the Administrative Court in judicial review proceedings but requires the kind of fact-finding process available in the Family Division.

22. The Judge rightly rejected these arguments. As to the first, he noted at [125] that there is nothing in the 1996 Hague Convention to suggest that only a court can determine whether the application of the ordinary choice of law rule would be "manifestly contrary to public policy". He might have added that there are a number of indications to the contrary in the text of the Convention. Articles 5, 7, 16 and 23, refer variously to "judicial and administrative" authorities, decisions and proceedings. Further, the Explanatory Report of Paul Lagarde states:

> "10. The Convention determines the State whose authorities have jurisdiction, but not the competent authorities themselves, who may be judicial or administrative and may sit at one place or another in the territory of the said State. In terms of conflicts of jurisdiction, it could be said that the Convention sets international jurisdiction, but not internal jurisdiction."

Similarly, the Practical Handbook on the operation of the 1996 Hague Convention, published by the Hague Conference on Private International Law in 2014, refers generically to the use of Article 22 by state authorities:

> "9.25 There is a public policy exception provided for in Article 22. This means that if the application of the law designated under the rules described above is manifestly contrary to the public policy of the Contracting State, taking into account the best interests of the child, the authorities of that State can refuse to apply it."

23. In response, Mr Devereux notes that the expression "judicial or administrative authorities" also appears in the 1980 Hague Convention on child abduction, and refers to the Explanatory Report of Professor Elisa Perez-Vera at [44]:

> "In this context, references to administrative authorities must be understood as a simple reflection of the fact that, in certain Member States, the task in question is entrusted to such authorities, while in the majority of legal systems jurisdiction belongs to the judicial authorities. *In fine*, it is for the appropriate authorities within each State to decide questions of custody and protection of minors; …"

An explanatory report to a different convention is a slender basis for an argument of this kind, and in any event this text provides no support for the present submission. As was observed during the hearing, the argument that a public policy judgement about the application of Article 22 is beyond the competence of the Secretary of State is a surprising one. It might indeed be thought that under our constitution a judgement of this kind is one that is quintessentially suitable for the executive to make, even though it also falls within the competence of the court in cases where it is called upon to act. Similarly, the Secretary of State is well used to assessing the best interests of children. Her own policies in relation to decisions under the Immigration Rules and applications for asylum require these sensitive factual assessments to be routinely made, and s. 55

of the Borders, Citizenship and Nationality Act 2009 will also apply. Both the s. 55 duty and the Article 22 power provide that the best interests of children shall be a primary consideration. These matters are not reserved to the courts.

24. The subsidiary argument that the Family Division has exclusive jurisdiction and that the Administrative Court cannot decide whether Article 22 applies fares no better. This argument was presented to the Judge on the basis that fact-finding will be called for and that this cannot be conducted in judicial review proceedings. The Judge rejected this at [126]. He noted that judges of the Family Division have particular expertise in assessing what is in the best interests of children, but that such assessments are also made, for example, in the Immigration and Asylum Chambers of the First-tier and Upper Tribunals. He affirmed that there is no reason of principle why they should not be made by the Administrative Court where relevant to its jurisdiction. I agree.

25. On appeal, the Secretary of State has sought to bolster the argument by reference for the first time to the Family Procedure Rules 2010. Reliance is placed on Rule 12.71, which provides in relation to Article 16 that:

> "(1) Any interested party may apply for a declaration –
>
> (a) that a person has, or does not have parental responsibility for a child; or
>
> (b) as to the extent of a person's parental responsibility for a child,
>
> where the question arises by virtue of the application of Article 16 of the 1996 Hague Convention.
>
> (2) An application for a declaration as to the extent, or existence of a person's parental responsibility for a child by virtue of Article 16 of the 1996 Hague Convention must be made in the principal registry and heard in the High Court.
>
> (3) An application for a declaration referred to in paragraph (1) may not be made where the question raised is otherwise capable of resolution in any other family proceedings in respect of the child."

26. On behalf of the Respondents, Mr Grodzinski QC, leading Ms Chaudhry and Ms Jones, accepted that a question about the existence and extent of parental responsibility can be determined by the Family Division but he submitted that it was hard to understand why an application about passports entails a dispute about parental responsibility. In this case, a passport had been issued for the youngest child on the basis of the mother's parental responsibility. In the face of HMPO's decision about the older children it was in theory possible for her to have issued proceedings under Rule 12.71, but there was no obligation upon her to do so. As the Judge said at [127], she is not seeking any order under the inherent jurisdiction of the High Court, or seeking to make the children wards of court, or to compel their return to the UK. She is challenging an administrative refusal to process her applications on the basis of an interpretation of foreign law. The only way in which that public law decision can be challenged is by way of an

application for judicial review, seeking a quashing order under s. 31(1) Senior Courts Act 1981. CPR 54.2 similarly provides that the judicial review procedure must be used when a quashing order is sought. By s. 61 and Paragraph 2 of Schedule 1 of the Senior Courts Act 1981, applications for judicial review are assigned to the Queen's Bench Division.

27. Mr Devereux at one point submitted that an interested person could apply for an order from the Family Division directing HMPO to provide or withhold a passport. He referred to an instance in which the Family Division had become involved at the behest of HMPO in a dispute between parents about the issuing of passports to children after an abduction: *Re SU and SA (Children)* [2017] EWHC 441 (Fam). On the facts of that case, the court's intervention was brief and unexceptionable, but the issue of principle with which we are concerned was not considered. The court in family proceedings can require an individual to apply for a passport or (more likely) prevent them from doing so, but it cannot give directions to HMPO, even on request. It may think it appropriate to invite the Secretary of State to take a particular course, but that is a different matter.

28. In conclusion, an interested party may choose to have recourse to the Family Division under the Rule 12.71 procedure when a question arises by virtue of the application of Article 16, but, as Mr Devereux was constrained to accept in argument, that procedure is not mandatory or exclusive. On the contrary, where the challenge is to a public law decision, the proper forum is the Administrative Court. As an aside, judges of the Family Division regularly sit in that court and it may be beneficial for one of them to hear a particular case, but the proceedings remain in the Administrative Court.

29. I therefore reject each of the Appellant's procedural arguments.

30. Turning to matters of substance, Ground 1 contends that HMPO was entitled to conclude that the father should be asked for his consent on the available information. Mr Devereux argued that under the particular circumstances there was a rational evidential basis for HMPO's conclusion that the mother lacked authority to make the applications. The Judge placed great emphasis on the travel consent given by the father to the court in Country X. However, that consent did not give express permission to the mother, who had no rights over the children to apply for British passports. It did not show that the father's rights were restricted. Consent to travel to visit parents is not the same as possession of a passport which confers a general ability to travel, which might include surreptitious and/or permanent removal.

31. These points, all considered by the Judge at [111-120], have been repeated on appeal. As noted, he held that the Country Profile was a (barely) adequate basis for concluding that, in general, the law of Country X allocates sole parental responsibility to the father, but it supplied no proper evidential basis for the conclusion that, in these particular circumstances, the mother lacked authority to apply for *British* passports under the law of that country. The relevant question was not what the father's rights were, but what the mother's rights were. Here, the court's endorsement of the travel consent suggests that under the law of Country X it was intended that the mother should be able to travel with the children to visit her parents without further permission from the father, and for that they needed travel documents. The concerns expressed in Mr Wharton's statement about the mother's motives were considered and rejected.

32. The Judge's conclusions on these matters are ones that he was comfortably entitled to reach. No real attempt has been made to show that they are wrong and there is no basis upon which we could interfere with them.

33. Mr Devereux sought to introduce a new argument to the effect that, even if the father's travel consent was valid at the date it was given, it could no longer be considered valid in the light of the mother's failure to obtain travel consent from him in the time that had since passed. As this was a continuing refusal to process the passport application, the Secretary of State was entitled to rely on information up to the date of the issue of proceedings in January 2021. The Judge was wrong to stop the clock at the date of the travel consent and thereby gave undue weight to it to the detriment of other pieces of evidence.

34. This strikes me as a very bad argument (because it ignores the reality of the mother's situation and seeks to rely on delay for which HMPO was itself responsible), but I need say no more about its merits because there is no principled basis upon which we could entertain it. It was not advanced in correspondence or in the detailed grounds of defence or in Mr Wharton's statement, and nor was it raised by the Secretary of State before the Judge. The attempt to advance it now is an obvious example of the practice frowned upon in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [68] (Singh LJ):

> "In the context of an appeal such as this it is important that the grounds of appeal should be clearly and succinctly set out. It is also important that only those grounds of appeal for which permission has been granted by this Court are then pursued at an appeal. The Courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed."

35. Ground 1 accordingly fails. That is sufficient to uphold the quashing order, but the remaining grounds remain relevant because they have consequences for the decision that HMPO must now make.

36. Ground 2 argues that HMPO "were not obliged to consider, and should not have considered" Article 22. Mr Devereux clarified that this is intended to mean that it "cannot" do so. However, as noted above, the Secretary of State now accepts that Article 16 cannot be applied in isolation from Article 22, so this ground stands or falls on the procedural argument that has been considered above.

37. Ground 4 argues that the application by HMPO of the law of Country X was simply a result of the proper interpretation and application of Article 16. Here Mr Devereux asserts that if there is a breach of the ECHR, the breach is justified because international law, in the form of the Article 16, requires the UK to apply the laws of Country X. In doing so, HMPO should be regarded as also complying with any engaged rights and obligations under the ECHR. This is because the effect of Article 31(3)(c) of the Vienna Convention on the Law of Treaties is that the 1996 Hague Convention must be

interpreted in the light of "any relevant rules of international law applicable in the relations between the parties", namely the ECHR.

38. The Judge not surprisingly found at [131] that applying the law of Country X to determine who can apply for a passport for children involves direct discrimination on the basis of sex, contrary to Article 14 of the ECHR, read with Article 8. The only purported justification is compliance with international law, but there was no rational basis for concluding that the law of Country X required the consent of the father in this case and in any event the effect of Article 22 is that HMPO was not required to apply that law. These conclusions are impregnable. The Judge was not addressed on the Vienna Convention, but it takes matters no further. As I have already said, it has not been established that the Secretary of State is obliged to apply the 1996 Hague Convention to passport decisions, but even if it was obligatory, Article 22 (aptly described by Mr Devereux as a safety valve) ensures that HMPO is not compelled to engage in unlawful discrimination as a result.

39. Ground 3 asserts that, where the mother had evinced a clear intention to remove the children from Country X and the issuing of British passports would have facilitated a likely permanent removal of the children without the father's knowledge or agreement, HMPO was entitled to conclude that he should be asked for his consent. I would not grant permission to appeal on this ground. It is premised on the speculative assertion that the mother would use the passports to abduct the children permanently from Country X. However, the Judge accepted the mother's evidence, including that cited at [63]:

> "I have no intention to remove my husband's access to his children. The children's UK passport is a door for them: it will give them a place of refuge. I have been married to my husband for a decade. For much of that, it was a good marriage. But he has lost control of himself. He has become so dangerous to me and to my children. I need to be able to remove them from this situation at short notice."

There is no appeal from the Judge's conclusion about this. As to the wider picture, HMPO and the courts are not naïve. Abductors need passports. But even if the Judge was wrong and there was some reason for justified suspicion about the mother's motives, she was always likely to bring the children to this country, where there are effective remedies against wrongful abduction.

40. The Respondent's Notice raises an argument that was advanced before the Judge but not determined by him. This is that the policy of insisting on primary consent from a person with parental responsibility, irrespective of the safety and well-being of the applicant parent and/or her children, is unlawful, irrational and inconsistent with common law rights. It is said that HMPO's stance leads to arbitrary and random outcomes. For example, the guidance on 'Authorisation and consent' identifies situations in which additional consent is required, including where there is a dispute between parents. There it is clearly stated that additional consent must not be asked for from a parent who has been violent or abusive to the child or other parent. It is therefore inconsistent with that guidance for HMPO to consider itself obliged to seek primary consent from such a parent in circumstances where it would not seek additional consent.

41. Although it is unnecessary to our decision, I also consider the argument in the Respondent's Notice to be well founded.

Conclusion

42. Despite the outcome of the appeal, the Secretary of State is to be commended for adopting guidance that is in general sensitive to the important issues of the UK's international obligations and the protection of vulnerable individuals and children in the context of passport applications. Unfortunately, the guidance was applied in the present case in a self-defeating way. The steadfast reliance on Article 16 without appreciating that it has to be read together with Article 22 was a clear error of law. The problem is epitomised by this section at page 56 of the document concerning 'Vulnerability':

> "*Abuse and exploitation vulnerability consideration: specific overseas issues*
>
> There are no specific overseas issues related to this vulnerability."

This case demonstrates that there can be specific overseas issues. Consideration will no doubt be given to filling that gap in future editions of the guidance.

43. I would dismiss the appeal and refuse permission to appeal on Ground 3.

Lady Justice Elisabeth Laing

44. I agree.

Lord Justice Moylan

45. I also agree.
