In The Supreme Court of the United Kingdom **UKSC 2020/0191**

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

***G v G* [2020] EWCA Civ 1185**

B E T W E E N :

'G'

Appellant

- and -

'G'

Respondent

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) INTERNATIONAL CENTRE FOR FAMILY LAW POLICY AND PRACTICE
(3) REUNITE
(4) SOUTHALL BLACK SISTERS
(5) THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(6) INTERNATIONAL ACADEMY OF FAMILY LAWYERS

Interveners

WRITTEN CASE FOR THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES ("UNHCR")

A INTRODUCTION

1 UNHCR has supervisory responsibility in respect of the 1951 Refugee Convention and its 1967 Protocol (together "**the Refugee Convention**"). Under the 1950 Statute of the Office of the High Commissioner (annexed to UN General Assembly Resolution 428(V) of 14 December 1950) ("**the Statute**"),[1] UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, for seeking permanent solutions for their problems. As set out in the Statute (paragraph 8(a)), UNHCR fulfils its mandate by, *inter alia*, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto*" (emphasis added). UNHCR's supervisory responsibility is also reflected in Article 35 of the Refugee Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments.

[1] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

2 Before the Supreme Court UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions on issues related to its mandate with respect to refugee protection and the Refugee Convention. UNHCR is very grateful in this case for the opportunity to attend the hearing and make oral submissions in relation to the important questions raised by this appeal concerning the inter-relationship between international refugee law and the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("**the 1980 Hague Convention**").

3 UNHCR's supervisory responsibility is exercised in part by the issuing of interpretative guidelines, including (a) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("**the Handbook**")[2] and (b) UNHCR's subsequent Guidelines on International Protection.[3] The Conclusions on International Protection of the Executive Committee of the High Commissioner's Programme ("**ExCom**") are also an important elaboration of the content of existing standards of international protection.[4] These are referred to where relevant below. UNHCR commends these materials to the Court.[5]

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2 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1952 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCRAP/4/ENG/REV. 3.

3 The Guidelines complement the *Handbook* and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

4 ExCom Conclusions are adopted by consensus by the 106 Member States (including the United Kingdom) and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. While ExCom Conclusions are not formally binding, regard may properly be had to them as "*expressions of opinion which are broadly representative of the views of the international community*.": Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* in Feller et al eds, *Refugee Protection in International Law* (CUP 2003), pp.29, 214.

5 The House of Lords and the Supreme Court have previously recognised the assistance that can be derived from such sources. Lord Bingham said in *R v Asfaw* [2008] 1 AC 1061 (HL), §13 that: "*The opinion of the Office of the UNHCR […] is a matter of some significance, since by article 35 of the Convention member states undertake to co-operate with the office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention*". Lord Bingham referred to the observations of Simon Brown LJ (in *R v Uxbridge Magistrates' Court, ex p Adimi* [2001] QB 667 (Div Ct) at 678), to the effect that UNHCR's Guidelines "*should be accorded considerable weight*". The observations of both Lord Bingham and Simon Brown LJ were endorsed by the Supreme Court in *Al-Sirri v SSHD* [2013] 1 AC 745, §36. Lord Clyde noted in *Horvath v SSHD* [2001] 1 AC 489 at 515, that the Handbook has "*the weight of accumulated practice behind it*". Internationally, it has been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), in reflecting "*subsequent practice in the application of the treaty*": *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (SCC), §54. It has similarly been recognised that the ExCom Conclusions should be given "*considerable weight*": *Rahaman v Minister of Citizenship and Immigration* [2002] 3 FC 537 (Fed CA), §39. Further endorsements have included those in *Fornah v SSHD* [2007] 1 AC 412, §15 per Lord Bingham; *Januzi v SSHD* [2006] 2 AC 426 (HL), §20 per Lord Bingham; *Adan (Lul Omar) v SSHD* [2001] 2 AC 477 (HL) at 520 per Lord Steyn; and *R v SSHD ex parte Robinson* [1998] QB 929 (CA) at 938 per Lord Woolf MR.

4 UNHCR makes these brief written submissions in respect of Issue 1 only. UNHCR submits, with respect, that the Court of Appeal erred in finding that a child named as a dependent on a parent's asylum application has no protection from *refoulement* to persecution (or serious harm).[6] In particular, for the reasons set out below UNHCR submits that:

(1) The determination of refugee status – whether under the Refugee Convention or retained EU law instruments, i.e. the Qualification Directive (**"the QD"**)[7] in conjunction with the Procedures Directive ("**the PD**")[8] – is declaratory, and not constitutive. A child may therefore be protected by the principle of *non-refoulement* – under the Refugee Convention and the QD and PD – in the absence of formal recognition of refugee status, and indeed in the absence of a formal claim. UNHCR submits the Court of Appeal was, with respect, incorrect to hold otherwise (Judgment §§58-61, 119, 125, 137-140).

(2) The obligation of *non-refoulement* has been incorporated in domestic law by statute and as retained EU law. It is a principle of customary international law. A decision to return a child under the 1980 Hague Convention may only be made if it is consistent with the State's duty not to *refoule*.

(3) It follows from the declaratory nature of refugee status, the importance of the principle of *non-refoulement* and the need to ensure its effective application, that the State has an obligation to investigate the facts of the case, and decide whether the definition of refugee under Article 1A(2) in the Refugee Convention is met. That investigative obligation arises where the State is on notice of information capable of indicating that the child meets the Article 1A(2) definition, even where he or she has not made an independent claim for refugee status (hereinafter "the invisibly claiming child"). It is of critical importance that the child is not rendered invisible in the determination process, and therefore the investigative obligation is of particular significance in this context. UNHCR submits that the Court of Appeal failed to recognise the obligations

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6 Serious harm is defined in Article 15 the QD (below) as consisting of "*(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*", and thus includes the protection conferred by Articles 2 and 3 of the European Convention on Human Rights.

7 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

8 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

on the State independently to assess the status of the invisibly claiming child (Judgment §89).

5 UNHCR recognises the powerful imperatives which point towards return of a child under the 1980 Hague Convention. However, it considers that those imperatives may be respected, consistently with the principle of *non-refoulement*, by significant expedition in the process for determining the child's need for refugee status and international protection.

B DETERMINATION OF "REFUGEE STATUS" IS A DECLARATORY PROCESS; AND *NON-REFOULEMENT* APPLIES TO CLAIMANTS

(1) Declaratory Nature of Refugee Status

6 The determination of status as a refugee is a declaratory, rather than constitutive, process. A person is a refugee as soon as they fulfil the requirements of the refugee definition in the Refugee Convention. This follows from the terms of Article 1A(2). That is so whether or not status has been recognised, or even formally claimed. As the Handbook explains:[9]

> "28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

7 In *R (Khaboka) v SSHD* [1993] Imm AR 484 at p.489, Nolan LJ (as he then was) referred to the passage of the Handbook quoted above, stating "*[t]hat, for my part, I would fully accept. It is common sense and a natural reading also of the wording of article 31.1.*[10] *The term "refugee" means what it says. It will include someone who is only subsequently established as being a refugee.*" In *SSHD v ST (Eritrea)* [2010] 1 WLR 2858 (CA), Stanley Burton LJ considered that this passage supported the view "*that unless qualified 'refugee' in the Convention means someone who objectively satisfies the requirements of the definition, without any recognition of his status."* (§31)[11] See also *Saad v SSHD* [2002] Imm AR 471, §12 per Lord Phillips MR ("*Although Convention rights accrue to a refugee by*

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9 See also UNHCR, *Note on Determination of Refugee Status under International Instruments*, 24 August 1977 EC/SCP/5,§5; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, §6.

10 Article 31 provides for the right not to be penalised for illegal entry into the territory of the State party.

11 This view was undisturbed on appeal to this Court ([2012] 2 AC 135). Stanley Burnton LJ also considered that "*The definition of refugees itself distinguishes between those who have been recognised as refugees (in the language of Article 1, who "have been considered a refugee") and refugees simpliciter. This suggests that "refugee" simpliciter means a person who objectively fulfils the requirements of the definition*." (§32) UNHCR notes that Article 33 precisely to 'refugees' *simpliciter*. See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 (HCA), §96 per Kirby J (dissenting), citing UNHCR, *Refugee Status Determination: Identifying who is a refugee*, (2005), §§4, 18.

virtue of his being a refugee, unless a refugee claimant can have access to a decision maker who can determine whether or not he is a refugee, his access to Convention rights is impeded.")

8 The declaratory nature of refugee status, and in particular as regards the protection against *refoulement*, has been affirmed in Grand Chamber decisions of the Court of Justice of the European Union ("**CJEU**") and European Court of Human Rights ("**ECtHR**"). In C-391/16 *M v Ministerstvo vnitra* [2019] 3 CMLR 30, the Grand Chamber of the CJEU held:[12]

> "92. … the fact of being a 'refugee' for the purposes of Article 2(d) of [the recast QD] and Article 1(A) of the [Refugee] Convention is not dependent on the formal recognition of that fact through the granting of 'refugee status' …"

9 In *N.D. v Spain* [2020] ECHR 8675/15 the Grand Chamber of the ECtHR endorsed the declaratory nature of refugee status, referring to the CJEU's decision in *Ministerstvo vnitra*, and explained that the same protective principle which underlies that approach to refugee status applied to claims for protection against removal under Article 3 (which, it held at §188 "*embraces the prohibition of refoulement under the [Refugee] Convention*") and Article 4 of Protocol 4 (prohibition on collective expulsion) of the ECHR (emphasis added):

> "183. … the principle of non-refoulement [is] applicable … to any person present in the territory of a member State who fulfils the material conditions to be considered a refugee, even if he or she has not formally obtained refugee status or has had it withdrawn. It appears that the enjoyment of these rights is therefore not conditional on having already obtained refugee status, but derives from the sole fact that the person concerned satisfies the material conditions referred to in Article 1A (2) of the Geneva Convention and is present in the territory of a member State (see the CJEU judgment in the case of *M. v. Ministerstvo vnitra and Others* §§84, 85, 90 and 105).[13]"

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12 See also *R (Kuchiey) v Secretary of State for the Home Department* [2012] EWHC 3596 (Admin), §31 per Singh J (as he then was): "*…Refugee status is granted by the recognition by a Member State of a person as a refugee. That is a declaratory act in the sense that it is founded upon facts which substantiate the claim for asylum. It is not the act of recognition which constitutes a person as a refugee; it is those underlying facts….*"

13 In *M v Ministerstvo vnitra* (above) the CJEU explained that where Article 14.4. and 14.5 of the QD apply, the refugee remained "*entitled to all the rights which the [Refugee] Convention attaches to 'being a refugee'*" (§106), but that the absence of formal refugee status or its withdrawal meant that the refugee was entitled only to "*the rights enshrined in the [Refugee] Convention expressly referred to in Article 14(6) [including non-refoulement] … and the rights provided for by that convention which do not require a lawful stay …*" (§107). The upshot is that (a) the CJEU affirmed the declaratory theory for (a) the Refugee Convention and (b) the QD as regards those rights in the Refugee Convention enshrined in EU law by Article 14.6, namely Articles 3, 4, 16, 22, 31, 32 and 33. The reason for the divergence as regards other rights concern (a) the different circumstances in which refugee status may be withdrawn or not granted under the QD and the Refugee Convention (§76); (b) the fact that the QD gives in some respects wider rights, such as the right to a residence permit (§91).

10 The protection from *refoulement* thus is a right assertable against a State party which follows automatically and immediately from the fact of being an Article 1A(2) refugee within the jurisdiction of that State.[14]

(2) Application to Claimants

11 Moreover, the protection applies "*irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined.*"[15] The duty not to *refoule* continues unless and until a person is determined not to be a refugee, for otherwise the protection provided by the Convention would not be effective. As noted by UNHCR:[16]

> "11. […] Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established. That the principle of non-refoulement applies to refugees irrespective of whether they have been formally recognized as such – that is, even before a decision can be made on an application for refugee status – has been specifically acknowledged by the Executive Committee in its conclusion on non-refoulement adopted at its twenty-eighth Session."

12 As noted by the Grand Chamber in *ND* (above) (emphasis added):

> "186. … Article 3 [has] been found to apply to any situation coming within the jurisdiction of a Contracting State, <u>including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions</u>. …"

13 This Court has also recognised that the duty not to *refoule* under the Refugee Convention is not contingent on formal recognition of refugee status and applies to claimants. In *ST (Eritrea) v SSHD* [2012] 2 AC 135 (SC), Lord Dyson observed that "*[i]f a refugee who is claiming asylum is to be protected from the risk of persecution, she needs the protection*

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14 A State party is bound to honour this right not only in territory over which they have formal, *de jure* jurisdiction, but also in places over which they exercise effective or *de facto* jurisdiction outside their own territory: see Hathaway, *Rights of Refugees Under International Law* (CUP 2005), p.169.

15 UNHCR, *Note on International Protection*, September 2001, A/AC.96/95 1, §16.

16 UNHCR, *Note on International Protection*, 1993, A/AC.96/815, §11. See also *ExCom Conclusion No. 6* (XXVIII) *"Non-Refoulement"* (1997), (c) (reaffirming "*the fundamental importance of the principle of non-refoulement […] of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees*.")

afforded by article 33." (§61).[17] There is very considerable academic support for this approach.[18]

14 Article 33 also applies to refugee claimants because the duty of *non-refoulement* is preventative in nature. That is in accord with international human rights law, where certain rights which contain a prohibition are interpreted, in view of their importance, also to contain a preventative component: a remedy after the event is generally recognised as insufficient. Thus:

(1) The UN Human Rights Committee in its General Comment 20 (1992) on Article 7 ICCPR (the international analogue of Article 3 ECHR) stated:

> "[…] [I]t is not sufficient for the implementation of article 7 to *prohibit* such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to *prevent* and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."

(2) The UN Convention Against Torture 1984 (separately) requires States to take measures to "*prevent*" torture, and cruel, inhuman or degrading treatment (Articles 2 and 16).

15 The classic test in *Soering v UK* (1989) 11 EHRR 439 (where the Plenary Court for the first time read a *non-refoulement* obligation into Article 3 of the ECHR) is itself an application of that preventative duty, as Lord Bingham recognised in *A and Ors (No 2) v SSHD* [2006] 2 AC 221 (HL), §33, citing the seminal passage from *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998, §148:

> "States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment)."

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17 Other House of Lords or Supreme Court case include: *Bugdaycay v SSHD* [1987] AC 514 (SC), §525-526 (Lord Bridge); *R v Special Adjudicator ex p Hoxha* [2005] 1 WLR 1063, §60 (Lord Brown); *R v Asfaw* [2008] 1 AC 1061 (HL), §§55-59 (Lord Hope). See also the discussion of *Szoma* in *ST Eritrea* (SC), §§38-39 (Lord Hope with whom Baroness Hale and Lords Brown, Mance, Kerr, Clarke and Dyson agreed).

18 Hathaway, *The Law of Refugee Status*, (2nd ed, CUP 2014) pp.25-26; Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) pp.156-192; Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* in Feller et al eds, *Refugee Protection in International Law* (CUP 2003), §90.

C NON-REFOULEMENT

(1) Importance of the Principle of *Non-Refoulement*

16 The obligation of States under Article 33(1) not to "*expel or return ('*refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened*" is the cornerstone of international refugee law. The importance of the protection conferred by Article 33 has been emphasised by this Court. In *ST (Eritrea)* (above), Lord Dyson referred to Article 33 as the "*principal duty*" owed to refugees and an "*essential part*" of the Refugee Convention's objective to protect persons who have a well-founded fear of persecution for the reasons stated in the Article 1A(2) definition (§59). His Lordship stated that "*Article 33 applies to refugees whether they are lawfully present in the territory or not. It applies to any refugee to whom the Convention applies. It provides the protection that lies at the heart of the Convention*" (§61).

(2) Domestic Incorporation

17 The protection against *refoulement* it is domesticated by s 2 of the Asylum and Immigration Appeals Act 1993 (**"the AIAA 1993"**), by Nationality Immigration and Asylum Act 2002 (**"the 2002 Act"**), and by the Immigration Rules (see Judgment §§44-57).

18 Moreover, as the Court of Appeal held at Judgment §§49-50, domestically transposed and recognised directly effective rights arising from the Common European Asylum System ("**CEAS**"), and in particular the QD and PD remain extant in domestic law as "retained EU law" by virtue of ss 2 to 4 of the European Union (Withdrawal) Act 2018 (**"EUWA**"), as amended by the European Union (Withdrawal Agreement) Act 2020. Such rights include Article 21 of the QD, which provides that "*Member States shall respect the principle of non-refoulement in accordance with their international obligations*", and Article 7 of the PD, which provides that *"Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision …".*[19]

19 Article 2(b) of the PD defines an "application" or "application for asylum" as an "*application […] which can be understood as a request for international protection from a Member State under the Geneva Convention*". (Article 2(g) of the QD is in similar terms.)

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[19] Alternatively, if those rights are not recognised as directly effective, s 77 of the 2002 Act, which provides that a person cannot be removed under the Immigration Acts from the United Kingdom while his or her claim for asylum is pending, must be read compatibly with Article 7 of the PD, by virtue of the principle in *Marleasing* (which remains extant as an aspect of the principle of EU law supremacy (s 5(2) EUWA) and as retained EU case law (s 6(3) of EUWA)).

Article 2(c) defines "applicant" as *"a … person who has made an application for asylum in respect of which a final decision has not yet been taken".*

20 The retained EU law framework affords primacy to the Refugee Convention. Indeed EU competence to legislate on asylum matters has always been conditional on compliance with the Convention: see Article 63(1) TEC under which the QD and PD[20] were adopted (see now Article 78(1) TFEU).[21] Thus, the QD is to be interpreted in a manner consistent with the Refugee Convention, see e.g. *Minister voor Immigratie en Asiel v X* [2014] QB 111, §40.

21 Recitals (2) of both the QD and PD proclaim that the CEAS was based on the *"full and inclusive application of the [Refugee] Convention] thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution."* (emphasis added). The CJEU has made the same point.[22]

22 The principle of *non-refoulement* as guaranteed under Article 3 of the ECHR is a general principle of EU law (which now forms part of domestic law pursuant to s 5(5) of EUWA): see *Elgafaji v Staatssecretaris van Justitie* [2009] 1 WLR 2100, §28.[23] It was recognised by (but did not derive from) Articles 18 and 19(2) of the Charter (which no longer form part of domestic law).

(3) *Non-Refoulement* as a Norm of Customary International Law

23 The principle of *non-refoulement* has been "*consistently reaffirmed as a basic principle of state conduct towards refugees*" and it would be "*patently impossible to provide international protection to refugees if States failed to respect this paramount principle of refugee law and human solidarity*."[24] The considered position of UNHCR is it has become a norm of customary international law ("**CIL**"): it satisfies the established test of

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20 Treaty establishing the European Community (as amended by Treaty of Amsterdam): "*The Council … shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the [Refugee Convention] and other relevant treaties, within the following areas … (c) minimum standards with respect to the qualification of nationals of third countries as refugees*."

21 Consolidated version of Treaty on the Functioning of the European Union (C/326/13 of 26/10/2012 (OJ 2012 L 55 p.13) "*1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the [Refugee Convention] and other relevant treaties*." (emphasis added). The UK has opted out of the second phase of the Common European Asylum System i.e. the recast directives under Article 78, save for the Dublin Regulation.

22 See CJEU Grand Chamber *R (NS) v SSHD* [2013] QB 102, §75; C-181/16 *Gnandi v Belgium,* §53.

23 See also Advocate General Bot in *MP (Sri Lanka) v SSHD* [2018] 1 WLR 5585, §39; and *SSHD v Said* [2016] EWCA Civ 442, §27.

24 UNHCR, *Note on International Protection*, 1993, A/AC.96/815, §10.

"*widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation*".[25] As stated by UNHCR:[26]

> "15. UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, […] constitutes a rule of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function, UNHCR has closely followed the practice of Governments in relation to the application of the principle of non-refoulement, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle."

24 UNHCR has noted that the principle of *non-refoulement* in Article 33 of the Refugee Convention is:[27]

> "16. […] [A] cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. "

25 The fundamental character of the principle of *non-refoulement* has been re-affirmed by ExCom Conclusions since 1977.[28] The United Nations General Assembly called upon States "*to ensure effective protection of refugees by, inter alia, respecting the principle of non-*

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25 For the test, see Lord Sumption (with whom all other members of the Court agreed) in *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] AC 777 (SC), §31.

26 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, §15. See also *R (Ibrahimi) v SSHD* [2016] EWHC 2049 (Admin), §40.

27 UNHCR, *Note on International Protection*, September 2001, A/AC.96/95 1, §16. This statement has been endorsed on several occasions by the Grand Chamber of the ECtHR. See, e.g., *MSS v Belgium* (no 30696/09, 21 January 2011) (2011) 53 EHRR 2 [GC], §56; *Hirsi Jamaa v Italy* (no 27765/09, 23 February 2012), §§23, 134; and *MK v Poland* (nos. 40503/17, 42902/17 and 43643/17, 23 July 2020), §93.

28 ExCom Conclusion No. 6 (XXVIII) "*Non-Refoulement*" (1977), (c). See subsequently ExCom Conclusion No. 17 (XXXI) "*Problems of Extradition Affecting Refugees*" (1980), (b); ExCom Conclusion No. 25 (XXXIII) "General" (1982), (b); ExCom Conclusion No. 65 (XLII) "General" (1991), (c); ExCom Conclusion No. 68 (XLIII) "General" (1992), (f); ExCom Conclusion No. 79 (XLVIII) "General" (1996), (j); ExCom Conclusion No. 81 (XLVIII) "*General*" (1997), (i); ExCom Conclusion No. 103 (LVI) "*Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection"* (2005), (m).

refoulement" which it noted was not subject to derogation.[29] In 2001, the State parties to the Convention also formally acknowledged "*the principle of non-refoulement, whose applicability is embedded in customary international law*."[30]

26 The view that the principle of *non-refoulement* is a norm of CIL also enjoys wide academic support.[31] Having reviewed State practice, G S. Goodwin Gill and J. McAdam concluded in 2007:[32]

> "The principle of *non-refoulement* can thus be seen to have crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction. This development is amply confirmed in instruments subsequent to the 1951 Convention, including declarations in different fora and treaties such as the 1984 UN Convention against Torture, by the will of States expressed in successive resolutions in the UN General Assembly or the Executive Committee of the UNHCR Programme, in the laws and practice of States, and especially in unilateral declarations by the US Government."

27 It follows from the status of *non-refoulement* as a CIL norm that it has "particular relevance" in the interpretation of other treaties such as the 1980 Hague Convention, particularly given that 89 of the 101 State party signatories to that treaty are also party to the Refugee Convention (including South Africa and the United Kingdom).[33]

D OBLIGATION OF INVESTIGATION

28 UNHCR submits that it follows from the declaratory nature of refugee status, the importance of the principle of *non-refoulement* and the need to ensure its effective application, that the State has an obligation to investigate the facts of the case and decide whether the definition of refugee in Article 1A(2) is met. This obligation arises even where the child does not make an independent asylum claim, but is listed as a dependent on a parent's asylum application

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29 See, e.g., UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, 12 February 1997, A/RES/51/75, §3; See also, A/RES/52/132, 12 December 1997, Preambular §12 and §16.

30 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09 (13 December 2001), §4.

31 See, e.g., Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), p.248; Lauterpacht and Bethlehem, '*The Scope and Content of the Principle of Non-Refoulement*' (above), pp.149-150.

32 Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), p.248.

33 See Article 31(3)(c) Vienna Convention on the Law of Treaties 1969; ILC Report on the work of its Fifty-eighth Session (2006), §21; Gardiner *The Vienna Convention Rules on Treaty Interpretation* in Hollis (ed.) *The Oxford Guide to Treaties* (OUP 2012), p499.

and there is evidence or information capable of proving that the child meets the Article 1A(2) definition of a refugee, i.e., the State is on notice that this may be the case.

29 As ExCom has emphasised, determination procedures must be *"adequate to ensure in practice that persons in need of international protection are identified and refugees are not subject to refoulement."*[34]

30 As UNHCR notes:[35]

> "If the state concerned is aware or ought to be aware of facts about the profile of persons in respect of whom return is contemplated, or circumstances in the country to which return is contemplated, which indicate a risk that such return may itself constitute *refoulement*, these must be taken into account regardless of whether there has been an explicit and articulated request for asylum."

31 UNHCR submits that this is so for the following reasons. First, the position under Article 3 of the ECHR provides a strong analogy. As noted, Article 3 "*embraces the prohibition of refoulement under the Geneva Convention*".[36] A State is under an investigative duty where it has actual or constructive knowledge of evidence or information capable of showing a violation of Article 3 ECHR. In *FG v Sweden* (no 43611/11) (2016) 41 BHRC 595, the Grand Chamber summarised the position as follows (emphasis added):

> "126. […] [I]n relation to asylum claims based on a well-known general risk, when information regarding such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion […]
>
> 127. By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk […] However …, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment … , the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion."

32 Thus, where an Iranian asylum-seeker did not himself pursue his claim for asylum before the Swedish authorities on the ground of his conversion to Christianity because "*he*

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34 UNHCR ExCom, *General,* No 71 (XLIV) (1993), §1.

35 UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea* (November 2017). See also UNHCR, *Note on International Protection*, September 2001, A/AC.96/95 1, §16 ("[the duty not to *refoule*] *encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution*." See also Article 2(a) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts: "*There is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law.*"

36 *ND v Spain* (above), §188.

considered his religion to be a private matter" and "*did not want to exploit his valuable new-found faith as a means of buying asylum*" or "*trivialise the seriousness of his beliefs*" (§§146-147), the Court found a violation of Article 3 of the ECHR arising out of the authorities' decision to expel him because they had become aware of his conversion and had not investigated this aspect of his claim (§156).

33 Further the existence of risk of ill-treatment must be assessed by reference to those facts which were "*known or ought to have been known to the Contracting State at the time of expulsion*". The Contracting State "*has the obligation to take into account not only the evidence submitted by the applicant but also all other facts which are relevant in the case under examination.*": *JK v Sweden* (2017) 64 EHRR 15, §87.

34 Second, this obligation is, as the Grand Chamber of the ECtHR has recognised, consistent with the shared responsibility to seek and present objective evidence of risk between the person seeking protection, and the State to which the asylum request is addressed.[37] As UNHCR explains in the Handbook:

> "196. […] [W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof."

35 The shared duty of investigation between the individual and the State follows not just for pragmatic reasons but as a matter of principle (emphasis added):[38]

> "State parties to the Refugee Convention have voluntarily agreed to ensure that persons who meet the refugee definition set by Article 1 receive the rights set by Articles 2-34. By virtue of their accession to the Convention, states have signalled their intention to effectuate refugee protection, meaning that they have no adverse interest to that of a person who in fact meets the refugee definition. Given the legal duty to implement treaties in good faith, governments of state parties are reasonably expected to commit themselves not simply to ensuring that the benefits of the Convention are withheld from persons who are not refugees, but equally to doing whatever is within their ability to ensure the recognition of genuine refugees.
>
> […] The shared duty of fact finding means that asylum state authorities may not simply adopt a passive posture, responding only to whatever evidence is adduced by the applicant. It also means that there is a duty to recognize refugee status even if the applicant misconceived her claim, or otherwise fails properly to frame her assertion of refugee status…The Tribunal should look at all the evidence and material that it has not rejected and give consideration to

37 *FG v Sweden* (above), §122; *JK v Sweden* (above), §101.

38 Hathaway, *The Law of Refugee Status*, pp.119-120. The Court of Appeal has recognised that asylum claims involve the promotion of a welfare consideration: see Thorpe LJ in *R v SSHD ex p Besnik Gashi* [1999] INLR 276, 308C-E.

a case which it might reasonably arise, notwithstanding that such a case might not have been contended for by the applicant."

36 Third, the shared responsibility in fact finding flows from the asymmetrical position of the State and the individual as regards access to information on country conditions.[39] Thus, as to applications for recognition of refugee status, the ECtHR has recognised that "*it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive per se*": *JK v Sweden* (above), §92.

37 It follows in UNHCR's submission that in a case where a parent provides information capable of showing that his or her child could face serious harm by acts of violence targeting the parent,[40] the Secretary of State will be on notice that the child may have an independent claim herself. This would give rise to an obligation on the Secretary of State to investigate the facts of the case, and decide whether the Article 1A(2) definition is met, pending which the invisibly claiming child cannot be removed. The State must take appropriate action to ensure that the child's rights receive due protection (see below).

E BEST INTERESTS OF THE CHILD / SPECIAL CONSIDERATIONS IN RELATION TO CHILDREN

38 These obligations are particularly acute given the special vulnerability of children. UNHCR has warned that "invisibility" is one of the key challenges that children may face in establishing an independent entitlement to refugee status. The 2009 Guidelines explain that: *"Many refugee claims made by children have been assessed incorrectly or overlooked altogether […] The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood."*[41] There is a higher risk of a child's independent refugee claim being overlooked when they are accompanied by a family member, as their claim is likely to be subsumed within their parent's claim.[42] As UNHCR explains, *"children may be perceived as part of a family unit rather than as*

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39 UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (1998), §6.

40 Or where the State, exercising its duty of inquiry into whether the child has a separate claim in their own right, is aware of such a risk.

41 UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, §§1-2.

42 For an empirical example of this problem, see UNHCR "*Quality Integration Project: Considering the Best Interests of a Child within a Family Seeking Asylum*" (December 2013): "*a strong overall finding was that current [UK] Home Office policy and processes do not provide for the participation of children who are dependents in a family asylum claim and this was reflected wholly in the practice*" (§23).

individuals with their own rights and interests"[43] and, as a result, the child's claim will generally be subsumed into the claim of one of her parents, with the child's status flowing directly from the status granted to her parent/s. Where the parent's claim is rejected, UNHCR considers that the State should ensure that it is has identified whether a child has an independent claim for refugee status even where they are part of a family unit: a child should not automatically be denied protection because their parent's claim has been rejected.[44] UNHCR has therefore repeatedly stressed the importance of *"providing each family member with the possibility of separately submitting any refugee claims that he or she may have."*[45]

39 The special position and primacy of the best interests of a child is also recognised in the QD (recitals (12), (20) and (27), Articles 20(3) and (5) and Article 23) and PD (recital (14) and Article 7(6)). Whilst the mandate of the Refugee Convention is age-neutral, the special protection needs of children is reflected in Recommendation B of the Final Act of the Conference of Plenipotentiaries which adopted the Refugee Convention. This provides for "*[t]he protection of refugees who are minors*."[46]

40 UNHCR submits that the removal of a child without an independent and individualised assessment of their eligibility for international protection would give rise to a real risk of breach of the statutory duty under s 55 of the 2009 Act which reflects Article 3 of the Convention on the Rights of the Child ("**CRC**"), and of Article 33 of the Refugee Convention construed in light of the requirements of Article 22(1) CRC to afford refugee children appropriate protection; and the obligation under Article 12 CRC to afford children an opportunity to be heard in proceedings affecting them.[47] It is well settled that the Refugee Convention must be interpreted in light of international human rights standards.[48]

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43 UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, §§1-2.

44 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1952 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCRAP/4/ENG/REV. 3, §185.

45 ExCom Conclusion No. 88 (L) "*Conclusion on the Protection of the Refugee's Family*" (1999), (b).

46 '*Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*' (1952) NCONF.2/108/Rev.l. The Final Act is an "*agreement relating to the [1951 Convention] which was made between all the parties in connexion with the conclusion of the treaty*" (Article 31(2)(a) of the VCLT), and therefore forms part of its context.

47 See generally Pobjoy, *The Child in International Refugee Law* (CUP 2017), Chapter 2; Pobjoy, *Article 22 Refugee Children* in Tobin (Ed.), *The UN Convention on the Rights of the Child* (2019, OUP).

48 See eg. the Preambular concern to "*assure refugees the widest possible exercise of … fundamental rights and freedoms*". Hathaway, *The Rights of Refugees Under International Law,* (CUP 2005), pp.8-9,55-68.

41 UNHCR considers that, where the principal applicant is recognised as a refugee, it may well be appropriate for dependent family members to also be recognised as derivative refugees to ensure and promote respect for the principle of family unity.[49] UNHCR certainly submits that there is no prohibition on States from electing so to regard such family members *qua* policy. However, it notes that this view was not accepted, respectively in *JS (Uganda) v SSHD* [2020] EWCA Civ 1670, §§188-190, and the present case. The issue does not arise in this appeal because the purpose of the protection conferred on dependents by their recognition as derivative refugees under the Refugee Convention is to "*promot[e] a comprehensive reunification of the family*."[50] There is no such imperative on the present facts: family reunification runs both ways in the present case.

F ADMISSIBILITY OF A SEPARATE CLAIM BY THE CHILD

42 The Respondent has claimed that any separate claim by the child would be automatically declared inadmissible because the child, having Austrian nationality, is an EU asylum applicant. This is plainly incorrect.

43 The United Kingdom introduced paragraphs 326E and 326F of the Immigration Rules on 29 October 2015 to implement Protocol (No 24) on asylum concerning nationals of EU Member States (otherwise known as the "Spanish Protocol") annexed to the Treaty on European Union. The assumption underlying the Spanish Protocol was that, given the level of protection of fundamental rights and freedoms by EU Member States, Member States were to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.

44 The purpose of the rule plainly is not to render inadmissible claims where the persecution feared is in a non-EU Member State where the State of nationality cannot provide protection. UNHCR further submits that paragraphs 326E and 326F of the Immigration Rules are *ultra vires* section 2 of the AIAA 1993, which accords primacy to the Refugee Convention. This is for the following reasons:

(1) Prior to investigating and assessing a claim for international protection by the child or others, the Secretary of State would not be able to guarantee that removal would be consistent with the duty not to *refoule* under Article 33 of the Refugee Convention.

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49 ExCom Conclusion No. 44 (XXXVII) "*Detention of Refugees and Asylum-Seekers"* (1986), (h); ExCom Conclusion No. 88 (L) "*Conclusion on the Protection of the Refugee's Family*" (1999), (b).

50 *ibid*.

(2) The Refugee Convention imposes an implicit obligation on State parties to determine whether or not an applicant has refugee status, unless the State party is prepared to confer all the rights set out in the Convention to the applicant or unless there is a safe third country to which the applicant may be returned. This follows from the incremental structure of rights accorded under the Refugee Convention: certain further rights inhere only once a refugee is lawfully staying in a State, usually upon formal recognition of refugee status[51].

(3) Article 3 of the Refugee Convention requires that States parties must "*apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.*" Differential treatment as regards the basic admissibility of a claim cannot be justified by reference to notional standards (which vary considerably in practice) of human rights compliance in EU Member States, still less where removal is proposed to a non-EU Member State.

(4) The Rules in effect introduce a geographical limitation to the definition of a refugee under Article 1A(2). Neither Article 1 nor Article 3 may be the subject of reservation: Article 42 of the Refugee Convention.

(5) Where a claim is treated as inadmissible by the Secretary of State under the Rules, it will not receive substantive consideration, and is not subject to a right to appeal.[52] This is in and of itself *ultra vires*, as it purports (without clear and specific statutory authorisation) to deprive an individual of the right to appeal under ss 82(1), 84(1)(a) and 86 of the 2002 Act, which provide for a substantive merits review on appeal to the First-tier Tribunal following the rejection of a claim.

G SUSPENSIVE EFFECT OF APPEALS

45 UNHCR turns finally to the question of what the position would be following an adverse decision by the Secretary of State, but before an appeal could be determined. The Court of Appeal noted that this was a "*difficult*" issue on which it did not hear full oral argument, and ultimately decided "*after considerable reflection*" not to make any observations on this topic

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51 Hathaway, *The Law of Refugee Status,* 2nd Ed. (CUP 2014), pp.25-27; Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) pp.156-160; *Saad v SSHD* [2012] Imm AR 471, §12 *per* Lord Phillips MR.

52 See Explanatory Memorandum to the Statement of Changes In Immigration Rules Presented To Parliament on 29 October 2015 (HC 535), §7.2 "*Where a claim is treated as inadmissible in accordance with these Rules it will not receive substantive consideration. There is no right of appeal against a decision to treat a claim as inadmissible though this may be challenged by way of Judicial Review.*".

(Judgment §136). UNHCR supports the conclusion invited by the Secretary of State below (Judgment §§133-134). UNHCR considers that:

(1) The general principle of effective judicial protection[53] (which forms part of retained EU law) requires that an individual benefit from the State's obligation of *non-refoulement* until such time that they have been able effectively to challenge an adverse decision of the Secretary of State before a competent court or tribunal.

(2) This follows from the gravity of the harm against which *non-refoulement* protects. See above at §15.

(3) Importantly, the ECtHR has repeatedly recognised that an effective remedy under Article 13 (which the Human Rights Act 1998 is intended to provide[54]) requires suspensive effect where an arguable breach of Article 3 is threatened. See, e.g., the Grand Chamber in *Hirsi v Italy* (2012) 55 EHRR 21:[55]

> "200. In view of the importance which the Court attaches to art.3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the Court has ruled that the suspensive effect should also apply to cases in which a state party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature."

(4) Thus, unless the merits of the claim are unarguable (in domestic law, "*clearly unfounded*"), removal prior to a determination of an appeal would lead to a denial of effective judicial protection of the right not to be *refouled* under retained EU law), and would be contrary to Article 3 and the basic purpose of the HRA 1998.[56]

(5) Where an appeal is not available (e.g. Judgment §135(ii)), removal ought not to be effected until such a time as the individual is able to challenge that decision by way of an application for judicial review. The imperative for expedition in any such appeal is self-evident.

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53 See, e.g., Tridimas, *The General Principles of EU Law* 2nd Ed. (OUP 2006) pp.443-445.

54 See, e.g., *R (Al-Skeini) v SSHD* [2008] 1 AC 153, §57 (Lord Rodger) and §§147- 148 (Lord Brown).

55 See also *Gebremedhin v France* (2010) 50 EHRR 29, §§66-67*; Hirsi v Italy* (2012) 55 EHRR 21, §§199-200; *MSS v Belgium* (no 30696/09, 21 January 2011) (2011) 53 EHRR 2, §§293, 387-389.

56 As the Strasbourg Court has identified, it is the nature of the right itself (i.e. the protection from *refoulement*) which renders a non-suspensive appeal inadequate in this context. See *Jabari v Turkey* [2001] INLR 136 (ECtHR), §50: "… *given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned*.".

H THE COURT OF APPEAL'S APPROACH

46 The Court of Appeal held that:

(1) "*[W]hilst the 1951 Geneva Convention affords rights attached to refugee status to all those who satisfy the definitional criteria article 1A of the Convention, in practice – and now, vitally, as a result of the Qualification Directive – a refugee's rights (including the right not to be refouled) are dependent upon and flow from formal state recognition of that status*." (Judgment §119).

(2) Article 7 of the PD restricts the obligation of *non-refoulement* to "*those who […] have a pending application for asylum*". Whilst Article 21 of the QD was not expressly limited to those granted refugee status, it was "*in effect so restricted*" because the duty not to *refoule* is protected for "applicants" by Article 7 of the PD (Judgment §§59-60).

(3) So there is no bar under the Refugee Convention or EU Directives on removal under the 1980 Hague Convention where a child is named as a dependent in an application for asylum by the parent, but makes no separate claim for international protection (Judgment §§137-138).

47 In so concluding, UNHCR respectfully submits that the Court of Appeal erred as follows:

(1) Recognition of refugee status remains declaratory and not constitutive, both under the Refugee Convention, the QD and the PD. The CJEU made that plain in *M* (above), §92, as did the legislator in recital (14) of the QD.

(2) Protection from *refoulment* is not restricted to those who have made formal applications. Article 7 of the PD merely makes express that which is implicit in Article 33 of the Refugee Convention: an applicant is protected from *non-refoulement* until and unless their application is refused. Recitals (2) of the QD and the PD show that the aim of the CEAS was to ensure that *"nobody"* was sent back to persecution, as the Grand Chamber of the CJEU confirmed in *NS*, §75.

(3) Still less is protection from *refoulement* restricted to those granted refugee status. Article 21 of the QD requires, without qualification, that Member States must respect the principle of *non-refoulement* in accordance with their international obligations. The QD and PD are intended to comply with the Refugee Convention (Article 78 TFEU; Article 63 TEC) and must be interpreted accordingly: *X* (above), §40. Moreover, the rights conferred by the Directives are directly effective and must be

interpreted consistently with the general principles of EU law, which include protection against *non-refoulement* as reflected in Article 3 of the ECHR (see *Elgafaji*, §28). Neither the Refugee Convention nor Article 3 of the ECHR limit the protection from *refoulement* to those granted formal status.

(4) Further, it follows from the definition of an "application for asylum" under Article 2(b) of the PD (see §19 above) that an "applicant" in the Article 2(c) of the PD falls to be construed in a similarly substantive rather than formal sense, not least given sub-paragraphs (1)-(3) above, to mean a person who *may be understood* to have made a request for international protection. Article 7 of the PD would thus include an invisibly claiming child.

(5) An invisibly claiming child is thus protected from *non-refoulement* both under the Refugee Convention, the QD and the PD.

(6) If a child is entitled to protection from *refoulement*, there is no discretion under Articles 13(b) and 20 of the 1980 Hague Convention to return under Article 12. *Non-refoulement* has primacy: that result follows at least from s 6 of the HRA 1998, since Article 3 of the ECHR "*embraces"* protection from *non-refoulement* under Article 33 of the Refugee Convention: *ND*, §188.

I CONCLUSION

48 UNHCR respectfully commends these submissions to the Court in its consideration of this appeal.

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