Neutral Citation Number: [2021] EWHC 868 (Admin)

Case No: CO/328/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2021

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

THE QUEEN
on the application of

(1) GA
(2) QA (a child, by GA as litigation friend)
(3) RA (a child, by GA as litigation friend)
(4) SA (a child, by GA as litigation friend)
(5) ZA (a child, by GA as litigation friend) **Claimants**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Rachel Jones (instructed by **Bindmans LLP**) for the **Claimants**
Claire van Overdijk (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 30 March and 7 April 2021

- -

Approved Judgment

MR JUSTICE CHAMBERLAIN:

Introduction

1 The Claimants are all British citizens, who currently live abroad. By order of this Court, the First Claimant ("the mother") is referred to as GA and the Second to Fifth Claimants ("the children") as QA, RA, SA and ZA. The country where they live is referred to as Country X. The order also prevents publication of any information or document relating to these proceedings in such a manner as to identify any of the Claimants, either directly or indirectly. This judgment has been drafted so as to omit irrelevant details that might lead to such identification.

2 GA was born and brought up in the UK. She met a man from Country X. GA moved to that country, married him and they had three children, QA, RA and SA, who have lived in Country X since they were born. They are all under 16 years old. According to GA, the children's father has a history of drug abuse and mental health problems. He has subjected her to severe physical and emotional abuse. He has interrogated and beaten her, sometimes knocking her unconscious. He has burned her, repeatedly threatened to kill her and the children and, on occasion, been violent towards the children. There were criminal proceedings against the father in Country X. In the course of those proceedings, he admitted causing GA bodily harm and gave written permission, authenticated by the court, for the children to travel with their mother to visit her parents outside the country.

3 The Defendant is responsible for HM Passport Office ("HMPO"). In December 2019, GA applied to HMPO for passports for QA, RA and SA. She signed the box on the application form confirming that she had parental responsibility for them. In a handwritten note, she explained that the father 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".

4 HMPO declined to process the application unless the consent of the father was obtained.

5 GA left Country X in January 2020, leaving QA, RA and SA in the care of their grandparents. She later came to the UK, where ZA was born.

6 HMPO issued a passport for ZA, but continued to refuse to do so for any of QA, RA or SA, unless the consent of the father was obtained. GA returned to Country X with ZA hoping to obtain that consent. It was refused. GA says that HMPO's stance forced her to return, with ZA, to her abuser, thereby exposing her and ZA to the risk of further violence from him. The father has still not given his consent for the passport applications.

7 The Secretary of State's position in these proceedings is as follows. A passport for a child can only be issued on the application of a person who in law has parental responsibility for the child. The law applicable to the attribution of parental responsibility is governed 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"). Under Article 16, the attribution of parental responsibility is governed by the law of the State of habitual residence, which in the case of QA, RA and SA is Country X. Under the law of Country X, the father has sole parental responsibility for QA, RA and SA. As the

father has not given his consent, HMPO cannot process the applications for QA, RA and SA.

8 The Claimants challenge the decision (which they say is ongoing) not to process the applications on the following grounds:

(a) It was irrational and disproportionate, took into account irrelevant factors, failed to take into account relevant ones and was unreasoned.

(b) It was contrary to HMPO's guidance.

(c) It involved an unlawful fetter on the discretion to issue a passport.

(d) It was incompatible with the Claimants' rights to respect for private and family life (under Article 8 ECHR) and GA's right not to be discriminated against on grounds of sex (under Article 14, read with Article 8 ECHR).

(e) It was incompatible with the Secretary of State's duty under Articles 2, 3 and/or 8 to take reasonable steps to protect the Claimants' lives and to protect them from torture and inhuman and degrading treatment.

Procedural matters

The timing of the Acknowledgement of Service

9 The claim was filed on 28 January 2021, together with an application for urgent consideration. On 1 February 2021, Robin Knowles J ordered that the Claimants be anonymised and imposed reporting restrictions. He also abridged time for service of the Acknowledgement of Service ("AoS") to 8 February 2021. On that date, the Secretary of State applied to extend time for service of the AoS until 22 February 2021. That application came before me on 16 February 2021. I refused it, noting that time had been abridged for good reason, and directed that the papers be placed before a judge later the same week. That happened and on 19 February 2021, in the absence of any AoS, Robin Knowles J granted permission and set an expedited timetable for the hearing. The detailed grounds and evidence were to be filed by 26 February 2021.

10 The importance of procedural rigour in judicial review has been repeatedly emphasised by the Court of Appeal: *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, [67]-[69] and *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [116] *et seq*. This applies as much to defendants as to claimants. In the ordinary course, a defendant has 21 days from service of the claim form to file an AoS: CPR r. 54.8(2)(a). Directions abridging time for service of an AoS are made only where the documents filed by the claimant disclose a real need for expedition. Where such a direction is made, and a defendant considers that it should not have been made, or it will be impossible to comply with the shortened timetable, the proper course is to apply promptly for an extension of time, rather than leaving it to the last day. In any event, there must be no assumption that an extension will be granted. It may be refused. If it is, defendants who have not by that time filed an AoS should assume that they may well forgo the opportunity to advance arguments why permission should be refused.

Redactions

11 The hearing was set down for 30 March 2021. Just before midnight on 25 March 2021, almost exactly a month after the date by which the detailed grounds and evidence were due, the Secretary of State filed and served an application for permission to rely on a witness statement from Jonathan Wharton, an amended skeleton argument and redacted copies of the policy guidance previously disclosed. On 26 March 2021, the Claimants objected to the late admission of this evidence, noting that the significance of the new versions of the guidance had not been explained. I indicated that I would determine the application at the hearing.

12 At the start of the hearing on 30 March 2021 it became clear that the guidance documents originally disclosed were versions which omitted certain passages which the Secretary of State considered were exempt from disclosure under s. 31 of the Freedom of Information Act 2000 ("FOIA"). But there was nothing on the face of the disclosed documents to indicate that such redactions had been made, or on what basis. Accordingly, the Secretary of State produced the same guidance documents, this time marked to show where redactions had been made.

13 Ms Claire van Overdijk, who represents the Secretary of State, said that it was usual for the Secretary of State to disclose in legal proceedings documents redacted to remove material exempt from disclosure under FOIA. She was unable to confirm: (a) who had made the redactions in this case; (b) whether the person who made the redactions was a lawyer instructed in these proceedings; and (c) whether the process involved consideration of anything other than the legal tests applicable under FOIA.

14 This meant that it was necessary for a statement to be filed to confirm the process undertaken. A statement was filed on 1 April 2021 by Liam Doyle, the solicitor with conduct of the litigation on behalf of the Secretary of State. In this statement, Mr Doyle indicated that the internal policies attached to the AoS were edited versions. The parts removed were judged to be exempt from disclosure under FOIA. Thereafter, Mr Doyle reviewed the unedited versions of the same policies and formed the view that the parts which had been removed were not relevant to the issues in the proceedings. Edited versions of the guidance notes were attached to the Detailed Grounds of Defence ("DGD"), served on 26 February 2021. The DGD said this at para. 21:

> "Current restricted versions of this guidance were filed with the acknowledgement of service and are classified as 'official sensitive'. The restrictions that have been applied to it are imposed pursuant to section 31(1) of the Freedom of Information Act 2000."

15 I read this as advancing an explanation why the guidance had not been disclosed earlier (in response to requests in pre-action correspondence), rather than as indicating – as in fact was the case – that the documents appended to the DGD had been edited. It appears that the Claimants' legal team read it in the same way.

16 Mr Doyle explained that, when the DGD were served, he made a note of his intention to re-serve and re-file the policy documents in a form that showed where redactions had been made. This was not done until very late on the evening of 25 March 2021. No indication was given of what the new documents were or how they differed from the ones already served.

17 On re-checking the documents after the first day of the hearing, Mr Doyle made some revisions. These involved redacting some additional passages and unredacting some that were previously redacted.

18 The need to get to the bottom of how these redactions had been made ate up a significant part of the first day of the hearing. It soon became clear that a written explanation would be required and that this would have to be provided after the hearing. In the event, the hearing would not have been completed in one day anyway. It was necessary to continue the hearing on 7 April 2021.

19 In the light of this, it is worth making two related general points. First, material that is exempt from disclosure under FOIA may also be immune from disclosure in legal proceedings (e.g. because it is irrelevant to the pleaded issues, attracts legal professional privilege or public interest immunity or is subject to a statutory restriction on its disclosure). However, the fact that material is exempt from disclosure under FOIA does not impose a restriction on disclosure of the material in general and does not, on its own, supply a reason to withhold material from disclosure in legal proceedings. Second, where a redacted document is served, the fact that redactions have been made, and the reasons for them, should be made clear, preferably on the face of the redacted document. Documents should never be filed or served in an edited form without making clear that they have been edited.

The Secretary of State's application to adduce late evidence

20 Given the circumstances and the urgency of this case, it was important that any judgment should take into account the whole of the Defendant's case, if this could be achieved without prejudice to the Claimants. The continuation of the hearing meant there would be time for the Claimants to address the late admission of Mr Wharton's statement, the amended skeleton argument and the updated guidance. In those circumstances, I admitted it, making clear that the weight to be given to the information in it was a matter for argument.

Relevant policy and law

21 Passports are issued under the Royal prerogative. Decisions relating to passport applications can be challenged on the usual public law grounds: *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Everett* [1989] QB 811.

The Written Ministerial Statement

22 On 25 April 2013, the then Secretary of State (the Rt Hon. Theresa May MP) made a Written Ministerial Statement. In it, she made clear there was "no entitlement to a passport and no statutory right to have access to a passport". The decision to issue, withdraw or refuse a British passport was "at the discretion of the Secretary of State for the Home Department under the Royal Prerogative". However: "A decision to refuse or withdraw a passport must be necessary and proportionate". The Statement continued:

> "These are the persons who may be refused a British passport or who may have their assisting passport withdrawn:

> i. a minor whose journey was known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour the residential care order had been made for who was awarded custody; or care and control…"

Policy

23 The Secretary of State issues two kinds of guidance about passport applications. The first kind is for members of the public. The second kind is for HMPO staff.

24 On 2 April 2019, the Secretary of State published on the Government website a guidance document entitled *Applying for a passport from outside the UK*. The guidance remains current. It provides in relevant part as follows:

> "**Parental responsibility**
>
> A child under 16 must have permission from a person with parental responsibility.
>
> The mother automatically has parental responsibility for her child from birth, and can give permission, providing the court has not taken parental responsibility away."

25 It is common ground that this is an accurate statement of the position under the law of England & Wales, Scotland and Northern Ireland.

26 Ms Rachel Jones, for the Claimants, refers to the guidance produced by HMPO for its own staff as a "secret policy". To my mind, it would be more accurate to call it internal guidance. FOIA governs the circumstances in which the Secretary of State can decline to release such guidance pursuant to request made under that Act. It also provides a procedure by which disputes as to relevant exceptions can be resolved. As noted above, the Secretary of State is under a separate duty to disclose internal guidance if and to the extent relevant to the issues arising in legal proceedings, unless it is immune from disclosure. In the light of the matters set out at paras 11-18 above, there is (now) no basis for doubting that the relevant parts of the internal guidance have been disclosed. Separately, Mr Wharton indicated in his statement that there is an intention to publish edited versions of the guidance. This would no doubt be helpful for future applicants.

27 The first relevant guidance document is entitled *Authorisation and consent*. The current iteration is version 3.0, published on 3 September 2020. On pp. 5-6, it provides as follows:

> "**When we need authorisation or consent to issue a passport**
>
> HM passport office needs the correct authorisation and consent to issue a passport:
>
> …
>
> - when the intended passport holder needs others to agree to the passport application (for example, if the intended passport holder is

under 16 years old who is 16 or 17 years old and is subject to a court order)

Who provides authorisation and consent

For HM Passport Office purposes, we consider "consent" to be from someone agreeing to the passport being issued by us. Someone with the authority to consent to a passport would be:

- a parent or guardian with parental responsibility (PR) for:
    - a child under 16 years…
- a third party representative acting on behalf of a vulnerable adult or child (for example a friend, carer, social services manager, solicitor or someone acting in place of a parent)
- a government official who must give additional consent before a passport is issued (for example, a prison governor or a social service manager agreeing to the issue of a passport for a child in care)
- someone with power of attorney for the intended passport holder

HM Passport Office, in some circumstances, needs additional consent or official or authorisation to issue a passport. Additional consent or official authorisation to issue a passport could come from:

- a court order
- a parent or guardian, when there is a:
    - caveat in place
    - change to the sex marker in the passport for anyone under 18 years old
    - change of name for a child
    - a dispute between parents
    - lost or stolen passport
- a school or youth organisation for a collective passport
- the Reputation Management team to issue a specimen passport
- the Foreign and Commonwealth Office to issue a Diplomatic or Official passport or standard passport with a diplomatic or official observation

- UK law enforcement agencies

…

When not to ask for additional consent

You must not ask for additional consent from a parent or legal guardian if you if discover they:

- have been violent or abusive to the child, other parent or legal guardian
- have a restraining order or prohibited steps order preventing or restricting them from contacting the child, other parent or legal guardian
- are in prison"

28 On pp. 8-9, the guidance continues:

"**Consent for children aged 0-18 years**

You must get consent for a passport application from someone with legal or parental responsibility (PR) if the intended passport holder is a child age 0 to 15 years or a young adult (16 or 17 years old) who is subject to a court order or who wishes to change the sex marker on their passport.

You must ask the customer for consent from someone who has PR or guardianship for the intended passport holder, if the customer does not have it or we have agreed to a caveat. We must check the additional consent is genuine and may have to ask caveat. the person providing additional consent for identity evidence. The person providing consent must:

- have parental responsibility
- be the legal guardian
- be acting in place of a parent or guardian
- be a social service manager (if the child is in care) of the local authority"

29 The second relevant piece of internal guidance is entitled *Children*. The current iteration is version 16.0, published on 15 September 2020. It provides as follows:

"**Completing and examining the application form**

3.10 The declaration at section 9 must be completed by someone with parental responsibility for children under 16.

iv) There are certain circumstances when the person with parental responsibility is not available to give their consent. HM Passport Office has to be extremely careful when applications are received without this consent. A passport may be authorised if the application is made by, or supported by the signature of an adult who can establish that they have parental responsibility; parental rights or they are acting in loco parentis. Further information is given under Loco Parentis. Alternatively, the application may be accepted if it is accompanied by the written consent of someone with parental responsibility.

Parental responsibility

14.1 The Children Act 1989, which came into force on 14 October 1991 in England and Wales, introduced the concept of parental responsibility. It is defined as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. Parental responsibility gives individual legal rights in respect of the child. More than one person may hold parental responsibility for a child, and they will not lose that parental responsibility because some other person subsequently acquires parental responsibility for the child. When more than one person has parental responsibility, they can act alone unless there are specific provisions in law that require the consent of more than one person, for example, for adoption or changing the child's name.

14.2 There is similar legislation in Northern Ireland and Scottish law with the Children (Scotland) Act 1995 and The Children (Northern Ireland) Order 1995.

14.3 Parents of children born overseas will also have parental responsibility and rights based on the laws of the country concerned where the child is habitually resident. Further information can be found under 14.18, which confirms where parental responsibility is gained overseas, this will not be lost if the child is now in the UK, even if the child is British.

…

14.18 When examining overseas applications supported by UK birth certificates, if the person applying has signed the declaration confirming that they that have PR or have made it clear in the supporting documents that they believe they have they PR, then in most cases this this would be adequate confirmation of PR. However, under new provisions of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children which came into force under a UK Regulation on 1 November 2012, parental responsibility is determined in accordance with the laws of the country of the child’s habitual residence, not under UK law even though the child is British and has British documents. However, it is also true that once PR is established in one country it will not necessarily be lost when habitual residence is established in another. For example, a child born in the UK with both parents named on the birth certificate both parents have parental responsibility. This PR will not be lost for either parent if one or

both parents move the child to a third country where PR is assessed or established differently. This also means that situations can arise where parents are at loggerheads over which PR process may apply. This is for the courts to decide, not HM Passport Office. Habitual residence is open to legal interpretation, but residence can be established quickly depending on the intentions of the parents. So even if a child has only been in a certain country for a short time, the local laws may still apply…

14.19 Examining a full birth certificate issued overseas (a foreign birth certificate). Birth registrations differ from country to country. Most do issue a certificate detailing the parents, but this may not automatically confer parental responsibility. In the majority of cases as long as a person applying has signed the declaration confirming that they have PR or have made it clear in the supporting documents that they believe they have PR, this would be adequate confirmation of PR. Examiners should check the Knowledge Base located on the U:Drive for specific country details. Care should be taken when assessing parental responsibility from an overseas birth certificate because of the new Hague Convention provisions detailed above. In any cases where the Knowledge Base is not clear, or there is a dispute between the is parents over the child or who has parental responsibility, please refer the case to the Guidance and Quality team via your ONG representative.

…

Court Orders instead of parental consent

23.1 There may be the rare occasion when an application is received for a child, and those with parental responsibility have refused to give their consent. Instead they have submitted a Court Order which indicates that it is in the best interests of the child that s/he is issued with a passport. This type of situation might arise where a child is voluntarily accommodated by the local authority and, for example, wishes to go on holiday independently or with their carers.

…

Loco parentis

30.1 The term loco parentis refers to a person who is caring for a child in the absence or death of the parent or guardian who has parental responsibility. As passport applications require consent from someone with parental responsibility, HM Passport Office has to be extremely careful when applications are received without this consent.

30.2 A Statutory Declaration (please see Statutory Declarations) must be produced in every case where an adult claims to be acting in loco parentis. (See below for information when dealing with the child's father who has not been married to the child’s mother.) Applicants should be made aware that the document is legally binding and a false declaration can lead to criminal charges. Additional documentary evidence must accompany the Statutory Declaration.

> 30.3 The statutory declaration should indicate that the applicant is looking after the child, and why. It should explain why they are the most appropriate persons to apply for a passport, the date they commenced looking after the child, whether there are any others with parental responsibility where they are and why they are unable to provide consent. It should also indicate whether those with parental responsibility are aware of the application, if not why not, and what they think of the application."

30 Next, there is the HMPO Country Profile in relation to Country X. In its current iteration, it provides as follows:

> "**What are the Local Laws on Parental Responsibility, Loco parentis?**
>
> Under the personal status law, all single women (whether divorced, widowed, or never married) under 40 are considered to be legal minors, and are under the guardianship of a male relative. Non-Muslims may apply their own personal status laws, and religious courts for each denomination adjudicate in matters relating to family and divorce for Christians. With regards to parental authority, [Country X] law recognises fathers as the sole legal guardians of children. This is despite the fact that in cases of divorce, mothers are granted custody of their children until they reach puberty, at which point it is up to the child to decide with which parent s/he wants to live. If a divorced woman remarries, she loses custody of her children, who are sent to live with the father, his mother, or the wife's mother, as decided by the court."

31 Later in the same document, under the heading "Tips and facts", the following appears:

> "Family guardian should apply for the first-time passport to his/her minor children.
>
> …
>
> In actual practice, the conditions placed on the mother's primary right to custody often enable the father to maintain a great deal of influence on the rearing of the children even though he may not have legal custody. For example, travel restrictions exist in [Country X]. The mother must seek the father's approval to travel with the children…"

32 Finally, there is internal guidance entitled *Vulnerability considerations for passports*. The current iteration is version 2.0, published on 23 September 2020. This "tells HM passport office operational staff what we mean by vulnerability and about our role in how we support our vulnerable customers". Vulnerability is defined as including "the risk to a customer of having something done to them because of the vulnerability, for example, a child abduction for human trafficking".

33 At pp. 19-20, the guidance provides:

> "**Child safeguarding and child welfare vulnerability consideration: when it may apply**

As part of the Home Office, HM Passport Office have a legal duty to safeguard children and must act on any information (or evidence) that shows the child's welfare is (or may be) at risk, whether it is before or during the passport application process or after a passport is issued.

This vulnerability relates to the welfare risk or concern:

- of a child being (or possibly being):
    - abused or exploited…

…

Child safeguarding and child welfare vulnerability consideration: how to deal with the application

If we identify the vulnerability, we will provide support and depending on the circumstances, may:

- prevent the issue of passport
- cancel an existing passport"

34 At p. 27, the guidance provides as follows:

"**Vulnerability consideration: parental disputes**

This section tells HM passport office operational staff about the parental disputes vulnerability indicator.

Parental disputes vulnerability consideration: when it may apply

The vulnerability relates to any child application where there appears to be a dispute (or argument) between 1 or more people who have parental responsibility for a child…

…

We must not take sides when dealing with parental disputes and will always recommend that all parties should seek an informal agreement or resolution via the family law courts. However, we must take action if we suspect someone with courts. parental responsibility is trying to fraudulently get a passport for a child, by avoiding our:

…

- authorisation and consent policy"

35 At p. 49-52, the guidance provides:

> "**Vulnerability consideration: abuse and exploitation**
>
> …
>
> **Abuse and exploitation vulnerability consideration: when it may apply**
>
> …
>
> 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)
>
> …
>
> **About domestic and other abuse**
>
> Domestic abuse is violence (or other abuse) made by one person against another, in a domestic setting (for example, marriage or while living together). It can:
>
> - …
> - involve violence against
>   - children
>   - parents
>
> Like other abuse types, it:
>
> - may take a number of forms, for example:
>   - physical abuse
>   - verbal abuse
>   - emotional abuse
>   - economic abuse
>   - religious abuse
>   - reproductive and sexual abuse

- can range from subtle, manipulative forms of abuse, to marital rape and violent physical abuse…

Abuse and exploitation vulnerability consideration: how we may identify it

We may:

- identify the vulnerability before, during or after an application from a customer (or third-party), when they:
    - submit a letter telling us about the abuse or exploitation
    - submit a court order that mentions the abuse…

…

Abuse and exploitation vulnerability consideration: how to deal with the application

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.

…

Abuse and exploitation vulnerability indicator: deciding what to do

The interventions (actions) you, the CFT member of staff, carry out, may mean you need to:

- contact the police to report your concerns (and give them details of your concerns)
- cancel an existing passport (to prevent travel)
- refuse to issue a passport, if
    - a court order tells us to
    - there is evidence the customer would be at risk of abuse or exploitation, if we issue them with a passport
- Post the passport to an alternative safe address (for example, a refuge or third-party that the customer or FCO has agreed)."

Law

36 The UK signed the 1996 Hague Convention in 2003 and ratified it in 2012. Country X has not signed it.

37 Chapter I is headed "Scope of Convention". It begins with Article 1, which provides:

> "(1) The objects of the present convention are—
>
> (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
>
> (b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
>
> (c) to determine the law applicable to parental responsibility;
>
> (d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
>
> (e) to establish such cooperation between the authorities of the contracting states as may be necessary in order to achieve the purposes of this Convention.
>
> (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or property of the child."

38 Article 3 provides:

> "The measures referred to in Article 1 may deal in particular with -
>
> (a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
>
> (b) rights of custody, including rights relating to the care of the person of the child and, in particular, to the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
>
> (c) guardianship, curatorship and analogous institutions;
>
> (d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
>
> (e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;
>
> (f) the supervision by a public authority of the care of a child by any person having charge of the a by child;
>
> (g) the administration, conservation or disposal of the child's property."

39 Article 4 provides:

> "The Convention does not apply to -
>
> (a) the establishment or contesting of of a parent-child relationship;
>
> (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
>
> (c) the name and forenames of the child;
>
> (d) emancipation;
>
> (e) maintenance obligations;
>
> (f) trusts or succession;
>
> (g) social security;
>
> (h) public measures of a general nature in matters of education or health;
>
> (i) measures taken as a result of penal offences committed by children;
>
> (j) decisions on the right of asylum and on immigration."

40 Chapter II (comprising Articles 5-14) is headed "Jurisdiction" and identifies the State whose authorities have jurisdiction to take the "measures" referred to in Articles 1 and 3. Chapter III (comprising Articles 15-22) is headed "Applicable law". It provides in material part as follows:

> "**Article 15**
>
> (1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
>
> (2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
>
> …
>
> **Article 16**
>
> (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
>
> …

> **Article 17**
>
> The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.
>
> …
>
> **Article 20**
>
> The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.
>
> …
>
> **Article 22**
>
> The application of the law designated by the provisions of this Chapter can be refused only if this of application would be manifestly contrary to public policy, taking into account the best interests of the child."

41 In his Explanatory Report on the 1996 Hague Convention, Paul Lagarde explains that the 1996 Hague Convention updated the 1961 Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors ("the 1961 Convention"). At para. 93 of the Report, Mr Lagarde noted that Article 3 of the 1961 Convention had provided that "a relationship subjecting the minor to authority, which arises directly from the internal law of the State of the minor's nationality, shall be recognised in all the Contracting States". Courts of the Contracting States were divided on the question whether it had laid down a rule of conflict of laws (that "the national law of the child" determined "whether the authorisation necessary to carry out an act on behalf of the child had to be given by the father or the mother of the child, or by the two jointly") or merely a rule of recognition (a rule that "applied if a measure of protection were requested from the authority having jurisdiction"). At para. 95, Mr Lagarde said: "The Commission [responsible for drafting the Convention]… opted clearly for a rule of conflict of laws in preference to a simple rule of recognition." At para. 98, he noted that Article 16(1) "lays down for parental responsibility a rule of conflict of laws designating the law of the state of the child's habitual residence".

42 The reference in Article 22 of the 1996 Hague Convention to "the best interests of the child" reflects the requirement in Article 3 of the UN Convention on the Rights of the Child ("CRC"), to which the UK and Country X are both parties, that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

43 In her skeleton argument, Ms van Overdijk said that the 1996 Hague Convention had direct effect in domestic law by virtue of the Parental Responsibility and Measures for the Protection of Children (International Obligations) England & Wales and Northern

Ireland) Regulations 2010 (SI 2010/1898: "the 2010 Regulations"). Those Regulations gave effect to *some* of the UK's obligations under the 1996 Hague Convention, but not those in Chapter III. However, with effect from 31 December 2020, the Private International Law (Implementation of Agreements) Act 2020 inserts a new s. 3C into the Civil Jurisdiction and Judgments Act 1982 providing that the 1996 Hague Convention "shall have the force of law in the United Kingdom".

44 Finally, s. 55(1) of the Borders, Citizenship and Nationality Act 1999 requires the Secretary of State to make arrangements for ensuring that the functions specified in s. 55(2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. By s. 55(2), the functions include "any function of the Secretary of State in relation to immigration, asylum or nationality". The Secretary of State accepts that dealing with passport applications is a function relating to nationality. Where s. 55(1) applies, the best interests of the child must be treated as a primary consideration, which means that "no other consideration is inherently more significant than the best interests of the child". Consequently, "[t]he question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it": *R (Project for the Registration of Children of British Citizens) v Secretary of State for the Home Department* [2021] EWCA Civ 193, [70(iv)].

The factual background, application and correspondence

45 Between August and December 2019, GA's mother and GA contacted the Foreign and Commonwealth Office ("FCO"), as it was then known, to seek assistance for GA to leave Country X with her children. She was told that she would need to obtain the father's permission and that, without such permission, the FCO could not help. Any such help might be seen as facilitating child abduction. The FCO advised her to contact the local police. In December 2019, the father was arrested. Court documents show that he admitted causing her bodily harm and that, in the course of the proceedings, he gave written permission, endorsed by the court, for the children to travel with their mother to visit her parents outside the country.

46 GA first applied for British passports for QA, RA and SA in December 2019. She filled in the section of the application form confirming that she had parental responsibility. With the completed application forms, she enclosed a letter. This made clear that she had been in regular contact with the FCO and had been told to say that this was a "sensitive case" due to the "extreme vulnerability of myself and my children". She expressed her hope that the applications could be processed as quickly as possible "to enable us to leave [Country X] safely". She asked that her mother be included in all communication between HMPO and herself "since my email address and phone number cannot be guaranteed long-term". She asked that the four passports and original document to be delivered to her mother in the UK "so that my husband does not have any knowledge or access to them". She gave the address of a "hopefully safe apartment" which she had rented temporarily following her escape from her husband when he was arrested after "extremely serious physical and psychological abuse including torture of me – much of this witnessed by the children – when he isolated us" in a particular location. She explained the father's drug use and mental health problems.

47 Separately, GA enclosed a "witness statement" detailing the very serious abuse she had suffered and the effect it had had on her. It is not necessary to set out the details.

48 On 7 January 2020, HMPO wrote to GA. The letter included this:

> "You can only agree to a passport being issued for the children if you have parental responsibility. The laws for parental responsibility vary depending on where a child is born, where they are, or where they have lived. As the children were born in [Country X] – due to [Country X] law – we require consent from father – a signed letter – to authorise the issue of the passports. Alternatively, if you have a court order which grants you parental responsibility – we will need to see the original."

49 On 23 January 2020, HMPO emailed requesting outstanding documents, including "anything to support fathers consent to the passports and travel". GA replied indicating that her mother would be sending court documents recording the father's admission of causing bodily harm to GA and his written permission for the children to travel. On 27 January 2020, GA's mother wrote to HMPO, enclosing those documents.

50 On 3 February 2020, HMPO sent GA a further letter requesting a letter from the father "confirming that he agrees to a passport being issued". On the same date HMPO emailed in these terms:

> "After reading through the court evidence and fathers consent letter – we have confirmed that as the children are currently living with father and due to [Country X] law – their father still holds his parental responsibility. 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."

51 GA responded on 3 February 2020, confirming that the children were not living with their father, but with their grandparents, and indicating that her mother would travel to Country X to obtain a letter from father.

52 On 3 March 2020, GA emailed HMPO asking whether they would issue passports for the children if she were to obtain a divorce and be awarded custody by the courts of Country X. The answer, on 3 March 2020, was that the father's consent would still be required:

> "From what we understand, unless the Divorce or court order specifically states father loses all parental responsibility rights to the children then unfortunately we would still need his consent."

53 On 1 May 2020, GA's mother wrote to HMPO saying that she had tried to get a letter from the father, but had been unable to do so. She continued:

> "The condition of [GA] not pressing charges… for the extreme violence and abuse by her husband was that her husband allowed her and the children to travel from [Country X] to visit her parents. The judge ensured they could travel by witnessing the necessary permission letter from her husband.
>
> Logically, the father's permission to travel letter implies permission is also granted for passports. You already have this travel permission letter which was written and signed by the father in front of the judge… in addition, it is

> stamped by the [court]. I showed this exit letter to the authorities at [an airport in Country X] and they told me that the document was acceptable for the children to travel out of [Country X] especially since it was stamped by the court…"

54 GA's mother attached three further documents: a report by a trauma therapist whom GA had consulted while out of Country X; a timeline and list of some of the abuse which GA had suffered (prepared by GA herself); and a list of the father's beliefs. The controlling and abusive behaviour listed included destroying GA's British passport.

55 GA was also in touch with HMPO herself by email on 16 and 30 March and on 15 June 2020. On the latter date, HMPO replied indicating that the travel document authenticated by the court could not be accepted as proof of the father's consent to the passport application.

56 GA's Member of Parliament intervened. HMPO responded on 5 October 2020. Their position remained that the father's consent was required. The travel consent had been considered against the relevant policy and was deemed insufficient. HMPO required either a document from the father expressly authorising the grant of passports to the children or an order of the court confirming that passports could be issued without the father's consent. HMPO suggested GA seek assistance from the Foreign, Commonwealth & Development Office ("FCDO") and referred her to a section on child abduction in Country X on the gov.uk website.

57 GA travelled to Country X with ZA to seek a letter from the father. To date, he has not provided it. She remains there with the father and all the children.

58 The Claimants' solicitors, Bindmans, sent a letter on 11 December 2019 asking them to issue passports for QA, RA and SA. On 21 December 2020 they sent a letter under the Pre-action Protocol. The response, on 4 January 2021, included this:

> "British passport applications were received for [QA, RA and SA] on the 06 January 2020. Parental responsibility for the children, who were all born and who currently reside in [Country X], was confirmed by their mother [GA], who signed the relevant section of each application form accordingly.
>
> [GA] was subsequently notified by HM Passport Office that [Country X] law, the law applicable to the circumstances involved, recognises fathers as the sole legal guardians of children. Therefore, consent from the father was advised for HM Passport Office to progress the applications further.
>
> As consent from the appropriate individual with parental responsibility is a standard requirement for children's British passport facilities, and this requirement is in accordance with HM Passport Office policies and procedures, I find no basis for your claim that the request is unlawful and irrational. Furthermore, HM Passport Office does not have discretion to circumvent a policy in an individual case, particularly one aimed at the safeguarding of children.
>
> Moreover, advice from our Policy Team has been sought that has confirmed that HM Passport Office are duty bound to request the father's consent in the

> circumstances due to the recognition of him as having sole legal parental responsibility for all three children.
>
> I acknowledge that your clients wish to travel to the United Kingdom, and I appreciate and empathise with the circumstances that you have described. Furthermore, I can confirm that HM Passport Office takes the responsibility of safeguarding and the welfare of the of the of children extremely seriously as part of our public protection commitments.
>
> However, in all circumstances passport applications must be considered in accordance with HM Passport Office policies and procedures with adherence to relevant nationality law."

59 Bindmans wrote seeking copies of all relevant policies. They were told to make a subject access request under the Data Protection Act 2018. On 20 January 2021, Bindmans wrote again, making clear that the Claimants "continue to be at **real and present risk of domestic violence** at the hands of their abusive and violent husband/father" (emphasis in original). Bindmans said that GA was willing to sign a statutory declaration confirming that: she is the birth mother and primary carer of the three children; the children's father has already consented to her taking the children out of the country to stay with their grandmother; the children's father is extremely abusive and "in keeping with this abusive and controlling behaviour, the children's mother is not able to obtain the letter from him which HMPO has requested".

60 HMPO responded on 26 January 2020 a statutory declaration in lieu of the father's consent would not be acceptable. HMPO continued:

> "Please note that HM Passport Office is not refusing to issue British passports to your clients. We are advising you that our policy is clear in that we do not have the authority to issue without the fathers consent or a Court Order giving sole responsibility to your clients' mother. Furthermore, we are exceptionally keeping the applications open to allow for the necessary consent to be provided.
>
> I appreciate that my response may be disappointing to your clients, however, I must stress again that all passport applications must be considered in accordance with HM Passport Office policies, procedures, and relevant nationality law. We do not have the authority to waive the provisions as advised by our policy colleagues who are aware of the difficulties encountered by your clients."

GA's evidence in these proceedings

61 In her first statement prepared for the purposes of these proceedings, and signed on 28 January 2021, GA gave further details as to the abusive behaviour listed, which included destroying GA's British passport and QA's Country X passport. Although she described him as "calmer than last year", she said that she was "constantly worried that this will change and he will become violent again". She lives in "constant fear". She added: "The longer we are here the less able my husband is to hide his mental state and to refrain from abusing us". She described a very recent occasion on which the father threatened to inflict serious injury on her and another occasion on which he threatened to kill QA.

62 GA said:

> "The three eldest children need their British passports. Without them, we are stranded and dependent on my husband. He at times taunts me with the fact that he has power over us… he believes no one can beat him and that I should give up. We have no alternatives, and he knows this.
>
> If I apply to court in [Country X], for instance to try to divorce him, or to seek any order from the court about parental responsibility, I would place myself and the children at real risk. He would feel betrayed. He feels in his actions, his violence towards us, that he is saving us. He is deluded. If he thought I was trying to leave him, I am sure he would become violent again. It will be a trigger… if he is aware or believes I am trying to separate the family, he will feel that he must punish me and the children again. The only way to try to stay safe while we are here, is to cooperate with him and go along with what he says."

63 In her second witness statement, signed on 3 March 2021, GA said:

> "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. Since I returned in November 2020, I can tell he is unwell. He is still paranoid. He is also very changeable in his moods. I believe that if I did anything to disturb him, such as going to the courts here, the risk to my children's safety (and my own) would be too great. He will not even let us go to the shops alone at the moment, and he has a gun."

64 GA went on the describe further abusive behaviour by the father towards her and towards one of the children.

The Secretary of State's evidence

65 Jonathan Wharton is the Passport Policy Lead for HMPO. He has held this position since 2010. Since 2014, he has been responsible for overseeing hundreds of sensitive child cases where there have been issues with court orders, disputes between parents, concerns of abuse welfare and obtaining documentation.

66 In his witness statement, signed on 25 March 2021, Mr Wharton confirmed that the Claimants' case was first referred to him in September 2020. It has been handled in exactly the same way as other cases for which he has been responsible. He says this:

> "11. My concerns at the time were that the mother was stating her intention to remove the children on safeguarding grounds, where the evidence provided to the court did not suggest that they were at significant risk of harm as the court had not intervened. The father has sole parental responsibility and whilst travel to visit family outside Country X was stated, did not state where and could, depending upon the country, have been facilitated by a

> British passport or a passport from Country X. The use of a British passport had far more wide ranging impacts (including the underlying reason to come to the UK), hence clarity from the father or the courts in Country X was required.
>
> 12. The FCDO position at that point and since has been that the mother needs to engage with the authorities in Country X and they would support her in doing so."

67 At para. 25 of his statement, Mr Wharton explained the status of the guidance about the law of Country X on which he had relied. This guidance "sought to capture the knowledge from overseas passport caseworkers of matters relating to Country X so as to minimise the impact on customers and provide some consistency in case handling". At para. 26, he continued:

> "This is information in the public domain. It is not meant to be a definitive answer. Any queries raised by customers would be assessed on their merits. This country profile is not part of formal policy and guidance and was made available to the claimant solicitors in helping resolve the complaints on the handling of these passport applications but beyond providing background information, it has no formal status other than being an early reference point for information. It is not formally maintained and is only updated as a result of new documents or information gathered as part of new case handling. It is not a legal opinion it is generally sourced from open source official records available online."

68 That said, Mr Wharton explained at para. 27 that he was not aware that any information contained in it was incorrect or outdated. He pointed out that the Claimant's solicitors had not disputed the interpretation of the laws of Country X.

Submissions for the Claimants

Ground 1

69 This ground encompasses three submissions.

70 First, HMPO failed to have regard to relevant factors, in particular the welfare and best interests of these four British children. Reliance is placed on:

(a) the statement in the internal guidance on vulnerability that HMPO "must act on any information (or evidence) that shows a child's welfare is (or may be) at risk, whether it is before or during the passport application process" (emphasis added): see para. 33 above; and

(b) the proposition that, by virtue of s. 55 of the Borders, Citizenship and Immigration Act 2009, "no other consideration is in here to more significant in the best interest of the child": see *R (PRCBC) v Secretary of State for the Home Department* [2021] EWCA Civ 193, at [70].

71 Second, HMPO erred in relying on her understanding of the law of Country X. There was no legal requirement to have regard to foreign law: the 1996 Hague Convention

applies only to "measures of protection" for children; and the internal guidance provides that "in most cases" a statement by the applicant that she has parental responsibility will be adequate. In any event, HMPO had an inadequate basis for believing that the law of Country X allocates sole parental responsibility to the father, given that this is so different from the position in the UK and is contrary to the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the CRC (to both of which Country X is party). In the circumstances, HMPO should have applied the presumption that, in the absence of satisfactory evidence of foreign law, the court will apply English law: *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.), rule 25(2); *Iranian Offshore Engineering and Construction Co. v Dean Investment Holdings SA* [2018] EWHC 2759 (Comm). See also *CS India v Secretary of State for the Home Department (Proof of Foreign Law)* [2017] UKUT 00199 (IAC) (McCloskey J), [15]-[20].

72 Third, it was disproportionate and/or irrational to apply foreign laws "for the sake of it, with no legitimate aim, and with disregard for the domestic abuse and the Claimants' well-being".

Ground 2

73 This ground encompasses four submissions.

74 First, the decision contradicts HMPO's guidance to overseas applicants, which provides that a birth mother can give permission for her children's applications: see para. 24 above.

75 Second, if HMPO's internal guidance contradicts this, applying them would be unlawful: *R (Lumba) v Secretary of state for the Home Department* [2011] UKSC 12, [2012] AC 245.

76 Third, in any event, the decision is contrary even to the internal policies, in particular the guidance on "Authorisation and consent" (which provides "You must not ask for additional consent from a parent or legal guardian if you discover they have been violent or abusive to the child, other parent or legal guardian": see para. 27 above) and the statement in the internal guidance on vulnerability: see para. 33 above.

77 Fourth, the decision contradicts passages in the internal guidance which allow applications to be made by persons who do not have parental responsibility, including: (i) third parties (see para. 27 above); (ii) those acting *in loco parentis* (see para. 29 above); and (iii) in cases where a court order indicates that it is in the best interests of the child to be issued with a passport (see para. 29 above). The court order in this case is to similar effect.

Ground 3

78 The decision was made on the footing that HMPO had no discretion to issue the passport. But this is wrong, given that (i) there was power under the Royal prerogative to do so and (ii) there was power (and indeed a duty) to disapply foreign law where contrary to English public policy: see *Oppenheimer v Cattermole* [1976] AC 249, 278; *Vervaeke v Smith* [1983] 1 AC 145, 164; *Kuwait Airways Corporation v Iraqi Airways Co. (Nos 4 and 5)* [2002] UKHL 19, [2002] 1 AC 882, [28]; and Article 22 of the 1996 Hague Convention.

Ground 4

79 If the law of Country X has the effect claimed, then the application of that law constitutes direct discrimination against GA on grounds of her sex. Such discrimination is contrary to Article 14 read with Article 8 ECHR unless justified by "very weighty reasons": *JD and A v United Kingdom* [2020] HLR 5, [89]. Such reasons are not supplied by the need to comply with international law, because:

(a) the Secretary of State's own guidance shows that HMPO was required to safeguard QA, RA and SA and ought not to have required consent from their abusive father;

(b) the decision is in any event contrary to other international law binding on the UK, including in particular CEDAW, Article 16, which guarantees men and women equality in respect of parental rights over children, and CRC, Article 3, which requires the best interests of the child to be taken into account as a primary consideration;

(c) so, the decision was not *required* by international law, which therefore cannot be relied upon to justify the discriminatory treatment of GA: see by analogy *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 77, [34].

Ground 5

80 The decision was contrary to Articles 2 and 3 because:

(a) on the information before HMPO, there was a real risk of the Claimants suffering inhuman and degrading treatment or death;

(b) the refusal to issue passports to QA, RA and SA forced GA and ZA to return to their abuser. The continuing refusal prevents GA from taking her children to temporary refuge in the UK should the father's violence and abuse escalate;

(c) Article 3 is an absolute right. The need to comply with international law can provide no basis for failing to comply with it.

Ground 6

81 The decision was contrary to Articles 3 and/or 8 ECHR because:

(a) the Secretary of State is under a positive obligation to protect the Claimants from being subject to torture or inhuman or degrading treatment, including in the context of domestic violence: *Opuz v Turkey* (2010) 50 EHRR 28, [161]; *Volodina v Russia* (App. No. 41261/17), 9 July 2019, [74]-[75];

(b) she is also under a positive obligation to protect them from the cumulative effects of domestic violence on private and family life: *Bevacqua v Bulgaria* (App. No. 71127/01, 12 June 2008);

(c) the ongoing decision, far from protecting the Claimants, created and continues to give rise to a real risk that they will suffer domestic violence.

Submissions for the Secretary of State

Ground 1

82 Ms van Overdijk began her analysis with the 1996 Hague Convention. This now has direct effect in domestic law by virtue of the 2020 Act. It applies not only to measures of protection but also supplies a choice of law rule which identifies the law governing any substantive issue concerning parental responsibility. Article 16 creates a general rule that that "attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority" is governed by the law of the State where the child is habitually resident. This is consistent with the internal guidance on "Children": see para. 29 above.

83 Next, it is submitted that the facts irrefutably support the conclusion that QA, RA and SA are habitually resident in Country X. That is where they were born and have lived their whole lives.

84 The content of foreign law was a matter of fact on which HMPO had to form a view. The internal guidance supplied a proper basis for concluding that the law of Country X allocates sole parental responsibility to the father. The suggestion that HMPO must prove the content of foreign law misunderstands the role of the court in judicial review proceedings. It is for the Claimants to establish that HMPO's conclusion about the requirements of the law of Country X was flawed. Cases like *CS India* are not in point, because in that case it was the role of the Upper Tribunal to make findings of fact about the content of foreign law. Here, by contrast, it was for HMPO to make such findings, which can be disturbed only if vitiated by a public law error. Expert evidence not before the decision-maker is not admissible to impugn such findings in judicial review proceedings: see e.g. *Lynch v General Dental Council* [2003] EWHC 2987 (Admin), [18]-[25].

85 The complaint that HMPO failed to have proper regard to the children's best interests is misconceived. The requirement in the guidance to act on information showing that the child's welfare is at risk may require HMPO to communicate and exchange information with other agencies whose function it is to protect the child. But it cannot and does not disapply "binding legal principles" established by conflict of laws rules.

Grounds 2 and 3

86 The Secretary of State submits that the Claimants' reliance on policy and guidance does not assist them. The guidance for passport applicants covers the situation where the child is habitually resident in the UK. Where the child is habitually resident in another State, the 1996 Hague Convention creates a choice of law rule according to which the law of that State determines parental responsibility. This is consistent with the guidance on "Children". This is not a case where "additional consent" is required. It is one where, applying the law of the State of habitual residence, there is no consent at all.

87 It is not relevant to consider the guidance on cases where the applicant is *in loco parentis*. That concept applies where there is no-one with parental responsibility, for example

because the parents have died or have abandoned the child or lack capacity. Here, by contrast, there is a parent with parental responsibility who is alive and has capacity. The exceptions for applicants *in loco parentis* cannot be used to circumvent the applicable choice of law rule.

88 Nor is there any relevant court order. The letter by which father authorised GA to take the children abroad for visits to their grandparents does not in terms authorise her to apply for passports on their behalf. The courts of Country X have not stripped the father of parental responsibility or conferred that responsibility on the mother, whether generally or for the specific purpose of applying for a passport.

89 The Secretary of State submitted as follows at para. 50 of her skeleton argument:

> "Ultimately HMPO has significant concerns about being asked to issue a passports where the intention is to remove the children from the jurisdiction of the courts of habitual residence which are uniquely placed to determine any dispute between the mother and father concerning parental responsibility."

Grounds 4-6

90 The Secretary of State submitted as follows at para. 52 of her skeleton argument:

> "Ultimately, if the children were habitually resident in the UK, HMPO request Social Services or the Police to confirm whether the mother and children are at significant risk of serious harm. In these circumstances, HMPO is reliant on assessments of risk and harm from local services/authorities in Country X. Further, the first claimant has previously been engaged in the court process in Country X and continues to have recourse to remedies there. The evidence shows that the Police in Country X have not identified anything that places the claimants in danger. The FCDO have provided consular assistance previously in country but at present there is no ongoing action…"

91 In those circumstances, it was submitted that the application of foreign law cannot be a breach of the Claimants' human rights.

92 The Secretary of State's position as regards Article 22 of the 1996 Hague Convention was pleaded in para. 57 of the DGD as follows:

> "…it is submitted that the facts are unlikely to meet the very high threshold under the 1996 Convention to exclude the application of foreign law on public policy grounds (Article 22). However, it is respectfully submitted that it is not the role of HMPO to decide whether public policy reasons exist to justify excluding foreign law here as this is a matter for the court. HMPO would respectfully defer to the court's determination on this issue and would take this determination into account when making a final decision on the claimants' passport applications."

93 The apparent concession that this Court can properly decide whether Article 22 applies has, however, been withdrawn. At para. 54 of the skeleton argument, the Secretary of State submitted as follows:

> "…the claimants may also have recourse in this jurisdiction through the Family Division in the context of an application made to that court in relation to the children's welfare. Given that the children are not habitually resident in this jurisdiction, this would need to be by way of a request for the Family Division to exercise its inherent jurisdiction on the basis of nationality rather than habitual residence, which could involve making the children wards of court. The Family Division in those circumstances would be best placed to consider whether the threshold is reached to justify an exclusion of the foreign law under Article 22 of the 1996 Convention."

94 On the first day of the hearing, I asked Ms van Overdijk if it was part of her case that the Claimants were precluded from relying on ECHR rights because they were outside the territorial jurisdiction of the UK. This was a question about her pleaded case, not an invitation to modify it. Ms van Overdijk confirmed in a note submitted on 6 April 2021, the day before the hearing resumed, that she was taking this point. She relied on the decision of the Grand Chamber of the European Court of Human Rights in *MN v Belgium* (App. No. 3599/18), 5 March 2020, which affirmed the principle that the scope of application of the ECHR was primarily territorial and that the exceptions to this principle were strictly limited. She submitted that none of the exceptions applies here.

95 Arguments of this kind should be clearly identified in the pleadings and should not be taken at such a late stage. If they are, a formal application to amend should be made. At the resumed hearing on 7 April 2021, however, Ms Van Overdijk confirmed expressly that: (i) insofar as GA relied on her own rights under Article 14 ECHR, she was entitled to do so because she had been in the UK for much of 2020, when relevant decisions were communicated to her; (ii) if her claim under Article 14 succeeded, she would be entitled to relief requiring the Secretary of State to treat her application for passports for QA, RA and SA as having been made by a person with authority to do so, notwithstanding that she was now outside the UK. For reasons which will become clear, in the light of these concessions, it has not been necessary to consider whether to grant the Secretary of State permission to amend to plead territoriality defences to other parts of the Claimants' ECHR claims.

Discussion

96 HMPO's decision-making process involved five relevant assumptions or conclusions:

(a) HMPO was obliged to refuse to process the applications unless there was consent from a person with parental responsibility.

(b) In deciding who had parental responsibility for QA, RA and SA, HMPO was obliged to apply the 1996 Hague Convention.

(c) For the purposes of Article 16 of the 1996 Hague Convention, QA, RA and SA were habitually resident in Country X.

(d) Under the law of Country X, the father had sole parental responsibility.

(e) Therefore, HMPO could not issue a passport for QA, RA and SA without the consent of their father.

97 For the Claimants, Ms Jones submits that each of these assumptions or conclusions was flawed. I shall consider them in turn.

(a) HMPO was obliged to refuse to process the applications unless there was consent from a person with parental responsibility

98 The power to issue a passport derives from the Royal prerogative. That being so, the Secretary of State is entitled to lay down rules for its exercise, including rules which admit of no exception. The rule against fettering does not apply: see *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKHL 44, [2014] 1 WLR 2697, [60]-[64].

99 The various guidance documents relied upon show, in my judgment, that the Secretary of State has laid down general rules that: (i) subject to limited exceptions which do not apply here, only a person with parental responsibility can validly apply for a passport for a child under the age of 16; and (ii) parental responsibility is to be determined in accordance with the 1996 Hague Convention.

100 My interpretation of the various statements and guidance documents relied upon is as follows:

(a) The Written Ministerial Statement of 25 April 2013 is not relevant to the present issue at all. It deals with decisions to refuse or withdraw a passport. But, as HMPO have pointed out, there has been no decision in this case to refuse or withdraw any passport. The applications have not progressed to the stage of acceptance or refusal.

(b) The online guidance document "Applying for a passport from outside the UK" contains high level practical guidance for those filling in the passport application form. It is not intended to provide a complete set of rules governing the exercise of the discretion to issue passports and it would not be understood in that way by an objective reader. The statement that "[t]he mother automatically has parental responsibility for her child from birth, and can give permission, providing the court has not taken parental responsibility away" is part of a set of similar statements which describe the rules for attributing parental responsibility under the laws of England & Wales, Scotland and Northern Ireland. These are the rules that will apply to most applicants for British passports. The document is written in simple language and does not address situations involving a conflict of laws.

(c) The "Authorisation and consent" guidance makes clear on pp. 5-6 that HMPO "needs the correct authorisation and consent to issue a passport" when the intended passport holder is under 16 years old. In the standard case, the person who must give such consent is "a parent or guardian with parental responsibility". The references to "a third party representative acting on behalf of a vulnerable adult or child" are to non-standard cases where someone else has legal power to make decisions on behalf of the child (hence the reference to "someone acting in place of a parent"). This is made clear on pp. 8-9. The references to "additional consent" are not material. They concern situations in which someone with parental

responsibility has made the application, but in the particular circumstances of the case this is not enough and the consent of another person is required additionally.

(d) The "Children" guidance is consistent with this. It provides at para. 3.10 that "[t]he declaration must be completed by someone with parental responsibility for children under 16", but includes a caveat at (iv) applicable in "certain circumstances when the person with parental responsibility is not available to give their consent". Paras 14.3 and 14.8 are clear that the 1996 Hague Convention applies to determine who has parental responsibility. Paras 30.1 and 30.2 indicate that the exception for those acting *in loco parentis* is a narrow one, applicable to "a person who is caring for a child in the absence or death of the parent or guardian who has parental responsibility".

(e) The "Vulnerability considerations for passports" guidance is mainly concerned with situations in which vulnerability considerations mean that a passport should be refused or cancelled. The only other action suggested where there is evidence of abuse or exploitation is liaison with other protective agencies. Nothing in this guidance states or implies that a passport may be issued on the application of a person who lacks parental responsibility because of vulnerability considerations.

101 This means that, in my judgment, HMPO was acting in accordance with its internal guidance by refusing to process the passport applications for QA, RA and SA unless there was consent from a person with parental responsibility for them. The internal guidance also provides that, in deciding who has parental responsibility, it is necessary to look to the 1996 Hague Convention.

(b) In deciding who had parental responsibility for QA, RA and SA, HMPO was obliged to apply the 1996 Hague Convention

102 In my judgment, HMPO did not misunderstand the scope of the 1996 Hague Convention. It deals not only with "measures of protection" taken by the authorities of a State, but also with the law applicable to parental responsibility generally. That is evident from:

(a) Article 1(1)(a)-(e) of the Convention, which defines its objects. These include (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person and property of the child, (b) to determine which law is to be applied by such authorities in exercising their jurisdiction and (d) to provide for the recognition and enforcement of such measures in all Contracting States, but also (c) to determine the law applicable to parental responsibility. These latter words are not expressly limited in application to the context of measures of protection. The fact that (c) was included separately from (b) suggests they were not intended to be limited in that way;

(b) Article 4, which sets out a number of matters to which the Convention does not apply. If the scope of the Convention were limited to measures of protection (of which examples are given in Article 3), there would be no need to specify that it does not apply to (for example) decisions on the right of asylum or immigration. Passport applications are made by persons who are or claim to be British citizens. Decisions on such applications are not decisions on the right of asylum or immigration;

(c) a comparison of the language of Articles 15 and 16. Article 15 determines the law to be applied by the authorities of Contracting States "[i]n exercising their jurisdiction under the provisions of Chapter II". Article 16 does not contain these limiting words. This indicates that (subject to the other provisions of the Convention) it was intended to determine the law applicable to parental responsibility more generally (in accordance with the object in Article 1(1)(c)); and

(d) Lagarde's Explanatory Report (see para. 41 above), which describes Article 16 as creating a rule of conflict of laws, rather than merely a rule of recognition applicable only to measures of protection.

103 At the time when the decision not to process GA's application for passports for QA, RA and SA was first communicated, there was no domestic law giving effect to the conflict of laws rules found in Chapter III of the 1996 Hague Convention. Contrary to what is said in the internal guidance on "Children", the 2010 Regulations did not give that part of the Convention the force of domestic law. But Chapter III 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. In any event, the decision challenged is an ongoing one and the 2020 Act now incorporates in domestic law the whole of 1996 Hague Convention.

(c) For the purposes of Article 16 of the 1996 Hague Convention, QA, RA and SA were habitually resident in Country X

104 Determining habitual residence is not always straightforward. In this case, however, QA, RA and SA were born in Country X to two parents who were resident there, one of whom was a national of Country X. They have lived their whole lives in Country X. In those circumstances, HMPO cannot be faulted for concluding that Country X was their State of habitual residence for the purposes of Article 16 of the 1996 Hague Convention. The Claimants advanced no serious argument to the contrary.

(d) Under the law of Country X, the father had sole parental responsibility

105 There is a dispute between the parties about the proper approach to the question whether, under the law of Country X, the father had sole parental responsibility. There are two well-established sets of legal principles, which point in different directions:

(a) In general, in legal proceedings in the courts of England and Wales, questions of foreign law are questions of fact, which have to be proved. In most cases (save perhaps where the law concerned is that of an English-speaking common law country), this must be done by expert evidence: *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] 4 WLR 166, [31]. In the absence of satisfactory evidence of foreign law, the court will apply English law: *Dicey, Morris and Collins*, §9-002.

(b) In judicial review proceedings, it is for the claimant to establish that the decision under challenge was flawed by a public law error. Expert evidence not before the decision-maker is generally not admissible for the purpose of impugning the rationality of the decision: *Lynch v General Dental Council*.

106 The principles in (a) appear to support the Claimants' submission that, because the Secretary of State has adduced no evidence about the law of Country X, the Court must apply the law of England and Wales, under which (as both parties agree) GA would undoubtedly have parental responsibility. By contrast, the principles in (b) appear to support the Secretary of State's submission that the only relevant question is whether it was rational for HMPO, on the information before it, to reach the conclusion it did about the law of Country X.

107 In my judgment, given that questions of foreign law are matters of fact, the proper approach to them depends on the role of the court with respect to matters of fact in the proceedings in question. In private law proceedings, the court generally has to decide disputed questions of fact. The same rules of pleading and proof apply to the determination of foreign law as to any other question of fact: the party who avers foreign law must prove it. This approach is also adopted in *some* public law proceedings. For example, on an appeal against an immigration decision, the First-tier Tribunal (or the Upper Tribunal when retaking a decision found to be erroneous in law) is required to make its own factual findings. These may include findings about foreign law: see e.g. *CS India*. Equally, a tribunal hearing an appeal against a decision to deprive someone of their British citizenship may have to make factual findings about foreign law based on expert evidence called by the parties: for a recent example see the decision of the Special Immigration Appeal Commission in *C3, C4 & C7 v Secretary of State for the Home Department* (SC/167, 168 and 171/2020), 18 March 2021.

108 In judicial review proceedings, however, the court does not generally decide questions of fact. The principal exceptions are "precedent fact" cases, where there is a challenge to the exercise of a statutory power which arises only if a particular factual condition is satisfied. But this is not a "precedent fact" case. In a case such as the present, the function of the Court is to decide not whether the decision-maker's conclusions were correct, but whether – on the material before her – she made a public law error in drawing them. Because of the presumption of regularity, the burden of proof in establishing such an error lies on the claimant; and it is not generally open to the claimant to discharge that burden by reference to evidence not before the decision-maker.

109 I would hold that the proper approach in judicial review proceedings of this kind is that matters of foreign law are to be treated in the same way as other facts. They are to be determined in the first instance by the decision-maker. If the determination is challenged, the onus is on the claimant to establish a public law error vitiating it. In general, that is done by asking whether, on the material before the decision-maker, it was open to her to reach the decision she did, and not by adducing fresh evidence. It is arguable that, in exceptional cases, expert evidence on foreign law might be admissible to establish that the decision-maker had made a technical error that was otherwise not apparent: see by analogy *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [36]-[39]. But it is not necessary to determine that issue here, because the Claimants have adduced no expert evidence. In this case, therefore, the focus must be on the materials before HMPO.

110 It is important, however, to identify with specificity the question HMPO had to answer. At times during the argument, Ms van Overdijk submitted that the question was simply: "do mothers have parental responsibility for children under the law of Country X?" That may be capable of a general answer. But experience suggests that general answers about foreign law may not be of much use. Like our own law, the law of foreign States is often

complex and nuanced. Applying it to a particular factual situation may not be straightforward. In this case, the question that had to be answered was not about parental responsibility in the abstract, but about one particular aspect of it – the legal authority to make a passport application – and it had to be answered by reference not to mothers in general, but to GA's particular situation. That situation included the proceedings before the courts of Country X and the permission which the father had given in the context of those proceedings for the children to travel with their mother.

111 The question for this Court is whether, on the materials before it, HMPO could rationally conclude that, under the law of Country X, GA lacked legal authority to make a passport application for QA, RA and SA.

112 The basis for HMPO's understanding as to the law of Country X was the "Country Profile", a document compiled by unidentified Home Office staff from information available from official sources online. Documents of this kind, published by the Home Office or by the US State Department, are regularly used in the immigration context to establish facts about foreign States. They can be useful in this regard. But the weight that can properly be attached to them will depend on a number of factors, including: (i) whether the author(s) have expertise in the country or region concerned; (ii) the degree of specificity of the information reported; (iii) whether references are given for the sources of the information reported; and (iv) how regularly the document is updated or checked for accuracy.

113 In this case, the author(s) of the document are not identified. It is not known whether he/she/they had expertise in the country or region concerned. The information provided is presented at a very high level of generality. There is only one sentence relevant to the key issue: "With regards to parental authority, [Country X] law recognises fathers as the sole legal guardians of children." No source is given for this proposition (save for the earlier reference to the Personal Status Law: see para. 30 above). Mr Wharton's evidence establishes that the document is not formally maintained and is updated only when new information comes to light from caseworkers.

114 For the Claimants, Ms Jones submitted that the single, unsourced sentence relied upon is an inadequate basis for concluding, even in general, that mothers have no parental responsibility for children, given that such a conclusion would be contrary to Article 16 to CEDAW, to which Country X is a party. Article 16 requires States Parties to take "all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations", and, in particular, to "ensure, on a basis of equality of men and women: …(d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount". The difficulty with this submission is that, when it signed CEDAW, Country X entered a reservation indicating that it did not consider itself bound by Article 16(d). The reservation was confirmed upon ratification. This means that CEDAW cannot be relied upon in showing that the law of Country X is unlikely to be as started in the Country Profile.

115 I am prepared to accept that the Country Profile was an adequate basis (albeit barely) for concluding that, *in general*, the law of Country X allocates sole parental responsibility to the father. But this tells one nothing at all about what exceptions the law recognises. This was important in the present case because of the letter signed by the father, and endorsed by the court, in the context of the proceedings against him. The court's endorsement of

this letter suggests that it intended GA to be able to travel with the children to visit her parents *without further permission from the father*. They could not do that without travel documents. If, under the law of Country X, the father had to give permission for the issue of a travel document, the apparent intention of the court in endorsing the letter of permission would be undermined.

116 Mr Wharton's response to this (see para. 11 of his witness statement, set out at para. 66 above) was twofold. First, he was concerned that GA wished to come to the UK for reasons which went beyond those permitted in the letter (i.e. to escape her abusive husband rather than to visit relatives). Second, he took the view that permission to travel did not necessarily imply permission to apply for a *British* passport (given that the children were also citizens of Country X).

117 The first point is difficult to understand, given the wording of the letter and the context in which it came to be written. The letter does not on its face purport to limit the purposes of the visits which are permitted. Moreover, the letter was written in the context of proceedings about domestic abuse. The court must surely have anticipated that one possible situation in which GA might seek to travel to visit her parents would be if she were subject to further domestic abuse.

118 As to the second point, given that the letter entailed a general permission to travel, and was written in the context of proceedings in which the father admitted violent abuse of GA, I can see no reason why it should entail permission to apply for a passport of Country X (if needed), but not a British passport.

119 Para. 11 of Mr Wharton's statement seems to me to indicate that underlying the challenged decision was a concern that GA was seeking British passports in order to remove QA, RA and SA from Country X unlawfully. In my judgment, however, there was no evidence that it would be contrary to the law of Country X for her to travel to the UK with the children if the father became abusive again. The letter endorsed by the court was to contrary effect.

120 In any event, the critical question for HMPO was whether, *in the light of that letter*, the law of Country X gave GA authority to apply for British passports on behalf of her children. On that question, the Country Profile contained nothing relevant. Nor did HMPO have or seek any other evidence about the application of the law of Country X to the facts of the case (for example from the UK post in Country X or others within or outside government with knowledge of the relevant law). The suggestion that the letter allowed GA to travel with the children on passports of Country X, but not to apply for British passports, was speculative. In my judgment, the Country Profile document for Country X supplied no proper evidential basis for the conclusion that, in these particular circumstances, GA lacked authority to apply for British passports for QA, RA and SA under the law of Country X.

121 The Claimants have accordingly established that HMPO's decision was vitiated by a public law error. That is enough to justify the grant of a quashing order. However, as I have heard argument on it and because it is relevant to what must happen next, I shall go on to consider the position if (contrary to my conclusion) HMPO had made a rationally sustainable finding that, under the law of Country X, GA lacked authority to apply for British passports for QA, RA and SA.

(e) If the father had sole parental responsibility under the law of Country X, HMPO could not issue a passport for QA, RA and SA without the consent of their father

122 If the law of Country X required the consent of the father for the issue of passports for the children, a further question would arise as to the application of Article 22 of the 1996 Hague Convention. Article 22 entitles the UK to refuse to apply the law designated by Article 16 if that application would be "manifestly contrary to public policy, taking into account the best interests of the child".

123 The Secretary of State has accepted that Article 22 can in principle be invoked before the courts in this jurisdiction. Initially, she was disposed to accept that this Court could consider whether Article 22 applied. However, by the time of the hearing, the submission was that an application would have to be made to the Family Division to exercise the inherent jurisdiction of the High Court. The Family Division can in principle exercise jurisdiction on the basis of nationality rather than habitual residence, though such a course would be exceptional: see *A v A (Children (Habitual Residence)* [2013] UKSC 60, [2014] AC 1. As elaborated in oral argument, the submission had two limbs: first, that the application of Article 22 is always a matter for a court, not an administrative authority such as HMPO; second, given the reference to the best interests of the child, deciding whether Article 22 applies requires the kind of fact-finding process available in the Family Division and cannot be undertaken by the Administrative Court in judicial review proceedings.

124 I reject both these submissions.

125 As to the first, there is nothing in the text of the 1996 Hague Convention indicating that only a court can determine whether the application of the ordinary choice of law rule would be "manifestly contrary to public policy" or that only a court can assess what is in the best interests of the children. Article 3 of the CRC, the first source of the obligation to consider the best interests of the child as a primary consideration, is directly contrary to any such suggestion. It expressly applies not only to "courts of law" but also to "administrative authorities" (among other bodies). Insofar as the internal guidance suggests that HMPO staff must apply Article 16, but must not apply Article 22, it misstates the law.

126 As to the second submission, there is no doubt that judges of the Family Division have particular expertise in assessing what is in the best interests of children. That is because the statutory and common law jurisdictions they exercise often require such assessments. But the Family Division is not the only forum where such assessments are made. They are also made, for example, in the Immigration and Asylum Chambers of the First-tier and Upper Tribunals. There is no reason of principle why they should not be made by the Administrative Court if and insofar as relevant to the jurisdiction exercised by this Court.

127 GA is not seeking any order under the inherent jurisdiction of the High Court. She is not seeking to make the children wards of court or to compel their return to the UK. She does not have to, because she has the father's permission, endorsed by the court of Country X, to travel with them to the UK. The object of these proceedings is to challenge an administrative decision, made by HMPO officials on behalf of the Secretary of State, to refuse to process her application for British passports for QA, RA and SA. The proper forum for that challenge is the Administrative Court. One of the grounds of challenge is

that the decision-maker failed to appreciate that Article 22 of the 1996 Hague Convention applied. To decide whether that ground is made out, this Court has to decide whether Article 22 applied or not. That is a question of law. Answering it involves deciding whether the application of the law of County X would be "manifestly contrary to public policy, taking into account the best interests of the child". So, an assessment of what is in the best interests of the child is a necessary part of this Court's function of deciding whether HMPO erred in law. That is the inevitable consequence of giving the 1996 Hague Convention (including Article 22) the force of law in the UK.

128 There is no hard and fast rule about how to assess what is in the best interests of a child. It depends on the context in which the assessment is taking place. Where the assessment arises in the context of family proceedings which will determine custody or parental contact, it is sometimes (though not always) necessary for both parents and the children to be separately represented. Where, on the other hand, the assessment takes place in other contexts (e.g. immigration decisions or proceedings), such a procedure is not normally considered necessary. In this context, the assessment is required in the context of a narrow issue: which law applies in determining who has authority to apply for a passport for the children. The written evidence before the Court from GA and her mother is sufficiently detailed and cogent to enable me to conduct the assessment even though (i) the father is not represented and has not been served; (ii) the children are not separately represented; and (iii) I have not heard oral evidence. To require that the father be served with the claim would, on the evidence, expose the family to the risks which made it necessary in the first place. This is not a case where the issues require the children to be separately represented. In any event, the Claimants are currently in Country X and their ability to communicate with the outside world is constrained by the father. On the evidence, there are likely to be extreme and possibly insuperable practical difficulties if oral evidence were required.

129 Accordingly, I consider that I can and must conduct the assessment required by Article 22 on the evidence I have. I bear in mind that the hurdle set by Article 22 is a high one. The application of the law of the State of the child's habitual residence must be *manifestly* contrary to public policy, taking into account the best interests of the child. The need to take into account the best interests of the child shows that the test is fact-specific. I have concluded that this test is met:

(a) GA has produced evidence that: (i) she alleged that the father had been violent towards her in court proceedings in Country X; and in the course of those proceedings (ii) the father admitted acting violently towards her and (iii) the father gave permission for her to travel with the children to visit her mother outside that country in a letter endorsed by the court. As noted above, the court must have anticipated that the need to travel could arise if he were violent in the future and must have intended that GA be permitted to travel in those circumstances without further consent from the father.

(b) GA and her mother have also filed written evidence before this Court to the effect that: (i) the father has repeatedly acted violently towards GA in the presence of the children; (ii) the father has also on occasion been violent towards the children; (iii) the father repeatedly threatened to kill GA and has also threatened to kill the children; (iv) the father has destroyed GA's and QA's passports so as to exert control over them; (v) the father is now refusing to consent to the applications for British passports for QA, RA and SA as a means of continuing to exert control over

the GA and the children; and (vi) GA fears that the initiation of further proceedings before the courts of Country X would trigger further violence and abuse by him against her and/or the children. GA's and her mother's evidence about the father's past conduct suggests that this fear is well-founded.

(c) Although I have not heard oral evidence from GA, the account given in her written evidence is detailed, consistent with what she told HMPO and corroborated by an equally detailed statement from her mother, which itself is consistent with her own extensive written correspondence with HMPO. There is no reason to doubt any part of GA's or her mother's evidence.

(d) If the law of Country X requires the father's permission for any passport application, the effect of applying that law – on the evidence currently before the court – would be (i) to enable the father to continue to exert control over GA and the children in the context of a violent and abusive relationship or (ii) to require GA to take further action in the courts of Country X in circumstances where, for good reason, she fears that doing so would put her and/or her children at risk of serious harm.

(e) Applying the law of England and Wales to determine who can apply for a British passport for QA, RA and SA would be consistent with proper respect for the authority of the courts and law of the State of habitual residence. Those courts – far from prohibiting GA from taking the children out of the jurisdiction – have expressly endorsed her right to do so. In any event, if the law of England and Wales is applied and if passports are in due course issued, that would not prevent the authorities of Country X from exercising their jurisdiction to prevent travel if they considered it appropriate to do so.

(f) The assessment which Article 22 requires of the best interests of the children in this case is strictly limited in scope. The question is not whether it would be in their best interests for GA to have parental responsibility for them generally, nor whether it would be in their best interests to live in the UK or to live with their mother. The question is simply whether it would be in their best interests to be granted passports, so as to enable them to travel pursuant to the permission which has already been given by the father and endorsed by the court of Country X. In my judgment, the answer is clearly "Yes".

(g) For these reasons, if the law of Country X requires the father to consent to any application for British passports, it would also be manifestly contrary to public policy to apply that law in this case, taking into account the best interests of the children.

130 It follows that, contrary to the Secretary of State's position, on the specific facts of Claimants' case, HMPO was entitled to refuse to apply the law of Country X. Nothing in HMPO's letters to GA or in Mr Wharton's evidence suggests that HMPO would have applied the law of Country X if it had understood that Article 22 applied. However, given that Article 22 on its face confers a discretion rather than a duty to refuse to apply the law of Country X, I have gone on to consider whether it would now be open to HMPO to apply the law of Country X even though it is not required to do so.

131 The answer, in my judgment, is "No". My reasons are these:

(a) Applying the law of Country X to determine who can apply for a passport for children involves direct discrimination on the basis of sex. A male parent of children habitually resident in Country X whose circumstances are otherwise identical to those of GA could make a valid passport application. GA has been and is being denied that opportunity because of her sex.

(b) This discriminatory treatment was and is incompatible with her rights Article 14 read with Article 8 ECHR, unless it can be justified as proportionate. "Weighty reasons" are required to justify direct sex discrimination: *JD and A v UK*, [89]. The only justification advanced is that HMPO was acting in accordance with international law. Such a justification could in principle succeed if it could be shown that the 1996 Hague Convention requires the UK to discriminate against GA on the ground of her sex. However, a "mere liberty" to do so would not be enough: see by analogy *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, [34] (per Lord Sumption).

(c) The Secretary of State cannot show that international law requires HMPO to discriminate against GA because (i) there was no rational evidential basis for concluding that the law of Country X required the consent of the father in this case; and (ii) in any event, Article 22 of the 1996 Hague Convention applied, so on any view HMPO was not required to apply the law of Country X. At most, international law conferred a "mere liberty" to apply the discriminatory law of Country X.

(d) The Secretary of State expressly conceded that: (i) insofar as GA relied on her own rights under Article 14 ECHR, she was entitled to do so because she had been in the UK for much of the period of the relevant correspondence; and (ii) if her claim under Article 14 succeeded, she would be entitled to relief requiring the Secretary of State to treat her application for passports for QA, RA and SA as having been made by a person with authority to do so, notwithstanding that she was now outside the UK. These concessions were correctly made. On GA's evidence (which there is no reason to doubt), GA only left the UK so as to seek the letter of consent which HMPO said she needed. It would be inimical to the scheme of an instrument conferring rights intended to be "practical and effective", not "theoretical or illusory", if she thereby lost the protection of the very right whose violation caused her to leave: see *Airey v Ireland* (1979) 2 EHRR 305, [24], and many cases since.

(e) 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 by requiring the consent of her spouse before processing her applications for passports for her children. The breach must be remedied by applying the law of England and Wales, under which GA has authority to make the application.

<u>The other grounds of challenge</u>

132 It is not necessary to determine any of the other grounds of challenge. In view of the urgency of this case, I have not done so.

Conclusion

133 For these reasons, I have concluded as follows:

(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.

134 I shall therefore quash the decision to refuse to process the applications and make declarations reflecting my conclusions. I shall invite further written submissions on the precise form of the order and on ancillary matters.