Neutral Citation Number: [2019] EWHC 3147 (Fam)

Case No: FD19P00347

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

R	**Applicant**
-and-	
G	**First Respondent**
-and-	
H	**Second Respondent**
-and-	
Secretary of State for the Home Department	**Intervener**

- -

Mr Edward Devereux QC and Ms Mehvish Chaudhry (instructed by **Bindmans**) for the **Applicant**
Mr Christopher Hames QC (instructed by **Broudie Jackson Canter**) for the **First Respondent**
Mr Michael Edwards (instructed by **CAFCASS) for the Second Respondent**
Mr Alan Payne QC (instructed by **The Government Legal Department) for the Intervener**

Hearing dates: 10 and 11 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. The dispute between the parties at this hearing concerns the correct legal principles to be applied and the correct procedure to be adopted where one party to private law proceedings under s 8 of the Children Act 1989 seeks disclosure and inspection of documentation from the successful asylum claim of the other party, for use in the family proceedings. Given the issues raised in this case, I gave the Secretary of State for the Home Department permission to intervene on this question. The Secretary of State is represented by Mr Alan Payne, Queen's Counsel.

2. The proceedings concern the welfare of H, born in 2011 and now aged 8 years old. H is a party to these proceedings and is represented through his Children's Guardian by Mr Michael Edwards of counsel. The applicant, R, is the father of H and is represented by Mr Edward Devereux, Queen's Counsel and Ms Mehvish Chaudhry of counsel. The first respondent, G, is the mother of H and is represented by Mr Christopher Hames, Queen's Counsel.

3. It is important to note at the outset that the question of the disclosure and inspection of documents from the asylum process within proceedings concerning H has already been considered once by Her Honour Judge Corbett sitting as a Judge of the High Court (see *R v Secretary of State for the Home Department* [2019] EWHC 1509 (Fam)). However, HHJ Corbett's decision not to order disclosure and inspection, dated 24 May 2019, was taken in the context of proceedings between the parents brought under the Child Abduction and Custody Act 1984 for relief pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Those proceedings were subsequently compromised between the parties.

4. Within this context, the Secretary of State initially contended that the issue of disclosure and inspection had already been determined by HHJ Corbett. However, in circumstances where the issue of disclosure and inspection *now* before the court arises in proceedings under the Children Act 1989 and where in those proceedings this court must hold a finding of fact hearing in which the disputed allegations of physical and sexual assault and child sexual abuse that formed the foundation of the mother's asylum claim will fall to be determined on the balance of probabilities, no party sought seriously to dispute that this changed procedural and forensic context requires the question of disclosure and inspection of the asylum documentation to be considered anew.

BACKGROUND

5. The mother and father are nationals of [country given]. They were married in that jurisdiction in 2009 and remain married. The only child of the marriage is H. The father is named on H's birth certificate. On 17 February 2016 the mother removed H from the jurisdiction of [country given] without the consent of the father. The father contends that this removal took place in the face of his clearly expressed opposition to the relocation of the family to the United Kingdom.

6. Upon arrival in the United Kingdom the mother made an application for asylum with H as a dependent and gave an asylum interview on 2 August 2016. The mother's application for asylum was based on the following claims:

   i) The father became domestically violent to the mother during the year following the year in which they were married and would physically and sexually abuse her;

   ii) The mother reported the violence to the police who stated they would make an arrest, but this did not happen;

   iii) The father's family have connections with the police in [country given];

   iv) The father was arrested for fraud in 2014 and served nine months in prison;

   v) On the morning of 24 January 2015 the mother witnessed the father sexually abuse H;

   vi) The mother feared that if she returned to [country given] the father would kill her as she had witnessed the sexual abuse and she feared further domestic violence from the father.

7. The Secretary of State accepted the mother's claims of domestic abuse and of the sexual abuse of H but did not accept the mother's allegations that the father had made threats to kill her or that he had influence with the police in [country given]. However, on 24 April 2017 the Secretary of State refused the mother's application for asylum on grounds that the mother had failed to demonstrate a genuine subjective fear and that, even if the mother's fears of the father were well founded, she could relocate internally in [country given] to a place where she would not face a real risk of harm.

8. The mother exercised her statutory right of appeal to the First Tier Tribunal. By a determination dated 11 September 2017 Judge Agnew allowed the mother's appeal. Judge Agnew considered that, in circumstances where the Secretary of State had accepted the mother's claims of domestic abuse and of the sexual abuse of H and had (by not raising the question of sufficiency of protection) accepted that the mother would not obtain state protection from violence by the father, the sole issue before the First Tier Tribunal was the validity of the Secretary of State's conclusion on internal relocation. Within this context, the relevant parts of the decision, which articulate the relevant standard of proof as a "reasonable degree of likelihood", are as follows:

> "[18] I found the [mother] to be articulate, detailed, specific, consistent and credible in her evidence. I accept her claims that she and her son would be located in [country given] on return by [the father] via his family members and computer records. She gave details of the names of the appellant's brothers and their positions within the police and prison force. This is far more information than is usual with asylum seekers claiming that they fear persons with influence in the security forces of the country from which they have fled. I accept that [the father] has filed a missing person's report and that the immigration authorities would be alerted to this fact on their return to the airport. Assuming they were returned, I find it has been established

> that there is a real risk both the appellant and her son would face ill treatment at the hands of [the father].
>
> [19] The [mother] has been found to be credible in her claims which includes the claim that she cannot safely relocate with her son in [country given]. She has established that her fears of persecution on return are well-founded. The Refugee Convention is engaged and she has established that she and her son are entitled to international protection."

9. In line with this decision, the mother was granted refugee status with H being granted leave with the mother. It is apparent that at a point thereafter an application for asylum was also made for H but this has not been progressed and no material has been filed in support of it. The Secretary of State has confirmed that this does not affect the leave that H has been granted as a dependent of the mother.

10. On 21 July 2016 the father made an application to the [country given]an authorities for the summary return of H. For reasons that are unclear, it took over two years for the relevant request to be transmitted to the English Central Authority. Proceedings under the Child Abduction and Custody Act 1985 for relief pursuant to the 1980 Hague Convention were issued by the father on 12 December 2018. The mother sought to defend those proceedings on the basis that H was settled in the jurisdiction of England and Wales for the purposes of Art 12 of the 1980 Convention.

11. Within the context of the issues now before the court, it is important to consider the history of disclosure in the proceedings under the Child Abduction and Custody Act 1985. On 25 January 2019 Roberts J ordered the mother to file and serve copies of her asylum application, all evidence in support of her asylum claim, her asylum interview and all of the decisions of the Secretary of State for the Home Department. On that date, no objection was raised by the mother to such disclosure and the documents were provided to the father's solicitors in accordance with the order of Roberts J. However, subsequently the mother *did* raise objection to the disclosure of documents from the asylum process. This appears to have been based on the mother's concern that the documentation contained names and pictures of people who had provided information which could compromise the safety of themselves and their families. At a hearing on 9 April 2019, and in light of her objection, the mother's asylum documentation was returned to her and the issue of disclosure of the asylum documentation was listed for determination before HHJ Corbett.

12. In her judgment of 24 May 2019 HHJ Corbett declined, within the context of the proceedings under the Child Abduction and Custody Act 1985, to order disclosure to the father of the documents from the asylum process. In summary, the learned Judge's reasons were that:

    i) Having regard to the nature of the proceedings then before the court, disclosure was not necessary to decide the question of the child's settled status for the purposes of Art 12 of the 1980 Hague Convention. The asylum documentation had limited relevance to the court's assessment of the settlement exception and the father was able to challenge the assessment of the Children's Guardian as to the applicability of the settlement exception when that assessment was made available;

ii) The father already had a great deal of information regarding the mother's asylum application, including the detailed refusal letters, the ruling of the First Tier Tribunal and the mother's detailed statements in the Hague proceedings and in the asylum proceedings;

iii) Having regard to the observation of Hayden J in *F v M* that the Secretary of State would frequently be better placed to determine whether and to what extent disclosure should take place, in this case Secretary of State was in the best position to advise on whether there should be disclosure and had made the recommendation that there should not be disclosure;

iv) Public confidence in the operation of the asylum system and Refugee Convention is very important. If disclosure were to be ordered from a completed or pending application for asylum it could have a serious effect on the integrity of the asylum process.

13. On 20 March 2019 the Guardian appointed for H in the child abduction proceedings provided her report on the question of H's degree of settlement in England. Following consideration of that report, on 13 June 2019 the father sought and was granted permission to withdraw his application under the Child Abduction and Custody Act 1985 for relief pursuant to the 1980 Hague Convention. The father issued his application under s 8 of the Children Act 1989 for a child arrangements order on 2 July 2019.

14. The father now once again seeks disclosure of the documents from the asylum process, contending that such disclosure is necessary for him to have a fair trial on the allegations of physical and sexual assault and child sexual abuse on which the mother now seeks specific findings on the balance of probabilities in the proceedings under the 1989 Act, the father contending that those documents go, or may go, directly to the credibility of the mother.

SUBMISSIONS

Father

15. With respect to the legal principles applicable in this matter, Mr Devereux and Ms Chaudhry submit on behalf the father that, in circumstances where he is facing the gravest allegations of physical and sexual assault and child sexual abuse such that the court has determined that a finding of fact hearing is required ahead of any welfare determination under s 1 of the Children Act 1989, the starting point must be that the father is entitled to consider all evidence that is relevant in that context, pursuant to Art 6 of the ECHR and the common law principles of fairness and natural justice. Further, within the context of the Secretary of State having confirmed that certain of the information provided within the asylum process is, *prima facie*, relevant to the issues of fact before the court, Mr Devereux and Ms Chaudhry submit that fairness demands that the father have access to that material, including material which may undermine the credibility of the mother. Within the context of the court's power to control evidence under FPR 2010 r 22.1, Mr Devereux and Ms Chaudhry remind the court that it is a serious matter for the court to exclude relevant evidence, citing the observations to this effect made in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 at [89].

16. Within this context, Mr Devereux and Ms Chaudhry submit the decision of the Supreme Court in *R v McGeough* [2015] 1 WLR 4612 is authority for the principle that information disclosed during the course of an asylum application does *not* have the general character of confidentiality. Within this context, they submit public interest cannot be a shield to *all* disclosure and, in particular, that the interpretations placed by the Secretary of State on Arts 22 and 41 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting or withdrawing refugee status and on the relevant part of the Immigration Rules in support of the nature and extent of public interest contended for by her is too wide.

17. Within the foregoing context, Mr Devereux and Ms Chaudhry submit that the legal principles articulated by Hayden J in *F v M* represent the starting point for the balancing exercise that must be undertaken, pointing out that in *F v M* Hayden J rejected a submission by Mr Payne that there was a presumption of exceptionality when considering the disclosure of documents from the asylum process.

18. With respect to procedure to be adopted, on behalf of the applicant father, Mr Devereux and Ms Chaudhry contended at the outset of these proceedings that the correct procedural approach to the disclosure of asylum documentation is that ordinarily adopted in relation to documentation held by public authorities to which it is said public interest immunity attaches. Mr Devereux and Ms Chaudhry further submit that it is difficult to see how a court can fairly determine a disputed question of disclosure without seeing the documentation, submitting in this context that in *F v M* Hayden J did not exclude this course when highlighting the advantages that the Secretary of State may have in determining the issue of disclosure. In any event, Mr Devereux and Ms Chaudhry submitted that the minimum requirements for whatever procedure is adopted to determine disputed issues of disclosure in relation to documents from the asylum process must be structured, clear and fair.

19. As to the question of disclosure in this case, Mr Devereux and Ms Chaudhry submitted that in circumstances where the father faces grave allegations that are to be determined by this court and where the information from the asylum process is relevant to his answering of those allegations, both the Art 6 and the domestic imperatives of a fair trial that have existed for hundreds of years demand disclosure of that material to the father. In particular, Mr Devereux and Ms Chaudhry submit that the information that is already available with respect to the mother's asylum claim does not negate the need for further disclosure. Thus, for example, in respect of the decision of the Secretary of State and the judgment First Tier Tribunal they submit that the standard of proof applied in that court was different. More fundamentally, Mr Devereux and Ms Chaudhry submit that such general documentation is no substitute, when considering the credibility of the mother's allegations, to seeing the contemporaneous documents she relied on as part of her application for asylum, the records of the accounts she gave, including her asylum interview, and any corroborative primary evidence she relied on. Only in this way, Mr Devereux and Ms Chaudhry submit, can the father challenge fully and fairly the allegations the mother makes against him. They submit that it would wholly exceptional if a party to family proceedings facing serious allegations of domestic and sexual abuse were to be disadvantaged in comparison to parties in a similar position simply by virtue of the

fact that evidence relevant to the determination of those allegations had been the subject of prior consideration in the asylum process.

Secretary of State for the Home Department

20. It is convenient next to deal with the submissions made on behalf of the Secretary of State for the Home Department. Making clear that the Secretary of State has no wish to frustrate the proceedings under the Children Act 1989, Mr Payne emphasised the duty Secretary of State to ensure that a group of adults and children who are extremely vulnerable, namely asylum seekers and refugees, have their rights protected within a process that deals with those who have endured ill-treatment, including torture, and have arrived from areas in which coming to the attention of the authorities is dangerous in the extreme. Within this context, Mr Payne submitted that it is vital for the effective functioning of the asylum system that such persons are able to engage fully with the authorities in this jurisdiction and to provide all the information necessary to ensure their international protection in an appropriate case. In the circumstances, Mr Payne submits that the confidentiality of the asylum process is the bedrock on which the trust that that process must engender in order to be effective firmly rests.

21. With respect to the legal principles applicable in this context to the disclosure and inspection of documents from the asylum process, the Secretary of State submits that the confidentiality of such material arises on common law by virtue of it being highly sensitive in nature and not generally in the public domain and the very real risk that knowledge that an asylum claim has been made, or of the information in support thereof, may exacerbate risk of harm. Within this context, Mr Payne highlights the fact that asylum seekers are informed when they claim asylum that the information they provide will be kept confidential and will only be disclosed where there is a requirement in law to do so. Mr Payne further contends that, in circumstances where asylum examinations are conducted in private, the asylum seeker has a reasonable expectation of privacy.

22. As to the threshold for disclosure and inspection, the Secretary of State concedes that information from the asylum process is capable of disclosure and inspection in an appropriate case. Within the foregoing context Mr Payne accepts on behalf of the Secretary of State that the rights under Art 8 and Art 6 are engaged not only in the decision to grant or refuse refugee status but also in proceedings in the Family Court. He further accepts on behalf of the Secretary of State that the duty of fairness is not only applicable to immigration decisions but to proceedings within the family court. In this context, Mr Payne submits that in determining whether disclosure and inspection should be ordered, the court must balance competing rights of the father under Arts 6 and 8, and of the mother under Arts 2, 3 and 8, of the ECHR together with what Mr Payne submits is the overwhelming public interest in not providing documents from the asylum process. In this context, Mr Payne relies on the decision of Hayden J in *F v M* as representing the proper approach to the balancing exercise, Mr Payne submitting that Hayden J appropriately identified the need to protect the asylum process generally and the need for care going behind any decision of the Secretary of State or the First Tier Tribunal that a person is at risk of persecution and entitled to international protection.

23. Within this context, Mr Payne submits that it is a *fundamental* principle of the asylum process that information from that process is not provided to an alleged persecutor. Mr Payne relies in this regard on the terms of Council Directive 2005/85/EC, the decision of the Supreme Court in *R v Terrence Gerrard McGeough* [2015] UKSC 62 and the Immigration Rules HC395 paragraph 339IA as supporting the submission that disclosure and inspection of documents from the asylum process to the alleged persecutor must be avoided. In this context, Mr Payne submits that a prior finding of the Secretary of State or the First Tier Tribunal that the person seeking disclosure and inspection is a persecutor *must* be accorded very significant weight in the balancing exercise undertaken by the court. Indeed, Mr Payne submits that such a finding must mean that at the outset the scales are heavily weighted against disclosure and inspection.

24. Within the foregoing context, Mr Payne identifies three categories of cases. First, with respect to pending asylum claims, he contends that given the compelling public interest, and what he submits is the bar to such disclosure under EU law and the Immigration Rules, in *no circumstances* should documents from the asylum process be provided to an alleged persecutor whilst the claim for asylum remains outstanding. Mr Payne submits that to conclude otherwise would undermine the certainty of the assurance of confidentiality given to asylum seekers and thereby fundamentally undermine the central foundation of the asylum process. Within this context, Mr Payne submits that any exception to the principle that information is not provided to the alleged persecutor created for the purpose of domestic proceedings relating to children would have a fundamental impact on the asylum process more widely, not least because it would require the promulgation of publicly available guidance alerting asylum seekers to the possibility of information being given to the alleged persecutor if required for the purpose of proceedings under the Children Act 1989.

25. Second, with respect to asylum claims that have been successful, Mr Payne submits that many of the considerations applicable whilst an asylum application remains outstanding apply with equal or greater force where a claim for asylum has been successfully established (Mr Payne conceding that Art 22 of the EU Directive applies specifically to the consideration of the asylum claim itself but arguing that the rationale must apply more widely notwithstanding the decision in *R v McGeough*). Mr Payne submits that disclosure and inspection in such circumstances would have a "devastating" effect on confidence in the asylum process, a chilling effect on the willingness of those seeking international protection to provide information and would prevent the UK authorities discharging their international and domestic obligations. Within this context, Mr Payne submits these factors would again militate against disclosure and inspection of documents from the completed asylum process into the family proceedings save in the most exceptional circumstances (notwithstanding that Hayden J rejected a similar submission by Mr Payne in *F v M* and held there is no such presumption of exceptionality). Further, even if, exceptionally, such disclosure and inspection were ordered, Mr Payne submits that the court should only (a) itself see the material and adopt an approach which ensures no evidence, question or submissions are made which are misleading or based on a premise known (from the asylum material) to be false (by analogy with *R (Secretary of State for the Home Department) v Inner West London Assistant Coroner* [2011] 1 WLR 2564), (b) invite the Children's Guardian to consider the material or (c) use a closed material procedure and appoint a Special Advocate.

26. Third, with respect to unsuccessful asylum claims, Mr Payne submits that only where the claim for asylum has been *unsuccessful* should the Secretary of State be required to contemplate disclosure and inspection for the alleged persecutor and then only in circumstances where non-disclosure might give rise to harm to the child (the Secretary of State relying by analogy on *Re D (Minors)(Conciliation: Privilege)* [1993] 1 FLR 932 and *Re D (Hague Convention: Mediation)* [2017] EWHC 3363 (Fam)). Mr Payne conceded that harm in this context could include harm to the child that would flow from the court making a decision as to the child's welfare on a false factual premise.

27. With respect to the appropriate procedure for determining the question of disclosure and inspection of documents from the asylum process within private law children proceedings, through Mr Payne the Secretary of State submits that:

    i) The public interest immunity process is not applicable in circumstances where the Secretary of State is not a party to the proceedings and the asylum seeker or refugee who is a party has access to, or can request as of right the relevant documents from the Secretary of State. Within this context, the Secretary of State has no more than a "supporting role" on the question of disclosure and inspection.

    ii) The application for disclosure and inspection should first be made against the relevant asylum seeker or refugee who is *party* to the proceedings in circumstances where that party will have a copy of the material for the purpose of any appeal or can request a copy of the material from the Secretary of State;

    iii) In considering the application, it is open to the family court, subject to any representations made by the parties, to see the asylum material in order to establish whether the material is relevant to the issues to be determined in the family proceedings but it should also be open to the court to reject the application for disclosure and inspection without looking at the material where the nature of the asylum claim gives no reason to consider there is information relevant to the issues before the court (for example, a claim based on fear of the State in the country of nationality);

    iv) If the court forms the preliminary view that it may be necessary to order the disclosure and inspection of some or all of the asylum documents the Secretary of State should be notified and given an opportunity to intervene on the issue, the Secretary of State being particularly well placed to provide a reasoned, objective assessment of the public interest having regard to the best interests of any child (pursuant to her duty under s 55 of the Borders, Citizenship and Immigration Act 2009) and the importance of maintaining the integrity of the asylum process.

28. Within this context, Mr Payne submitted that the Secretary of State is not required to provide a public interest immunity certificate in respect of the relevant information in circumstances where documentation from the asylum process constitutes a category of information where the public interest in non-disclosure is firmly established, Mr Payne drawing an analogy with material from mediation in family proceedings. Rather, Mr Payne submits that the question of disclosure falls to be determined between the parties to the private law proceedings balancing the rights engaged and

the public interest in the confidentiality of the asylum system, in respect of which latter issue the Secretary of State may wish to intervene in some cases. Mr Payne relies on the decision in *Re A (Forced Marriage: Special Advocate)* [2010] EWHC 2438 as authority for the proposition that a public interest immunity certificate is not required in order for the court to determine issues relating to disclosure of sensitive material. Finally, Mr Payne submits that a process other than the one he contends for would result in a significant cost to public funds.

29. In this context, Mr Payne submits that the correct procedural approach to disclosure and inspection of asylum documentation where that documentation is also in the possession of a party to the proceedings is the ordinary process for disclosure and inspection in private law Children Act proceedings articulated in FPR 2010 PD 21A, subject to the requirement in some cases for the Secretary of State to be invited to intervene on the question of disclosure.

30. Finally, as to the merits of disclosure and inspection in this case, Mr Payne submitted that if the court concludes that as a matter of principle disclosure *can* be made to an alleged persecutor, that should not be the outcome in this case. He submitted that the court has before it the decision of the First Tier Tribunal (which included a finding that the mother had given a consistent account of the abuse she alleges), the asylum refusal letter and a medical report, resulting in the parties being aware of "key aspects" of the account provided in the asylum claim, which can be compared to the assertions made by the mother in these proceedings. Within this context, Mr Payne submits that it cannot be said that non-disclosure would give rise to a grave risk of harm to the child. Further, Mr Payne argues that the father has not identified any *particular* factor in this case that justifies disclosure and inspection beyond the argument that he faces serious allegations in respect of which credibility is central.

Mother

31. On behalf of the mother, the submissions of Mr Christopher Hames QC largely reflected those of the Secretary of State. Whilst Mr Hames confirmed that the mother now has, it is believed, the totality of the documents but submits that in circumstances where they remain documents from the asylum process they must also remain subject to the principles that govern the disclosure and inspection of such documents, notwithstanding that the mother is under a duty of 'full and frank disclosure' in the Children Act proceedings. Mr Hames submits that in these circumstances the mother is entitled to object to their disclosure and inspection even in circumstances where the documents are *prima facie* relevant based on the fact that confidentiality is at the heart of the asylum system.

32. Where the mother maintains her objection, Mr Hames submits that the court must consider that objection by reference to the legal principles set out in *F v M* by Hayden J. In this respect, Mr Hames again emphasises Hayden J's observation that the asylum process is a system fretted with confidentiality and that confidentiality is intrinsic to the operation of the entire system. As did Mr Payne, Mr Hames likewise relies on Arts 22 and 41 of the EU Directive as reinforcing the principle that no disclosure should be made to an alleged persecutor. Indeed, at times Mr Hames appeared to argue that in such circumstances confidentiality should be upheld even if that means evidence that impacts on the welfare of the child is not disclosed, such is the public interest in maintaining the confidentiality of the asylum system.

33. With respect to procedure, Mr Hames submitted that requisite balancing exercise does not require the court *at any point* to descend into consideration the documents themselves in circumstances where, so contends Mr Hames, the nature of the documents in question means that the balance in favour of non-disclosure is ordinarily so compelling following a comparison of the competing rights and interests that consideration of the documents by the court is simply unnecessary. He further submits that ordinarily, again relying on the decision of Hayden J in *F v M*, the question of disclosure and inspection should be determined by the Secretary of State.

34. As to the merits of disclosure and inspection in this case, Mr Hames accepts that the issues of credibility "peculiar to a fact finding hearing" mean that the father should be able to understand the mother's position in the asylum process in detail. Mr Hames submits however, that the father already has sufficient evidence with respect to the mother's position in the asylum process, in particular in the form of the First Tier Tribunal judgment and the Secretary of State's decision. Within this context, Mr Hames relies on the conclusion of HHJ Corbett that the father has the benefit of far more than just the "gist" of the mother's account in the asylum process. In the circumstances, and given the weight to be attached to the confidentiality of the asylum process, Mr Hames contends that no further disclosure is justified or should take place.

The Child

35. On behalf of the child, Mr Michael Edwards submitted that FPR 2010 r 21.3, concerning claims by a party to withhold disclosure of documents, provides the appropriate procedural framework for the determination of the issue of disclosure and inspection by reference to the applicable balancing exercise. Within this context, Mr Edwards rejects the suggestion made by Mr Payne that the Children's Guardian may be the appropriate person to review the disputed material for relevance and urges the court to adopt the well-established process under FPR 2010 r 21.3.

THE LAW

The Asylum Process and Confidentiality

36. Sections 1 and 2 of the Asylum and Immigration Appeals Act 1993 which provides as follows:

> **1 Interpretation**
>
> In this Act— "the 1971 Act" means the Immigration Act 1971;
>
> "claim for asylum" means a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and
>
> "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to that Convention.
>
> **2 Primacy of Convention.**

> Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.

37. Art 18 of the Charter of Fundamental Rights of the European Union, in accordance with which the United Kingdom is bound to act whenever it acts within the scope of EU law pursuant to Art 6(1) of the Treaty of the European Union, provides as follows:

> **18 Right to Asylum**
>
> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

38. The 1951 Geneva Convention relating to the Status of Refugees (hereafter the 'Refugee Convention') that is referred to both in the Asylum and Immigration Appeals Act 1993 ss 1 and 2 and in Art 18 of the Charter of Fundamental Rights codifies the rights of refugees at the international level. The Refugee Convention must be interpreted in accordance with the Vienna Convention on the Law of Treaties, Art 31(1) of which provides that a decision maker must interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaties objective and purpose. Art 31(2) makes clear that the Preamble to a treaty is part of the context of the treaty for the purposes of interpretation. The second paragraph to the Preamble to the Refugee Convention makes clear that the objective of the Refugee Convention is to assure refugees the widest possible exercise of their fundamental rights and freedoms.

39. Within the foregoing context, relying on the decision of the House of Lords in *R v Asfaw (United Nations High Comr for Refugees intervening)* [2008] 1 AC 1061, in *EN (Serbia) v Secretary of State for the Home Department* [2010] QB 633 Stanley-Burnton LJ concluded at [58] that the application of the Refugee Convention within domestic law is prescribed as follows:

> "So far as the Refugee Convention as a whole is concerned, Parliament has legislated in section 2 of the Asylum and Immigration Act 1993, but it did not do so in terms that would give the Refugee Convention the force of statute for all purposes. It expressly limited the force given to the Refugee Convention to the Immigration Rules. The Refugee Convention also effects the lawfulness of administrative practices and procedures, because, as Lord Steyn put it in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1, para 41: It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention. But to give the Refugee Convention any greater force or status under our law would be to go further than section 2 requires or permits, and in my judgment this is something the court cannot do."

40. Within this prescribed context, Part 11 of the Immigration Rules stipulates the procedure for claims of asylum. Paragraph 328 provides that asylum applications will be determined by the Secretary of State in accordance with the Refugee Convention.

41. Within the foregoing context, and given the issues that arise for determination in this case, it is of particular note that Paragraphs 339IA and 339NB of the Immigration Rules provides as follows with respect to the confidentiality of information provided in support of applications for asylum:

> "**339IA**
>
> For the purposes of examining individual applications for asylum:
>
> (i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and
>
> (ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being directly informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and their dependants, or the liberty and security of their family members still living in the country of origin.
>
> This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules."

And

> "**339NB**
>
> (i) The personal interview mentioned in paragraph 339NA above shall normally take place without the presence of the applicant's family members unless the Secretary of State considers it necessary for an appropriate examination to have other family members present.
>
> "(ii) The personal interview shall take place under conditions which ensure appropriate confidentiality.

42. The foregoing provisions of Paragraph 339 of the Immigration Rules regarding the confidentiality of information provided in support of asylum applications reflect the terms of Art 12, Art 22 and Art 41 of the Council Directive 2005/85/EC, which provide as follows:

> "**Art 12**
>
> **Personal Interview**
>
> .../
>
> 2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

> 3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner."

And

> "**Art 22**
>
> **Collection of information on individual cases**
>
> For the purposes of examining individual cases, Member States shall not:
>
> (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;
>
> (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."

And

> "**Art 41**
>
> **Confidentiality**
>
> Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

43. As to the extent of the confidentiality of information within the asylum process, this question was examined by the Supreme Court in *R v McGeough* [2015] 1 WLR 4612. At [20] Lord Kerr the summarised the central argument advanced by the defendant against disclosure into domestic criminal proceedings of information he had disclosed during his asylum application in Sweden, namely the need to encourage applicants for asylum to make full disclosure to the relevant authorities, as follows:

> "In order that this be achieved, applicants should feel secure that the information that they supplied would not be revealed to state authorities in the country from which they had fled. It was acknowledged that the relevant instruments referred to the withholding of information from the actors of persecution but it was suggested that this reflected a broader public policy that all applicants for asylum should be encouraged to be candid and open in their applications. Candour depended on assurance that the information revealed would not be disclosed."

44. Within this context, at paragraphs [22] to [27] Lord Kerr held as follows with respect to the confidentiality of information disclosed during an asylum application:

> "[22] The need for candour in the completion of an application for asylum is self-evident. But this should not be regarded as giving rise to an inevitable requirement that all information thereby disclosed must be preserved in confidence in every circumstance. Obviously, such information should not be disclosed to those who have persecuted the applicant and this consideration under lies article 22 of the Procedures Directive. It provides:
>
> "**Collection of information on individual cases**
>
> For the purposes of examining individual cases, member states shall not: (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum; (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."
>
> [23] As the defendant has properly accepted, there is no explicit requirement in this provision that material disclosed by an applicant for asylum should be preserved in confidence for all time and from all agencies. On the contrary, the stipulation is that it should not be disclosed to alleged actors of persecution and the injunction against its disclosure is specifically related to the process of examination of individual cases. The defendant's case had been examined and his application had been refused. The trigger for such confidentiality as article 22 provides for was simply not present.
>
> [24] The defendant is therefore obliged to argue that the need for continuing confidentiality in his case arises by implication from the overall purpose of the Directive. But neither article 22 nor article 41 provides support for that claim. Article 22 is framed for a specific purpose and in a deliberately precise way. To imply into its provisions a general duty to keep confidential all material supplied in support of an asylum application would unwarrantably enlarge its scope beyond its obvious intended purpose.
>
> [25] Article 41 provides: "Member states shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."
>
> [26] It is not disputed that Swedish national law does not define the confidentiality principle as extending to the non-disclosure of information supplied in support of an asylum application, where that application has been unsuccessful. On the contrary, the tradition of the law in that country

> is that information generated by such applications should enter the public domain. Article 41 cannot assist the defendant, therefore.
>
> [27] Neither of the specific provisions of the Directive that the defendant has prayed in aid supports the proposition that its overall purpose was to encourage candour by ensuring general confidentiality for information supplied in support of an application for asylum. The Directive in fact makes precise provision for the circumstances in which confidentiality should be maintained. It would therefore be clearly inconsistent with the framework of the Directive to imply a general character of confidentiality for such material."

45. Against this, in *F v M* Hayden J (who does not appear to have been referred by counsel to the decision of the Supreme Court in *R v McGeough*) concluded at [60] that, in circumstances where an application for asylum will involve material of a highly distressing and personal nature and where asylum seekers are informed that the information they provide will be treated as confidential and will only be disclosed where there is a requirement of the law to do so, there is a duty of confidence at common law owed to a person claiming asylum and, more widely, that a reasonable expectation of privacy "is intrinsic to the operation of both the asylum system generally and the proper discharge by the United Kingdom of its obligations under the Refugee Convention, the Qualification Directive and the European Convention". Earlier at [52], Hayden J cited with approval the submission of the Secretary of State that there is a compelling public interest in ensuring that this confidentiality is protected, which public interest applies *a fortiori* to those granted refugee status following a successfully concluded application.

46. Within this context, and in circumstances where (a) the decision in *R v McGeough* was arrived at in the context of *Swedish* national law not defining the confidentiality principle as extending to the non-disclosure of information supplied in support of an asylum application where that application has been unsuccessful, the law in that country being that information generated by such applications should enter the public domain in Sweden, and (b) were the Supreme Court in *R v McGeough* did not reach a settled conclusion on the impact of the position in domestic law being that such material would not be publicly disclosed (see [28] per Lord Kerr), it is important to recall the domestic principle that confidentiality arises where one person reposes confidence in another. In *Att Gen v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 Lord Goff observed at [281] that confidentiality arise where:

> "...information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others".

In *Attorney-General v Guardian Newspapers Ltd (No 2)* it was confirmed that there is a public interest in confidentiality being maintained, but that his public interest may be overridden by a competing right, for example the right to a fair trial (see *Re A (Sexual Abuse: Disclosure)* [2013] 1 FLR 948).

Disclosure and Inspection – Balancing Exercise

47. In *F v M* Hayden J endorsed the submission made by the Secretary of State for the Home Department in that case that the question of whether information from the asylum process should be disclosed and inspected fell to be determined by balancing the rights of the refugee under Arts 3 and 8 and the public interest in protecting the confidentiality of the asylum process against the rights of the person seeking disclosure and inspection under Art 6 and Art 8. Hayden J however rejected the contention of the Secretary of State that disclosure and inspection would only be ordered in an exceptional case, observing as follows at [61]:

> "I am not prepared to agree with the submission that 'only where an exceptional case is established by an applicant, will disclosure be necessary'. It may be that the balancing of the competing rights may lead to disclosure in only a very limited number of cases but effectively to create a presumption that disclosure should be 'exceptional' is corrosive of the integrity of the balancing exercise itself."

48. With respect to the asylum seeker, the rights that fall to be placed in the balance may include the right to life under Art 2 and the right to freedom from torture or other cruel of inhuman treatment under Art 3. These rights may also be engaged in relation to others, for example members of the asylum seeker's family who remain behind in the country of origin (see *Re B (Disclosure to other Parties)* [2001] 2 FLR 1017 at [64] to [66] and *A Local Authority v A* [2010] 2 FLR 1757).

49. With respect to the party seeking disclosure and inspection, the right to a fair trial under Art 6 will be engaged. Art 6 requires that each party must be afforded an equal opportunity to present their case, including their evidence, under conditions that do not place them at a substantial disadvantage. This includes the right to the disclosure of relevant documents (see *Feldbrugge v The Netherlands* (1986) 8 EHRR 425). The right to a fair trial thus demands that, ordinarily, all relevant documents and information be before the court (*Re D (Adoption Reports: Confidentiality)* [1995] 2 FLR 687). By reason of their central importance within a democratic society, the rights enshrined in Art 6 as a whole must be given a broad and purposive interpretation (*Delcourt v Belgium* (1970) 1 EHRR 355 at [25]). Within this context, in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 the court held that whilst a limited qualification of the right to see the documents may be acceptable if directed towards that clear and proper objective, any non-disclosure must be limited to what the situation imperatively demanded and was justified only when the case was compelling or strictly necessary, with the court being rigorous in its examination of the feared harm and any difficulty caused to the litigant counterbalanced by procedures designed to ensure a fair trial. The decisions of the ECtHR reflect this position. In *Karrer v Romania* (App No. 16965/10 21 February 2012 at [50] the ECtHR reiterated that:

> "As regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a "fair hearing" are met (*Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A No. 274)."

50. Within a domestic context, these cardinal principles also find expression in the common law principle of natural justice. In *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38 at [3] the Supreme Court observed that:

> "...fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully".

51. Whilst the right to a fair trial is a fundamental and absolute right (see *Brown v Stott* [2003] 1 AC 681), its component parts, including the right to inspection of documents may be divisible in certain circumstances (*Re B (Disclosure to Other Parties)*). In the circumstances, the right to a fair trial under Art 6 falls to be considered in the balancing exercise when determining disclosure and, whilst carrying very great weight in that balancing exercise, will not by itself be determinative. Within this context, in some cases disclosure and inspection of certain information may be refused in order to afford due respect to the interests of the children, the other parties and the witnesses safeguarded by Art 8 of the ECHR.

52. Art 8 will also be engaged *procedurally* in respect of the party seeking disclosure by reason of the nature of the substantive rights under Art 8. Substantively, a parent has a right to respect for family life with their child pursuant to Art 8. Any decision making process concerning measures which would have the effect of interfering with rights under Art 8 must be fair and must itself be conducted in a manner which ensures the efficacy of those rights protected by Art 8 (see *TP and KM v United Kingdom* [2001] 2 FCR 289 at [7]). Within this context, Art 8 may be the subject of interreference if a parent is not able fairly to advance a case before a court for the effective implementation of that right. In the circumstances, the rights under Art 8 also include the right to disclosure of information relevant to issues before the court that engage Art 8 (see *R (P) v Secretary of State for the Home Department; R (Q) v Secretary of State for the Home Department* [2001] 2 FLR 1122), subject to the usual principles of legality, necessity and proportionality. These procedural elements of the Art 8 right to respect for family life accordingly also fall to be placed in the balance when considering an application to withhold disclosure and inspection of evidence.

53. The public interest in maintaining confidentiality will also fall to be placed in the balance when considering whether to withhold disclosure and inspection of relevant evidence from a party. However, whilst there is a public interest in maintaining confidentiality, as noted above, it may be overridden by a competing right, including the Art 6 right to a fair trial. Further, where derogation from the principle of full disclosure and inspection is contemplated, in *R v H* [2004] 2 AC 134 the House of Lords held that:

> "… some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial".

54. Within this context, and subject to the same caveat, where a public body asserts that disclosure and inspection of documents relevant to the determination of the child's welfare in private law proceedings under the Children Act 1989 is not in the public

interest, that public interest will, if established following a balancing of the public interest favouring confidentiality as against the public interest that justice should be done, likewise fall to be placed in the balance when determining whether and to what extent the material should be disclosed, in what manner and with what safeguards. In this context, it is very important to note that not all cases in which a public authority seeks exemption from disclosure and inspection on public interest grounds will be cases of public interest immunity in the strict sense (see *Durham County Council v Dunn* [2013] 1 WLR 2305 at [22]).

55. Finally as to the factors relevant to the balance, other factors may also fall to be considered in the balancing exercise. In particular, the interests of the subject child in the proceedings will fall for consideration. In *Re B (A Minor)(Disclosure of Evidence)* [1993] Fam 142 (setting out principles which the Supreme Court in *Re A (Sexual Abuse: Disclosure)* described as being designed to protect the welfare of the child who is the subject of the proceedings and to prevent the proceedings which are there to protect the child being used as an instrument of doing harm to that child) the following approach was articulated:

    i) It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party.

    ii) When deciding whether to order disclosure the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.

    iii) If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.

    iv) If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.

56. The court will also consider if the information in dispute is available elsewhere in a form that does not raise the concerns regarding confidentiality or public interest immunity. In considering alternative sources contended for, consideration must be given to whether there is any prejudice caused to the party seeking disclosure by providing information only in such an alternative source. Within this context, I note that in *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475 (Fam) at [55] and [56] The President held as follows with respect to findings made by the First Tier Tribunal:

> "[55] Turning to the second issue, namely the role of the family court in assessing risk in FGMA proceedings where the risk has previously been assessed by the FTT, I am unable to accept the Secretary of State's

> submission that an FTT assessment must be the 'starting point' or default position for the court and that the court should only deviate from the FTT assessment if there is good reason to do so.
>
> [56] The Secretary of State's submission is not supported by any authority. In fact, as the helpful observations from Black LJ (as she then was) in *Re H* (see paragraph 32 above) demonstrate, the approach to risk assessment in a family case is a different exercise from that undertaken in the context of immigration and asylum. The family court has a duty by FGMA 2003, Schedule 2, paragraph 1(2) to 'have regard to all the circumstances' and, to discharge that duty, the court must consider all the relevant available evidence before deciding any facts on the balance of probability and then moving on to assess the risk and the need for an FGM protection order. Although the family court will necessarily take note of any FTT risk assessment, the exercise undertaken by a FTT is not a compatible process with that required in the family court. It is not therefore possible for an FTT assessment to be taken as the starting point or default position in the family court. The family court has a duty to form its own assessment, unencumbered by having to afford priority or precedence to the outcome of a similarly labelled, but materially different, process in the immigration jurisdiction."

57. Within the foregoing context, the very limited extent to which the court can restrict or deny disclosure to a party of information relevant to the determination of the welfare of a child was emphasised in *Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 2 FLR 687.

Disclosure and Inspection – Procedure

58. In *F v M* Hayden J was not required to consider the procedural position as disclosure and inspection had already taken place in that case. That issue however, has been the subject of detailed consideration at this hearing. The FPR 2010 does not provide a comprehensive disclosure code for parties to family proceedings (see *Tchenguiz-Imerman v Imerman* [2014] 1 FLR 232, in which Moylan J (as he then was) urged litigants in family proceedings to use the CPR 1998, r 31.10(3) procedure and CPR PD31A, paras 3.1 and 4.1 for guidance). The general position in private law proceedings under the Children Act 1989 is that a fair trial requires that the court makes its decision on the basis of all available relevant documentary evidence. Within this context, FPR 2010 r 21.1 provides as follows:

> **21.1 Interpretation**
>
> (1) A party discloses a document by stating that the document exists or has existed.
>
> (2) Inspection of a document occurs when a party is permitted to inspect a document disclosed by another person.
>
> (3) For the purposes of disclosure and inspection –

> (a) 'document' means anything in which information of any description is recorded; and
>
> (b) 'copy' in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."

59. Within the foregoing context, the term 'disclosure' means only that a party states that they know that a document 'exists or has existed' (see FPR 2010, r 21.1(1)). Thereafter, pursuant to FPR r 21.1(2) disclosure is accompanied by the right to inspect that which is disclosed. FPR 2010, r 4.1(3)(b) enables the court to order "such disclosure and inspection, including specific disclosure, as it sees fit". Accordingly, whilst there is no comprehensive disclosure code for parties to family proceedings it is clear that the process that is ordinarily described in family proceedings by the shorthand term of art "disclosure" conflates two processes that are in fact procedurally distinct in the FPR, namely notification of such relevant documentation that exists (disclosure) and the provision of that documentation (inspection).

60. In respect of material that is relevant to the court's determination of the welfare of the child subject of the proceedings, parties engaged in private law proceedings under the Children Act 1989 are subject to a duty of full and frank disclosure, i.e. of making known to the other party the existence such material (see *Practice Direction: Case Management* [1995] 1 FLR 456). Once proceedings are on foot, the duty of full and frank disclosure continues for the duration of those proceedings (see *Vernon v Bosley (No 2)* [1998] 1 FLR 304).

61. Within the foregoing procedural context, certain documents may be exempt from disclosure and/or inspection in the proceedings by reason of confidentiality or privacy or by reason of public interest immunity. The procedure for withholding disclosure and/or inspection of documents to which public interest immunity confidential documents, and in relation to public interest immunity, is set out in FPR 2010, r 21.3 as follows:

> "**21.3 Claim to withhold inspection or disclosure of a document**
>
> (1) A person may apply, without notice, for an order permitting that person to withhold disclosure of a document on the ground that disclosure would damage the public interest.
>
> (2) Unless the court otherwise orders, an order of the court under paragraph (1) –
>
> (a) must not be served on any other person; and
>
> (b) must not be open to inspection by any other person.
>
> (3) A person who wishes to claim a right or a duty to withhold inspection of a document, or part of a document, must state in writing –
>
> (a) the right or duty claimed; and
>
> (b) the grounds on which that right or duty is claimed.

> (4) The statement referred to in paragraph (3) must be made to the person wishing to inspect the document.
>
> (5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.
>
> (6) Where the court is deciding an application under paragraph (1) or (5) it may-
>
> > (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and
> >
> > (b) invite any person, whether or not a party, to make representations.
>
> (7) An application under paragraph (1) or (5) must be supported by evidence.
>
> (8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest."

DISCUSSION

Asylum Process and Confidentiality

62. I recognise, as highlighted by Mr Devereux and Ms Chaudhry, that in *R v McGeough* the Supreme Court held, by reference to the terms of Council Directive 2005/85/EC, that information supplied in support of an application for asylum that has concluded does not have a general character of confidentiality. However, as I have highlighted above, some care must be taken with that decision in the context of the facts of this case.

63. In *R v McGeough* the Supreme Court was concerned with the effect of *Swedish* national law, which does not define the confidentiality principle as extending to the non-disclosure of information supplied in support of an asylum application where that application has been unsuccessful, the law in that country being that information generated by such applications should enter the public domain. Within this context, the decision in *R v McGeough* can be distinguished from the situation with which this court is concerned, namely the effect of domestic law on the question of confidentiality. Further, and within that context, the Supreme Court did not reach a settled conclusion on the position in this jurisdiction in circumstances where, on the evidence available to this court, information from an asylum application will not be publicly disclosed following the conclusion of that application.

64. Within this context, when considering the nature and extent of the confidentiality that attaches to documents from the mother's concluded asylum application, I am satisfied that this court must take into account the manner in which that information has been and is treated administratively in *this* jurisdiction. The evidence before the court demonstrates that upon making the application, the mother was given assurances of confidentiality with respect to the information she provided to the Secretary of State in support of her application for asylum, namely that the information she provided

would be treated as confidential and will only be disclosed where there is a requirement of the law to do so. Further, there is nothing in the evidence before the court to demonstrate that, upon an asylum claim being successful, the information in support of that claim is made public or otherwise treated in a manner that suggests the assurances of confidentiality given upon application cease to operate. Indeed, all the information before the court suggests that the confidentiality of such information continues to be jealously guarded by the Secretary of State, in particular with respect to any alleged persecutor.

65. In these circumstances, whilst the court must have regard to the fact that neither the Refugee Convention, the EU Charter and Directives or the Immigration Rules provide for blanket confidentiality with respect to any alleged persecutor, as recognised by Hayden J in *F v M* there is a duty of confidence at common law owed to a person claiming asylum in respect of the information they provide in support of that claim. Accordingly, the information in issue in this case remains material to which confidentiality attaches where it has come to the knowledge of the Secretary of State in circumstances where the Secretary of State has agreed that the information is confidential and will only be disclosed where there is a requirement of the law to do so.

66. As also recognised by Hayden J in *F v M*, there is also a public interest in maintaining the confidentiality that arises, the trust that is engendered by a system that maintains such confidentiality being, as Hayden J observed, intrinsic to the operation of both the asylum system generally and the proper discharge by the United Kingdom of its obligations under the Refugee Convention, the EU Directive and the European Convention to those who are vulnerable by reason of, for example, discrimination, ill-treatment or torture. Within this context, I accept that there is also a compelling public interest in ensuring that the confidentiality of the asylum process is protected.

Disclosure and Inspection - Balancing Exercise

67. I am equally satisfied that, whilst the question of disclosure into family proceedings of documents from an asylum claim falls to be determined within the context of the confidential nature of the information submitted in support of an asylum application and the wider public interest in maintaining the confidentiality of the asylum process as set out above, the foregoing principles do not prevent a court ordering disclosure and inspection of such documents into proceedings under the Children Act 1989 in an appropriate case.

68. Whether disclosure and inspection is appropriate in a given case will depend on the outcome of a balancing exercise that weighs the rights of each individual concerned (including third parties whose rights may be affected by disclosure, for example family members who remain in the refugee's country of origin), the welfare of the subject child or children and the confidential nature of the documents that are the subject of the application and the wider public interest in maintaining public confidence in the asylum process.

69. Depending on the facts of the case, the rights engaged may include the rights of the refugee (and potentially third parties) under Arts 2 and Art 3 of the ECHR and will include the rights of the refugee under Art 8, the rights under Art 6 and Art 8 of the

party seeking disclosure and the rights of the child under Art 8. As Munby LJ (as he then was) observed in *Durham County Council v Dunn* at [45]:

> "The reality now in the Family Division is that disputes about the ambit of disclosure, whether in relation to social work records or other types of document, are framed in terms of the need to identify, evaluate and weigh the various Convention rights that are in play in the particular case: typically Article 6 and Article 8 but also on occasions Articles 2, 3 and 10."

70. Whilst no right will start with preferential weight, the authorities make clear that, when considering questions of disclosure and inspection, the court is required jealously to guard the Art 6 right of the parties to a fair trial. Within this context, the court will bear in mind at all times that it is a fundamental principle of fairness and natural justice that a party is entitled to have sight of all materials which may be taken into account by the court when reaching a decision adverse to that party, including the determination of any allegations levelled at them. Any qualification of the right to see documents relevant to the issue to be determined by the court will only be acceptable if directed towards that clear and proper objective and any non-disclosure must be limited to what the situation imperatively demands and will be justified only when the case for non-disclosure is compelling or strictly necessary. To this end, the court will be rigorous in its examination of the feared harm disclosure will cause.

71. Within that latter context, the confidential nature of the material submitted in support of an asylum claim, and the public interest in maintaining public confidence in the asylum system by ensuring vulnerable people are willing to provide candid and complete information in support of their applications, will attract significant weight in the balancing exercise. However, whilst Mr Payne sought to resurrect the argument he ran before Hayden J in *F v M* that, within the context of the cardinal importance of confidentiality to an effective asylum process, a presumption of exceptional circumstances applies to questions of the disclosure of documents from the asylum process, I too reject that submission. There is no presumption of exceptionality when it comes to considering the disclosure of asylum documents into proceedings under the Children Act 1989. I agree with Hayden J that to introduce such a presumption would be corrosive of the efficacy of the balancing exercise the court is required to undertake.

72. Paragraph 339 IA of the Immigration Rules (reflecting Art 22 of Directive 2005/85 EC) makes clear that information provided in support of an application and the fact that an application has been made *shall* not be disclosed to the alleged actor(s) of persecution of the applicant. Within this context, I accept that it is difficult to see how a court could order disclosure of material in a *pending* asylum application into proceedings under the Children Act 1989 where the parent seeking disclosure is an or the alleged persecutor. However, having regard to the principles set out above, I am satisfied that the position is different where the application for asylum has been determined, either successfully or unsuccessfully.

73. Mr Payne submits that provision of material to an alleged persecutor following a successful asylum claim into family proceedings can only take place in the most "exceptional" circumstances. However, in line with the decision of Hayden J in *F v M*, I have already rejected the notion that there is presumption of exceptionality when considering the question of disclosure. Further, in *R v McGeough* the Supreme Court

(in observations that were not dependent on the factual matters that distinguish that case from this one) made clear that Art 22 of Directive 2005/85/EC (from which Paragraph 339 IA of the Immigration Rules is derived) containing the prohibition on disclosure to an alleged perpetrator is specifically relates to the process of examination of the claim and does not extend beyond its determination. Within this context, nowhere in the Directive or the Immigration Rules is it suggested that a test of exceptionality applies following the successful (or unsuccessful) conclusion of an asylum claim. Within this context, whether disclosure and inspection takes place following a successful or unsuccessful claim for asylum will depend on the balancing exercise set out above executed by reference to the particular facts of the case.

74. Within this context, I cannot accept Mr Payne's submission that a prior finding of the Secretary of State or the First Tier Tribunal that the person seeking disclosure is a persecutor *must* mean that, at the outset, the scales are heavily weighted against disclosure and inspection following a successful claim for asylum. In some cases it may have that consequence, but it some cases it may not. Whether documents from the asylum process will be provided to an alleged persecutor who is a party to proceedings under the Children Act 1989 following a successful (or unsuccessful) claim depends on all of the facts of the individual case and the balance that is struck on the basis of those facts, having regard to the principles set out above.

Disclosure and Inspection - Procedure

75. At the outset of the proceedings, Mr Devereux and Ms Chaudhry argued strongly that the appropriate procedural framework for consideration of disclosure and inspection was through the Secretary of State asserting public interest immunity over the documents in issue and the court determining a public interest immunity application. Latterly however, Mr Devereux and Ms Chaudhry were prepared to accept on behalf of the father the process proposed by Mr Edwards founded on the provisions of FPR 2010 r 21.3 provided that this resulted in a structured, clear and fair process. This was a sensible concession in circumstances where not all cases in which a public authority seeks exemption from disclosure and inspection on public interest grounds will be cases of public interest immunity in the strict sense (see *Durham County Council v Dunn* at [22]) and where, in my judgment, FPR r 21.3 provides the appropriate procedural framework for disputes concerning disclosure and inspection in private law proceedings under the Children Act 1989 of documents from the asylum process that are in the possession of a party to those proceedings.

76. FPR r 21.3 provides a procedural framework both for an application to withhold disclosure on the grounds that disclosure would damage the public interest and a procedural framework for withholding disclosure or inspection of a document on the grounds of confidentiality or privacy. Within this context, FPR r 21.3 is in my judgment particularly suited to dealing with asylum documents in the possession of a party to private law proceedings who asserts that those documents are confidential or private, but where the disclosure and inspection of those documents will also likely raise issues of public interest.

77. Having regard to the terms of FPR r 21.3, where a party to private law proceedings under the 1989 Act wishes to withhold disclosure and/or inspection of documents from the asylum process that he or she is otherwise required, under the duty of full

and frank disclosure, to make known to the other party the following procedural steps will operate:

i) Where the party to private law child proceedings in possession of documents from the asylum process seeks to withhold *disclosure* (i.e. seeks to withhold from the other party to proceedings the fact of the documents existence) on the grounds that disclosure would damage the public interest then, unless the court orders otherwise, the party must make a without notice application for a non-disclosure order (FPR r 21.3(2)(a)).

ii) An application to withhold disclosure on the grounds that disclosure would damage the public interest must be supported by evidence (FPR r 21.3(7);

iii) On an application to withhold disclosure on the grounds that disclosure would damage the public interest the court may require the production of the document(s) to the court to assist in the determination of the application (FPR r 21.3(6)(a)). Whilst the court will not require the production of the documents in every case, this rule makes clear that there will be cases in which the courts will only be able determination of the question of disclosure having seen the documents in issue.

iv) On an application to withhold disclosure on the grounds that disclosure would damage the public interest, the court may invite any person, whether or not a party, to make representations (in cases concerning asylum documentation this is likely to be the Secretary of State for the Home Department) (FPR r 21.3(6)(b).

v) Where the party to private law proceedings in possession of documents from the asylum process seeks to withhold *inspection* (i.e. to prevent the other party seeing the document or part of the document the existence of which has been disclosed) on the grounds of confidentiality or privacy, that party must indicate to the other party (FPR r 21.3(4)) the right or duty claimed to withhold inspection and the grounds on which that right or duty is claimed (FPR r 21.3(3)).

vi) Where a party in possession of documents from the asylum process indicates to the other party to proceedings their intention to withhold inspection on the grounds of confidentiality or privacy one or other party may apply to the court to determine whether that claim should be upheld (FPR r 21.3(5)).

vii) An application to withhold inspection on the grounds of confidentiality or privacy must be supported by evidence (FPR r 21.3(7)

viii) Where the court is required to determine a claim to withhold inspection on the grounds of confidentiality or privacy, again the court may require the production of that document to the court to assist in the determination of the application (FPR r 21.3(6)(a)). Whilst the court will not require the production of the documents in every case, again this rule makes clear that there will be cases in which the courts will only be able to determine the question of inspection having seen the documents in issue.

ix) Where the court is required to determine a claim to withhold inspection on the grounds of confidentiality or privacy, again the court may invite any person, whether or not a party, to make representations (in cases concerning asylum documentation this is, again, likely to be the Secretary of State for the Home Department) (FPR r 21.3(6)(b)).

78. Within the foregoing procedural framework, and having regard to the legal principles set out earlier in this judgment, in *Durham County Council v Dunn* at [23] the Court of Appeal summarised the approach to issues of disputed disclosure and inspection in cases that are not cases of public interest immunity in the strict sense but which nonetheless may engage the public interest, which approach in my judgment should be adopted where there is a dispute as to the disclosure or inspection of documentation from the asylum process within private law proceedings under the Children Act 1989 (emphasis in the original):

> "First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include "train of inquiry" points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality. Secondly, if the relevance test is satisfied, it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights may require protection. It will generally involve a consideration of competing ECHR rights. Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of strict necessity."

Merits

79. In this case the court has determined that a fact finding hearing is necessary to determine the allegations made by the mother against the father in proceedings under the Children Act 1989. The mother has filed in these proceedings a schedule of those allegations and it is clear from the documentation that is before the court with respect to the asylum process that those allegations are the same as those made by the mother during the course of her claim for asylum, namely that the father was a perpetrator of serial domestic violence and sexually abused H in [country given]. In addition, the position at present is that the previous bodies that have been required to consider these allegations (the Secretary of State and then the First Tier Tribunal) did not make specific findings with respect to the allegations of domestic abuse, the conclusions that were drawn were not determined to the standard of proof that applies in these proceedings, the father strongly disputes the allegations made by the mother (and positively asserts they are fabricated) and the nature of the allegations is such that if found proved they will have an impact on the future determination of the child's welfare, in respect of which the court is seised. Within this context, the Secretary of

State concedes that the documents in issue are, *prima facie*, relevant to the foregoing issues.

80. In the foregoing circumstances, I am not able to accept the submission of the mother and the Secretary of State that the existence of material already available to the father simply negates the need for disclosure and inspection of the disputed material. I am satisfied that in this case the court cannot simply conclude, without seeing the disputed material, that the availability of information in an alternative format, namely the decision of the Secretary of State and the decision of the First Tier Tribunal, negates the need for any further disclosure because that material details, and assesses the validity of the mother's allegations against the father. In this respect, I repeat the observations of the President in *Re A (A Child: Female Genital Mutilation: Asylum)* at [56]:

> [56] The Secretary of State's submission is not supported by any authority. In fact, as the helpful observations from Black LJ (as she then was) in *Re H* (see paragraph 32 above) demonstrate, the approach to risk assessment in a family case is a different exercise from that undertaken in the context of immigration and asylum. The family court has a duty by FGMA 2003, Schedule 2, paragraph 1(2) to 'have regard to all the circumstances' and, to discharge that duty, the court must consider all the relevant available evidence before deciding any facts on the balance of probability and then moving on to assess the risk and the need for an FGM protection order. Although the family court will necessarily take note of any FTT risk assessment, the exercise undertaken by a FTT is not a compatible process with that required in the family court. It is not therefore possible for an FTT assessment to be taken as the starting point or default position in the family court. The family court has a duty to form its own assessment, unencumbered by having to afford priority or precedence to the outcome of a similarly labelled, but materially different, process in the immigration jurisdiction."

81. Within this context, and in any event, I am likewise not able to accept the submission of Mr Hames on behalf of the mother that the court can determine the disputed issues of disclosure and inspection in this case by simply balancing the competing rights and interests engaged without the need to see the information that is in dispute. Such an abstract exercise, divorced from the disputed material itself and undertaken in circumstances where there is concession by the Secretary of State regarding the material's *prima facie* relevance to the issues before the court, would not allow the court to meet the imperative need to ensure that any non-disclosure is limited to what the situation imperatively demands and to properly satisfy itself whether the case for non-disclosure is compelling or strictly necessary.

CONCLUSION

82. In the circumstances, having satisfied myself as to the principles and procedure the court is required to apply in respect of the disputed issues of disclosure and inspection in this case:

    i) Pursuant to FPR r 21.3(6)(a) the mother will be directed to produce for the court the documentation from the asylum process which she has received from

the Secretary of State and which she contends should not be disclosed and inspected by the father;

ii) If the parties seek an opportunity make supplementary submissions on the application of the principles set out in this judgment to the material to be provided to the court, provision will be made for the receipt by the court of those submissions;

iii) Upon receipt of the documentation from the asylum process and any supplementary submissions from the parties, the court will proceed to determine whether an order should be made that some or all of the documents or parts thereof should be disclosed and inspected.

83. A tension is created in this case by the fact that the information in issue is relevant in two different forensic contexts, in which two forensic contexts precisely the same allegations are the subject of consideration, but in which the role of the person against whom the allegations are made is markedly different. During the currency of the the asylum claim the father has no right to know the allegations against him, no right to answer those allegations and cannot see the information that is said to evidence the conduct alleged. By contrast, during the currency of the subsequent proceedings under the Children Act 1989 the father has a cardinal right to know those same allegations against him, a cardinal right to answer those allegations and, ordinarily, is entitled to see the information that is said to evidence the conduct alleged. In this case, that tension falls to be determined by a balancing exercise undertaken on the principles, and within the procedural framework set out in this judgment. Further, in this case I am satisfied that that balance must be reached with the court having had sight of the information in dispute.

84. That is my judgment.