IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

[2019] EWHC 1509 (Fam)

No. FD18P00825

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 May 2019

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985 INCORPORATING THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Before:

HER HONOUR JUDGE CORBETT

(Sitting as a Judge of the High Court)

(**In Private**)

B E T W E E N :

R — Applicant

- and -

G
H
(3) SECRETARY OF STATE FOR THE HOME DEPARTMENT — Respondents

This judgment has been redacted and some details abridged for publication. Any application for further publication may be made orally or in writing, with notice to the parties

J U D G M E N T

A P P E A R A N C E S

MR DEVEREUX QC and MS CHAUDHURY appeared on behalf of the Applicant.

MR C. HAMES QC appeared on behalf of the First Respondent.

MR OSBORNE appeared on behalf of Children's Guardian for the Second Respondent.

MR A. PAYNE QC appeared on behalf of the Third Respondent.

JUDGE CORBETT:

Introduction

1 This is my judgment pursuant to a hearing listed initially on 8 May and then adjourned part heard to 16 May. The main application before the court is one made by the father under the Hague Convention issued on 12 December 2018 for the summary return of his son H to DD. The matter is listed before me to determine the father's application in respect of disclosure. I will refer to the father R as "the father" in this judgment, to the mother G as "the mother", and the child H as "the child" or H

2 The child H was born in DD on XXX and so he is now 7 years. His parents are DD nationals married in 2009. They remain married and they share parental responsibility for H, their only child.

3 In this application before me, the applicant father was represented by leading counsel Mr Devereux and Ms Chaudhry, the mother was represented by leading counsel Mr Hames, the child himself through his guardian and his solicitor Mr Osborne, and the Secretary of State for the Home Department (SSHD) was represented on 8 May by Mr Waite, and then on 16 May leading counsel Mr Payne.

4 Until 17 February 2016, H was living in the care of both of his parents in DD when he and his mother came to the United Kingdom. He has been in the United Kingdom living with his mother since February 2016. The mother accepts that this was a wrongful removal from DD

5 The mother made a claim for asylum. The SSHD's decision set out the mother's reasons for the applications as follows:

> "You have applied for asylum in the United Kingdom and asked to be recognised as a refugee. You claim to have a well-founded fear of persecution in DD on the basis of your membership of a particular social group being a woman who is a victim of domestic violence."

6 Her application was refused, she appealed and her appeal was heard on 11 September 2017. I have had the opportunity of reading the decision of the First-tier Tribunal Judge Agnew.

7 In July 2016, the father made an application to the DD authorities for his son's return, but it took over two years to transmit that request to the UK. Before the father had issued his application under the Hague Convention on 12 December 2018, the Tribunal had made a decision in September 2017 in relation to the mother's application for asylum allowing her claim.

8 By way of background, Judge Agnew records at paragraph 3 of his judgment:

> "3. The basis of the appellant, the mother's, claim can be briefly summarised as follows. She married a man who immediately after the marriage began to abuse her. She attempted to leave him but by persuasion of her own family, particularly her brothers, and her husband and his family, she returned to him. She reported some incidents of violence to the police but they laughed at her, partly due to culture but also because the appellant's husband had relatives within the security forces. The final straw came when the appellant found her husband sexually abusing her son."

9 Then later in this judgment, the Judge records at paragraph 18:

> "18. I found the appellant to be articulate, detailed, specific, consistent and credible in her evidence. I accept her claims that she and her son would be located in DD on return by her husband 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 in asylum seekers claiming that they fear persons with influence and the security forces of the country from which they have fled. I accept that her husband has filed a missing persons report and that the immigration authorities would be alerted to this fact on their return at 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 her husband.
>
> 19. The appellant has been found to be credible in her claims which includes the claim that she cannot safely relocate with her son in DD. 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."

10 The mother, therefore, has been granted asylum by the UK government applying to both herself and her son as her dependent; they have refugee status. Since the father commenced these Hague Convention proceedings and when she was acting without legal representation, the mother subsequently made an application specifically for H to be granted asylum. This may have been unnecessary but is nonetheless pending a decision. The child himself was joined as a party to this Hague Convention application on 15 February by order of Keehan J. His interests are represented through his guardian, Emma Huntington, who has filed a report dated 20 March concluding, amongst other things, that H is settled in this country.

11 The father's application before me relates to disclosure of the mother's asylum file and the child's pending asylum file. On 25 January 2019, at a hearing before Roberts J, the mother appeared in person and it is recorded in the order that she volunteered to file and serve her asylum documentation. At paragraph 9 of Roberts J's order of that day, it is recorded:

> "The mother shall by 4.00 p.m. on 8 February 2019 file and serve her asylum interview, her asylum application, all evidence submitted in support of her claim for asylum, and all decisions of the Secretary of State for the home office."

12 The mother then subsequently wrote an undated letter to the court asking, in short, for non-disclosure of that documentation, saying that the interviews therein contained details, including names and pictures of people who have given information, providing their names et cetera, which would compromise the security of their family and themselves. As I understand it, Roberts J agreed that the papers be returned to the mother.

13 The matter came again before Roberts J, when the mother was legally represented, on 9 April 2019 and, at that time, at paragraph 17 of her order, Roberts J listed a hearing to take place before me sitting as a section 9 judge at this court on 8 May to consider four matters:

"(i) The disclosure of any of the documents from the asylum proceedings into these proceedings;

(ii) The disclosure of some or all of the documents from the asylum proceedings to the father or any special advocate instructed by him;

(iii) The disclosure of some or all of the documents from the asylum proceedings to the guardian; and

(iv) Any application made by the parties for the appointment of special advocates."

14 The Secretary of State for the Home Department accepted the court's invitation to intervene in these proceedings and to make submissions in respect of the father's application for disclosure of the asylum documentation. The father's application is opposed by the mother, the guardian, and the Secretary of State.

15 Two further hearings are listed, firstly a pre-trial review on 5 June 2019 before MacDonald J; I have been able, by speaking to the learned judge's clerk, to extend the time estimate on that hearing to one day. There then follows a final hearing before the same Judge listed by Roberts J for five days beginning on 10 June. It can be seen that I am not the trial judge. Whether this disclosure application should have been listed before the trial judge is, to a certain extent, now irrelevant since it was, in fact, listed before me and no one suggested that it should be adjourned in order to be heard by the trial judge.

16 I heard submissions on 8 May. I adjourned following submissions to 16 May so that the Secretary of State could clarify the basis on which he makes submissions and to indicate which documents have been considered by him by category. The terms of that are recorded in my order of 8 May. Both on 8 May and 16 May, I heard detailed submissions from all advocates and what follows in this judgment is a summary only of the very full, comprehensive submissions made.

Father's position

17 The father's contention is that his Article 6 and Article 8 ECHR rights cannot be preserved without disclosure of material from the asylum process because the reasons for the grant of asylum were that the father was the perpetrator of domestic abuse and also sexual abuse of the child and that the mother could not obtain effective state protection in their home country. Further, he argues that the grant of asylum on a false basis undermines the mother's case that the child and she would be at grave risk of harm or intolerability pursuant to Article 13b. Further, that the grant of asylum effects the settlement defence because, the father argues, the grant of asylum on a false basis undermines any argument that the child is settled here. It was argued on his behalf that the only way that the father can, as his Counsel put it, 'penetrate the shield of the grant of asylum' raised by the mother is to have the tools to challenge the original determination by the Immigration Tribunal. If not, it is said he is denied the opportunity to participate.

18 Further, Mr Devereux QC argued that the mother relied on a forged affidavit upon her relocation to this country and that the father should be entitled to see that to pursue his arguments before this court. In fact, I note, that the mother accepted to the Tribunal (as she had in her initial asylum interview) that that was a forged document. Mr Devereux QC compared the statement filed by the mother in these proceedings to the statement provided by her to the Tribunal, arguing that the mother makes the same arguments both then and

now. Mr Devereux QC set out in some detail his submissions that in determining a Hague Convention matter, the court must act in a manner compatible with European Convention on Human Rights relying on the Supreme Court decision in *Re E* [2012] 1 AC 144 following on from the decision in *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31. Further, father's legal team relied, in particular, on the case of *Re H* [2016] EWCA Civ 988 and the consequential decision of Hayden J in *F v M and Another* [2017] EWHC 949 (Fam) where the emphasis was placed upon the balancing of competing rights in an application such as this. In fact, all advocates agree that the test set out by Hayden J therein is the correct test to be applied.

19 Mr Devereux QC emphasised that not only the father, but also this child, has the right both to a fair trial pursuant to Article 6 ECHR and a right to private and family pursuant to Article 8. His arguments were that without the asylum disclosure which the mother is denying to the father, he on behalf of the father will be unable to properly investigate and challenge the mother's assertions.

20 Finally, the argument of the father's legal team was that if disclosure is not permitted by this court, then the court should consider appointing a special advocate with or without disclosure for the guardian or to the court. In other words, the involvement of special advocates in some way. At the adjourned hearing on 16 May, for the first time, Mr Devereux QC raised orally in submissions whether the correct procedure in an application such as this, for disclosure when there are questions of asylum, should be a public interest immunity application (PII) with the court being assisted by the Secretary of State for the Home Department in looking at the documentation.

The Mother's position

21 In response to the application made under the Hague Convention the mother will invite the court at the listed final hearing to dismiss the father's application for her child's summary return to DD, her primary contention being pursuant to Article 12 that their son is factually settled, as set out in the detailed report of the guardian. He has lived in England happily, according to the mother, for over three years, nearly half his life. Further, the mother relies on Article 13b, the harm/intolerability defence and the child's objections. As a result of the mother having raised the Article 12 defence, the child was joined as a party and a guardian appointed. I have read the guardian's report and it is her very clear conclusion that this child is settled in this country.

22 The mother will also argue that the grant of asylum was properly made on the basis that the father was a perpetrator of domestic abuse and of sexual abuse on the child, and that neither of them could be protected by return to an undisclosed location. Mr Hames QC argued that the grant of asylum to the mother and her dependent child is an absolute bar to a return under the Hague Convention and that refugees should not be sent back to the country from whence they fled relying on the decision of Hayden J in *F v M (supra) and FE v YE* [2017] EWHC 2165 (Fam), and Article 33 of the Geneva Convention. I will return to those cases shortly.

23 Further, Mr Hames QC submitted that a return by this court under the Hague Convention could only be ordered if the mother and child's status as refugees is revoked and that any appeal in that regard is likely to take years. The issue of settlement is a discrete issue, it was further submitted, which could be determined independent of the circumstances which led to the grant of asylum.

24 At the forthcoming hearing listed before MacDonald J, Mr Hames QC indicated that the mother would be likely to argue that the Article 13b defence should only be determined if the mother and child's asylum status was revoked or, alternatively, his Lordship should only consider those defences if the defence of settlement fails. In other words, to consider the defence of settlement first. That, of course, would be a matter for the trial judge.

25 As to disclosure, the mother opposes the disclosure of any documents from her asylum application proceedings or from the pending application on behalf of H. In relation to the settlement issue, she submits it is difficult to envisage what difference it would make even if there was full disclosure of the asylum documentation. In resisting disclosure of the documents in her and H's asylum file, the mother mainly relies on the analysis and conclusions of Hayden J in *F v M and Another* [2017] EWHC 949 (Fam), and also relies on Article 22 and Article 41 of the Council Directive 2005/85/EC of 1 December 2005 which operations to prevent disclosure of information to alleged acts of persecution of the applicant for asylum.

26 It is the mother's particular concern that the father will become aware of the identity and whereabouts in DD of individuals who assisted her in her asylum application. Mr Hames QC acknowledged that there is a balancing act for the court to perform, his submission being that the balance which the court should strike is between the competing Article 6 and Article 8 rights coming, decisively and overwhelmingly, on the side of non-disclosure. Mr Hames QC reminded the court that the mother has already exhibited to her statement filed in these proceedings a copy of the decision and reasons of the tribunal judge to which I have already referred. So, it is argued by the mother, the father and the court already have detailed information as to why the mother was granted asylum and, therefore, it is submitted the father does not need and should not receive any more disclosure.

27 As to the affidavit which the mother accepted at her asylum interview was a false document and continued to accept was false at the hearing before the tribunal judge, the father appears to be particularly concerned to have disclosure of that. Mr Hames QC submitted that the Tribunal Judge knew the mother's account of why she created that document yet accepted that that was necessary in her bid to escape DD and that the judge still went on to grant her asylum. It was submitted on behalf of the mother that its disclosure adds nothing to the father's case within these proceedings.

Position of the Secretary of State for the Home Department

28 The Secretary of State for the Home Department resists disclosure setting out in a detailed position statement the relevant law and the balancing exercise for the court to consider. He provided a second position statement for the adjourned hearing where he sets out those documents by category which the Secretary of State had considered, namely the mother's asylum application, the court papers, and last but not least including the detailed position statement filed on behalf of the father. It was submitted on behalf of the Secretary of State for the Home Department that court needs to pay particular attention to the question of confidentiality and assurances that are given to applicants for asylum and that the court must have particular regard to the public confidence in the asylum process. It was further submitted that there is no material difference between the position of the mother as a principle asylum seeker and her son as her dependent in terms of disclosure but, in any event, he is now an applicant for asylum in his own right.

29 Like the mother, counsel for the Secretary of State referred the court to the essential balancing exercise set out by Hayden J in the case of *F v M* and, like the mother, he

emphasises the importance of the confidentiality in the asylum process when carrying out the balancing exercise.

The position of the Guardian

30. Mr Osborne, on behalf of the guardian, accepted the arguments put forward on behalf of the Secretary of State emphasising, in his submissions, the importance of the sensitivity and confidentiality of the documents in relation to this child's pending application.

The Law

30 I have considered all of the authorities provided to me. I do not propose to go through each of those cases in this judgment. In particular, I have been assisted by the cases to which I am about to refer.

31 In *Re E* [2012] 1 AC 144, following a discussion as to the effect of the *Neulinger* case on Hague Convention proceedings:

> "26. The most that can be said, therefore, is that both *Maumousseau* and *Neulinger* acknowledge that the guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child's future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents. The violation in *Neulinger* arose, not from the proper application of the Hague Convention, but from the effects of subsequent delay."

> "32. First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination."

> "36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner [then leading counsel in the case] submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then

ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

32 I turn now to the case of *FE v YE v Secretary of State for the Home Department* [2018] 1 FLR, a decision of Mostyn J who begins by saying:

> "Does an asylum claim by the subject children halt an application under the 1980 Hague Child Abduction Convention? Surprisingly, this question has apparently never before been determined in England and Wales, although it has been addressed in the USA and Canada. The Home Secretary has intervened in the proceedings, and argues that a grant of asylum to the subject children, if made, would act as an absolute bar to a return order being made under the 1980 Convention. While the application is pending (and for these purposes a pending application is one that has not exhausted all appeal rights) the Home Secretary argues that a return order cannot be implemented. Such an order can only be made, or take effect, where the asylum claim has been refused and where all appeal rights have been exhausted."

33 And further at [17] and [18]:

> "17. Approaching the matter from first principles I have no hesitation in concluding that where a grant of asylum has been made by the Home Secretary it is impossible for the court later to order a return of the subject child under the 1980 Hague Convention. Equally, it is impossible for a return order to be made while an asylum claim is pending. Such an order would place this country in direct breach of the principle of non-refoulement. It is impossible to conceive that the framers of the 1980 or 1996 Hague Conventions could have intended that orders of an interim procedural nature could be made thereunder in direct conflict with that key principle. In my judgment, the existence and resolution of the asylum claim amount to 'exceptional circumstances' within the terms of article 11.3 of the Brussels 2 revised regulation.
>
> 18. If I needed to find a source of the power to refuse to make an order in such circumstances it would be article 20 of the 1980 Convention, which is plainly part of our national law notwithstanding that it escaped incorporation by the Child Abduction and Custody Act 1985."

34 His Lordship refers at [21] to his conclusion having accorded:

> "21. ...with the interesting and erudite decision of Mr Justice Hayden in *F v M & Anor* [2017] EWHC 949 (Fam). In that case the question was whether the court should exercise its powers under the inherent jurisdiction of the High Court to order a summary return of a child, who had been granted asylum, to Pakistan. [He quotes Hayden J at [44]]:

> ‘It seems clear that the grant of refugee status to a child by the SSHD is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction.’

I fully agree with this. In my judgment, it matters not whether the power that is sought to be deployed to effect a return is pursuant to the inherent jurisdiction or to the 1980 Hague Convention. Either way, a return order would breach the principle of non-refoulement.”

35 Turning then to the case to which Mostyn J referred, *F v M and Another* [2017] EWHC 949 (Fam), this followed the Court of Appeal decision in *Re H* [2016] EWHC Civ 988. In the Court of Appeal decision Black LJ said,

36 “39. The starting point for a consideration of the implications of [this child’s] refugee status will have to be ... that at the very least it is unlikely to be appropriate for the family court to order [his] return to Pakistan without first concluding that his situation did not, in fact, justify the protection afforded by the Secretary of State. It needs to be recognised that the position may go further in that, if some of the submissions made to us are correct, it might not even be permissible for the family court to order [the child’s] return unless and until his refugee status is revoked. The questions that will need to be addressed include at least the following...”

“i) Is [the child’s] refugee status an absolute bar to the family court ordering his return to Pakistan?

ii) If so, by what process can the father challenge the refugee status, given that he denies the allegations of violence by the mother and A upon which their asylum claims were based?...

iii) If the family court determines whether there has been a misrepresentation, on what basis does it do so?...

iv) If [the child’s] asylum status is not an absolute bar, how should it be taken into consideration in the family proceedings? ...how [should] the court ... resolve the factual debate between the parties.

v) Does it make any difference that, strictly speaking, [the child in that case] probably has humanitarian protection rather than protection as a refugee?”

37 Hayden J decided the case which was remitted from the Court of Appeal, taking those questions (obviously) very much as his starting point. I note that at [44], Hayden J says this:

> “44. ...it seems clear that the grant of refugee status to a child by the SSHD is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction.”

38 At [49]:

"49. The objective underpinning this guidance is to enable the Family Court to take decisions relating to children, in timescales which keep their needs in sharp focus and avoid delay. Passport and visa applications relating to children will often need to be resolved before the Court can make decisions in their best interest. An application for Asylum however, has an entirely different complexion to it. It will invariably involve material of a highly distressing and personal nature. Asylum seekers are informed, precisely because of these often exquisitely sensitive issues, that the information they provide will be treated as confidential and will only be disclosed where there is a requirement in law to do so. As Mr Norton [leading counsel for the Secretary of State] emphasised, this is made plain to those seeking asylum in very clear terms at the start of the asylum process.

50. This emphasis on confidentiality is fretted throughout the investigative process. In order to maintain confidentiality, examinations are always conducted in private in circumstances where ... 'the individual has a reasonable expectation that their privacy would be protected'. [As Mr Norton submits]:

> 'The legal basis for the need to protect information regarding a person's claim for asylum and any subsequent grant of refugee status (or refusal of the same), is that a duty of confidence arises at common law.'

51. This approach finds support in the obligations imposed by Articles 22 and 41 [of the Procedures Directive] ... 41 obliges the Member States to:

> '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'.

52. Further, to summarise the submission on this point, it is contended on behalf of the SSHD that it is axiomatic that information pertaining to any asylum claim is, in the light of its sensitive nature, rarely in the public domain. In their written document Mr Norton and Mr Payne make the following, and in my judgement, compelling submission:

> 'Confidentiality is a vital element for the working of the asylum system and the proper discharge by the UK of its obligations under the Refugee Convention... The need for those seeking asylum to have confidence that the information they provide will not be made public means that there is a compelling public interest in ensuring that this confidentially is protected. This applies *a fortiori* to those granted refugee status (where the risk of harm has been established). For these reasons the SSHD considers that such disclosure should not take place absent exceptional circumstances and a Court order'."

39 Hayden J then quotes the submissions made by Ms Fottrell QC in relation to procedural obligations and the interlink with European law from [53] to [59].

40 "60. Whilst it is undoubtedly correct that [the child and father's] Article 8 rights are engaged here and that procedural fairness is an indivisible facet of these rights, it is equally important to recognise that the duty of confidence to the claimant, in common law, also falls within the embrace of Article... More widely, this reasonable expectation of privacy is intrinsic to the operation both of the asylum system generally and the proper discharge by the UK of its obligations under the Refugee Convention, QD and ECHR... [He then quotes from the submission from Mr Norton and Mr Payne]:

> 'Accordingly, when considering whether to order disclosure the Court will need to consider whether disclosure would be compatible with the refugee's ECHR rights, and in particular their Article 3 and 8 rights. In addition, in considering proportionality under Article 8 the Court will need to attach particular weight to the wider powerful public interest in protecting the confidentiality of the asylum process. This is particularly so where the applicant ... is the alleged persecutor. Against these considerations the Court will need to weigh, in the case of an application made by a family member, any adverse Article 6 and/or 8 impact of disclosure not being provided to the person making the application. The SSHD's position is that only where an exceptional case is established by an applicant will disclosure be necessary'."

41 Hayden J says at [61]:

> "61. Whilst I accept and endorse much of this, 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.
>
> 62. It also requires to be stated that the SSHD will frequently be better placed than the Court to conduct the balancing exercise when identifying whether or to what extent disclosure should take place."

Discussion

42 It is accepted that the child was wrongfully removed by his mother from the country of his habitual residence on 17 February 2016. An independent Tribunal Judge has found the mother to be consistent and credible in her evidence and that there is a real risk that she and the child would face ill-treatment at the hands of her husband if returned to DD. This grant of refugee status has not been challenged. The child has now issued his own asylum

application. A refugee cannot be returned to the state of persecution unless and until that state has been revoked and all appeals have been determined. That much seems clear from the decisions in *FE v YE* by Mostyn J and in *F v M and another* by Hayden J. I have not been referred to any authority where a child with refugee status, whether on the child's own behalf or a dependent, has been returned to the home country. Importantly, for the purposes of this application, I have not been referred to any authority where a court has granted disclosure of a pending asylum file.

43 Counsel for the Secretary of State has confirmed to this court the categories of material which his client has considered in respect of this application. I can be satisfied that he has done this properly in the discharge of his duties. There is no exceptionality test. All advocates accept that there is a balancing exercise to be carried out by the court and in respect of the father's application for disclosure, this court needs to consider whether this would be compatible with the mother and the child's rights, in particular, their Article 3 and Article 8 rights. I must attach particular weight to the wider public interest in protecting the confidentiality of the asylum process, especially as here where the applicant is the alleged persecutor. It is also, of course, extremely important to weigh the father's Article 6 and Article 8 rights and the impact on him of not having the disclosure which he seeks. As Hayden J said, there is no presumption that there would be disclosure only in an exceptional case and the balancing exercise is one for the court. I accept, as did the learned Judge, that the Secretary of State will frequently be better placed than the court to conduct the balancing exercise when identifying whether or to what extent disclosure should take place but, nonetheless, the decision is one for me alone advised by the parties before me including the Secretary of State.

44 The emphasis on confidentiality is, indeed, fretted through the investigative process of asylum application and is a vital element for the working of the asylum system. There is a reasonable expectation of privacy which is essential to the operation of the asylum system and essential to the United Kingdom obligations under refugee conventions. I accept the submission of the Secretary of State that there is a compelling need for those seeking asylum to have confidence in the system and to have confidence that the application which they make and any resulting material will be kept confidential. If disclosure is ordered from a completed or, perhaps even more importantly, a pending application, that, in my judgment, could have a serious effect on the integrity of the asylum process.

45 Weighed against that are very important rights of the father's and indeed the child's to a fair trial under Article 6 and a right to private and family life under Article 8. The role of the court is to consider how those rights might be respected. The father has a great deal of information about the mother's asylum application already, far, far more than 'a gist'. He has the detailed refusal letters and the full unredacted ruling by the independent judicial tribunal describing the mother's consistent account. He has the mother's detailed statements and exhibits provided both in these proceedings and in the asylum proceedings. He puts a great deal of emphasis on a forged affidavit produced by the mother. The mother accepted from the point of her asylum interview that she forged it and the Tribunal Judge knew of her account and accepted its use in order to leave DD. Quite frankly in those circumstances, I cannot see why emphasis is being placed on its disclosure. I fail to see how disclosure of this document necessarily outweighs the other competing arguments as to confidentiality.

46 Do these documents have any relevance to the settlement defence? The mother will seek a finding that H is settled in this country pursuant to Article 12 relying on, amongst other things, the guardian's report. H has lived here since 2016, over three years ago. The mother is not just relying on the fact he has refugee status, she is relying on his actual settlement in this country. The father submits that the asylum documentation is needed to challenge the

assertion that the child's environment is settled. Mr Devereux QC argues that from the guardian's report, it can be seen that this child is not positive about his father or his home country and he says that the trial judge will need to enquire into the child's environment in order to assess if he is actually settled and that the asylum documentation is needed to do this. In my judgment, I find it very hard to see what effect the asylum documentation, over and above what else the father has, would have upon consideration of the question of settlement. The father is able to ask questions of the guardian, if the trial judge permits. He may make submissions on the many documents that the mother has made available and also make submissions upon the guardian's report. The trial judge will have the full judgment of the tribunal and the evidence to which I have already referred provided by the mother. The trial judge will be not sitting on appeal from the Tribunal Judge.

47 Just turning to the arguments that were raised by Mr Devereux QC in oral submissions at the adjourned hearing, raising as he did the question of whether the Secretary of State should have made a public interest immunity application, I note and agree with the remarks of Hayden J in *F v M and another*, that the Secretary of State "will frequently be better placed than the Court to conduct the balancing exercise when identifying whether or to what extent disclosure should take place". There is, as I can see, no reference in that case to the necessity of special advocates being appointed to assist. I am puzzled as to what benefit there would be to the system of having special advocates and I can only imagine negatives to which I will refer in a moment.

48 In conclusion, the mother has undergone an asylum application for herself and her child. The original determination of the Secretary of State was lawfully challenged by her. The Tribunal Judge's detailed decision is available and has not been challenged. For as long as the mother and her dependent child have refugee status, they will not be returned to DD. The child himself has a pending application and I cannot imagine circumstances in which a child, subject to a pending asylum application, would be returned summarily to his home country.

49 The father's High Court application for the summary return of his child, who has been in this country for now over three years, will be heard by MacDonald J as the trial judge; I have no doubt that he will conduct that hearing in accordance with Hague Convention law and procedures and principles alongside the relevant ECHR law and procedure. The burden of proof, of course, is on the mother to prove one of the exception defences. The father will play a full role in those proceedings and is very well represented. The Secretary of State, I find, is best placed to advise the court as to disclosure. He has demonstrated that he is fully aware of the issues raised by the father in his detailed position statement and still makes the recommendation that he does that there should be no disclosure. It is my role to balance those competing rights and in summary, as I have said already, confidentiality, in my judgment, is extremely important for the asylum system. Public confidence and the effective operation of the asylum system and refugee convention is very important.

50 I am satisfied that the impact upon the integrity of the asylum process, if disclosure to this father were ordered from the mother's asylum file, does outweigh any impact on the Article 6 and Article 8 rights of the father and child which might arise from non-disclosure. This is even more acute if there was disclosure of the child's pending asylum application. The father has available to him a large amount of documentation to which I have already referred. He has access to material by which he can pursue his application under the Hague Convention. He has vastly more than the gist of her case. He can make submissions through his counsel. This respects his and the child's Article 6 and Article 8 rights.

51 Further, I do not accept that full disclosure of the asylum documents is needed to decide the question of the child's actual settled status in this country given the amount of information already available to the father and the court. He will be properly engaged in this process by consideration of the material already available and this would maintain the confidentiality of the process that the mother underwent. The child is currently undergoing and maintains public confidence in the confidentiality of the asylum process. The material in the mother's case and the child's pending case is linked. If there was disclosure to the court of an asylum application and documents even before it has been lawfully determined, in my judgment, that would have an extremely negative effect upon the public trust in the asylum process.

52 Turning finally to the question of special advocates. The circumstances in which special advocates are used in cases are very rare. If there is disclosure of any of the asylum documentation to the guardian, and/or to the court, and/or to special advocates, as is suggested by the father, in my judgment, that would still impact upon the integrity of the asylum process and upon the emphasis of confidentiality in asylum applications. The Secretary of State would not be able to give any assurances as to the confidential nature of material provided by an applicant for asylum. The suggestions made on behalf of the father involving special advocates lessens the assurance of confidentiality which, as Hayden J said, was fretted through the asylum process.

53 If special advocates were thought appropriate in this case, I ask myself: what differs from every Hague Convention case where asylum disclosure is resisted? I have not been provided with an authority to suggest that special advocates have been used in similar circumstances, in particular, in the detailed judgment of Hayden J, it does not appear to have been a suggestion either made to him or considered by him.

54 In summary, applying the law to this case, I am entirely satisfied that the necessary and proportionate step for me to take is to refuse the father's application for disclosure of the mother's asylum file and/or the child's pending asylum file, and/or the instruction of special advocates, and/or disclosure to the court and/or the guardian.

55 The directions order which has already been made listing the matter before MacDonald J on 5 June simply needs to be amended to extend that timescale to one day.

56 That concludes my judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

**** This transcript has been approved by the Judge ****