Neutral Citation Number: [2020] EWCA 1001

Case No: B4/2020/0719 AND 0721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT FAMILY DIVISION
The Hon Mr Justice MacDonald
FD19P00347

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2020

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF H (A CHILD) (DISCLOSURE OF ASYLUM DOCUMENTS)

Between :

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
(2) G	
- and -	
(1) R	**Respondent**
(2) H (by his children's guardian)	

- -
- -

Alan Payne QC and John Goss (instructed by **Government Legal Department**) for the **Secretary of State**
Christopher Hames QC (instructed by **Broudie Jackson Canter**) for the **Second Appellant mother**
Edward Devereux QC and Mehvish Chaudhry (instructed by **Bindmans LLP**) for the **First Respondent father**
Michael Edwards (instructed by **Cafcass Legal**) for the **Second Respondent child, by his children's guardian**

Hearing date: 10 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals

Judiciary website. The date and time for hand down is deemed to be 10:30 on Wednesday 29 July 2020

LORD JUSTICE BAKER:

1. This judgment concerns two appeals against an order by MacDonald J for disclosure made in private family proceedings under the Children Act 1989 concerning a boy, H, now aged 9. The appeals are brought by the Secretary of State for the Home Department and the boy's mother. The order under appeal requires the mother to disclose to the solicitors acting for the father and the child redacted copies of certain documents contained in the mother's asylum file. The order was made following two judgments delivered by the judge – the first, dated 18 November 2019, in which he set out the principles he proposed to apply in reaching his decision on the father's application for disclosure of the documents, and the second, dated 4 May 2020, in which he set out his reasons for ordering disclosure.

2. At the conclusion of the hearing before us, we indicated that the appeal would be dismissed. This judgment sets out my reasons for agreeing with that decision.

Brief summary of background

3. The mother, father and child are nationals of an African country. In February 2016, the mother and child left that country without the father's knowledge and travelled to London. On arrival, the mother claimed asylum, including the child as a dependent, alleging that she had fled her home countrybecause of chronic domestic and sexual abuse inflicted on her by the father in the child's presence and sexual abuse of the child. She said that were she to return to her country of origin there was a substantial risk that the father and/or his family and associates would kill her or inflict further physical abuse.

4. In the course of the examination of her application, the mother was interviewed and provided information in support of her claim. By letter, dated 24 April 2017, the Secretary of State accepted the mother's account of abuse perpetrated by the father, but refused the claim for asylum on the grounds that she could relocate within her country of origin away from the danger posed by the father and his family. The mother appealed to the First-tier Tribunal which, on 11 September 2017, allowed her appeal, as a result of which she was granted leave to remain and refugee status as a recognised refugee. In her determination, the tribunal judge stated that the mother's claims, including her claim that she could not safely relocate within her country of origin, were credible and that she had established that her fears of persecution were well founded.

5. In December 2018, the father issued proceedings for the return of the child under the Hague Child Abduction Convention. The mother opposed the application. During the proceedings, the father applied for disclosure of the information provided by the mother in the course of her asylum application. That application was refused by HH Judge Corbett, sitting as a judge of the High Court. The father then withdrew his application under the Convention and issued proceedings for a child arrangements order under the Children Act 1989.

6. Meanwhile, an application on behalf of the child for asylum in his own right was issued, relying on the material provided in support of the mother's claim, and subsequently granted on 12 May 2020.

7. Within the Children Act proceedings, the father again applied for disclosure of the asylum file. The Secretary of State was invited to intervene in respect of the disclosure issues. She accepted the invitation and opposed the application, as did the mother. That application was considered by MacDonald J at two hearings and determined over two judgments. In the first, reported as *R v G and Secretary of State for the Home Department (Intervener)* [2019] EWHC 3147 (Fam), the judge set out his analysis of the general principles applicable in private law family proceedings when determining applications for disclosure of confidential material obtained in the course of asylum claims. In the second, reported as *R v G and Secretary of State for the Home Department (Intervener)(No.2)* [2020] EWHC 1036 (Fam), he considered the application of those principles to the facts of this case and concluded that a number of documents from the asylum file should be disclosed in a redacted version. In the course of determining the application, the judge read all of the documents which the Secretary of State and the mother sought to withhold, in accordance with the procedure set out in FPR 21.3(6).

8. The Secretary of State and the mother filed notices of appeal against the disclosure order. On 29 May 2020, King LJ granted permission to appeal and imposed a stay on the implementation of the disclosure order until the appeal had been determined.

The Law

9. The court was greatly assisted by a detailed exposition of the legal framework to refugee claims and claims for humanitarian protection set out in an annex to the Secretary of State's skeleton argument. For the purposes of this judgment, however, it is only necessary to refer in outline to some of that framework.

International instruments and domestic regulations

10. The Geneva Convention 1951 relating to the Status of Refugees defined the term "refugee" and provided a number of substantive rights to which refugees are entitled. Under Article 1A, the term "refugee" shall apply to "any person who"

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as result of such events, is unable or, owing to such fear, is unwilling to return to it."

11. The Geneva Convention has never been formally incorporated or given effect in UK domestic law. It is, however, given significant weight as result of the terms of s.2 of the Asylum and Immigration Appeals Act 1993, which provides that:

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

12. The extent to which the Convention is applicable in domestic law was described by Stanley Burnton LJ in *EN (Serbia) v Secretary of State for the Home Department* [2010] QB 633 in these terms:

> "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 affects 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."

13. Under Article 6(1) of the Treaty of the European Union, the UK is bound to act in accordance with the rights protected by the Charter of Fundamental Rights of the European Union. Article 18 of the Charter provides that:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention on 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty of the European Union and the Treaty on the Functioning of the European Union …."

14. Council Directive 2004/83/EC is entitled "minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". Article 13 of the Directive requires the grant of "refugee status" to those recognised as refugees by a Member State and Article 18 provides for subsidiary protection for those who are at risk of serious harm but do not qualify as a refugee.

15. Council Directive 2005/85/EC (hereafter "the Procedures Directive") sets out "minimum standards on procedures in Member States for granting and withdrawing refugee status". It includes the following recitals:

> "(7) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person is a refugee within the meaning of Article 1(A) of the Geneva Convention.

> (8) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union."

Article 22 of the Procedures Directive provides:

> "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 dependents, or the liberty and security of his/her family members still living in the country of origin."

Article 41 of the Procedures Directive obliges 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."

16. In accordance with the 2004 Council Directive, the term "refugee" is defined in UK domestic law in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 as meaning a person who falls within the Geneva Convention. The Immigration Rules have been drafted in terms which ensure compliance with the two Council Directives. Thus, under paragraph 334(v) of the Rules, an applicant will be granted asylum in the UK if the Secretary of State is satisfied that:

> "refusing his application would result in him being required to go … in breach of the Geneva Convention to a country in which his life or freedom will be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

Paragraph 339IA provides:

> "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 dependents, or the liberty and security of their family members still living in the country of origin."

17. The rules of court set out the procedure to be followed when deciding whether documents should be disclosed into court proceedings. In family proceedings, the procedure to be followed in such circumstances is set out in Family Procedure Rules rule 21.3:

> "(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 claim; 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 (3) 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 (3) 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 grounds that its disclosure or inspection would damage the public interest."

The terms of the rule follow almost precisely the provision in civil proceedings in CPR 31.19.

Case law

18. In *Science Research Council v Nasse* [1980] AC 1028 at page 1065, Lord Wilberforce observed:

> "There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone."

The approach to be followed by a court when deciding whether confidential documents should be disclosed into proceedings has been broadly settled for many years. It was summarised by Lord Cross of Chelsea in *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No.2)* [1974] AC 405 at p413:

> "What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other."

19. Since the incorporation of the European Convention on Human Rights ("EHCR") into our law via the Human Rights Act 1998, this weighing up of considerations has been expressed in terms of a balancing of competing ECHR rights. The approach to be adopted was summarised by Maurice Kay LJ in this court (sitting with Munby and Tomlinson LJJ) in *Durham County Council v Dunn* [2012] EWCA Civ 1654:

> "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."

20. In conducting the balancing exercise, appropriate weight must be attached to the parties' rights to a fair trial under Article 6 of ECHR. In *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 at paragraph 89, Munby J (as he then was) set out the following principle:

> "Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary."

This approach, and in particular the passage cited above, was endorsed by this court in *Re B, R and C (Children)* [2002] EWCA Civ 1825.

21. In *R v McGeough* [2015] UKSC 52, the Supreme Court considered arguments advanced by a defendant in criminal proceedings against the disclosure into the proceedings of information he had disclosed in support of an asylum application in Sweden. Lord Kerr, with whom the other Justices agreed, put forward the following analysis of the extent of confidentiality attaching to such information:

> "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 underlies article 22 of the Procedures Directive ….
>
> 23. As the appellant 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 appellant'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 appellant 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 appellant, therefore.
>
> 27. Neither of the specific provisions of the Directive that the appellant 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 charter of confidentiality for such material.
>
> 28. The fact, if indeed it be the fact, that material which an applicant for asylum in the United Kingdom supplied, in circumstances such as those which confronted the appellant when making his application in Sweden, would not be disclosed here, likewise cannot assist his case. The information which the Swedish authorities provided was properly and legally supplied. When the authorities in this country obtained that material, they had a legal obligation to make appropriate use of it, if, as it did, it revealed criminal activity on the appellant's part."

22. In *F v M and another (Joint Council for the Welfare of Immigrants intervening)*. [2017] EWHC 949 (Fam), Hayden J had to consider by way of preliminary issue whether the decision of the Home Secretary to grant a child, A, refugee status provided an absolute bar to the court in family proceedings ordering his return to another country and, if so,

by what process the child's father, F, could challenge the refugee status, given that he denied allegations made against him on which the asylum claim had been based. Hayden J held that the cumulative effect of the Geneva Convention, immigration legislation and rules, and the two Council Directives cited above was that the determination of the refugee status of any adult or child fell entirely within an area entrusted by Parliament to the Home Secretary so that the court in family proceedings could not intervene. He added, however, that, were the court to make findings of fact which undermined the allegations in which the asylum claim had been based, the Home Secretary would be duty-bound to reconsider her decision to grant asylum.

23. In the course of his judgment, Hayden J made a number of observations about the extent of the confidentiality attaching to documents generated by the asylum process. At paragraph 52, he described as "compelling" the submission made to him on behalf of the Secretary of State that:

> "confidentiality is a vital element for the working of the asylum system …. 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 confidentiality is protected. This applies *a fortiori* to those granted refugee status."

Later in the judgment, Hayden J continued:

> "60. Whilst it is undoubtedly correct that both F and A'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 8 (see *Campbell v MNG Ltd* [2004] UKHL 22). 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. Mr Norton and Mr Payne [counsel for the Home Secretary] address this necessary analysis of the competing rights and interests in play in these terms:
>
> > "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 for disclosure 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."

> 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."

The judgments in this case

24. In his first judgment, *R v G and Secretary of State for the Home Department (Intervener)*, having considered the provisions of the international convention, statute and European and domestic regulation, and the case law to which he had been referred, MacDonald J drew these conclusions about the confidentiality of documents filed in support of an asylum application:

> "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."

He then proceeded to consider the conduct of the balancing exercise when determining an application for disclosure of confidential asylum documents.

"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 Art 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."

25. In paragraph 77, MacDonald J then gave guidance as to the correct procedure to be followed under FPR rule 21.3 where a party to private law proceedings under the Children Act wishes to withhold disclosure and/or inspection of documents from the asylum process that he or she is otherwise required to disclose under the duty of full and frank disclosure. Having rejected a submission by the mother and the Secretary of State that the existence of material already available to the father negated the need for disclosure and inspection of the disputed material in this case, he then gave directions requiring the mother to produce to the court documentation from the asylum process she had received from the Secretary of State which she contended should not be disclosed or inspected by the father and for a process leading to the determination by the court of whether the material should be disclosed.

26. In the second judgment, *R v G and Secretary of State for the Home Department (Intervener) (No.2)*, MacDonald J (at paragraph 13) reiterated the principles to be applied by citing paragraphs 68 to 74 of his first judgment. He recorded that counsel for the Secretary of State had made further submissions regarding the relative weight that the court should attach to the various factors informing the balancing exercise. By the date of the second hearing, the further application for asylum on behalf of the child had been made but not determined. The Secretary of State submitted that, whatever the outcome of the balancing exercise by reference to the legal principles set out in the previous judgement, any disclosure order could not take place until such time as the child's pending asylum application had been determined. Having summarised the submissions made on behalf of the parties and read the disputed documentation, the judge concluded that certain documents identified in paragraph 33 of the judgment should be disclosed, suitably redacted.

27. The judge proceeded to set out the reasons for his decision. First (at paragraph 34), he declared that, whilst it would not be appropriate for disclosure to take place until such time as the child's asylum application had been determined, he was satisfied that the balancing exercise could fairly be carried out prior to that determination. In so deciding, he had regard to the overriding objective in Part 1 of the FPR, in particular the duty to deal with issues expeditiously and saving expense, and the need to avoid a further hearing on the disclosure issue. Secondly, he declared (at paragraph 35) that he was satisfied that the documents identified met the test of relevance:

> " … each touches and concerns the accounts given by the mother of the matters of fact now in issue before the court. As I have

> observed, that documentary material might be said, *prima facie*, to lend some support to the mother's case in terms of a degree of consistency that is apparent across the accounts provided by the mother within the asylum process and the accounts provided by her within the family proceedings, as well as containing inconsistencies that offer potential lines of forensic enquiry for the father and are relevant of credibility of the mother. Within this context, the Secretary of State concedes that the documents in issue are, *prima facie*, relevant to the issues of fact before the court."

28. At paragraph 36, he summarised his approach to the balancing exercise in these terms:

> "The court has to consider first whether disclosure of the material would involve a real possibility of significant harm to the child. 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. 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."

29. The judge then identified three factors which tended to militate against disclosure of information from the asylum documents in this case, namely (1) feared harm to the mother or third parties, (2) harm to the child and (3) "harm to the public interest in the operational integrity of the asylum system more widely as the result of the disclosure of material that is confidential to that system, such confidentiality being the very foundation of the system's efficacy" (paragraph 37).

30. With regard to the risk of harm to the mother, the judge observed (at paragraph 38) that no evidence has been adduced on her behalf articulating how disclosure would create a greater risk, given that the father was unaware of the mother's whereabouts in this country. He noted that the tribunal had concluded that, if the mother and child returned to their country of origin, there was a risk that they would be located by the father via family members, but concluded that, as they were now residing in this country, no such risk arose. Similarly, no evidence had been adduced as to the risk to third parties, and the judge observed that any such risk could be ameliorated by redaction of the documents. He reached a similar conclusion about the risk of harm to the child (paragraph 39). Indeed, it was his view that the greater risk of harm to the child lay in relevant evidence *not* being disclosed and the court reaching the wrong decision about welfare issues.

31. As for the contended risk of harm to the integrity of the asylum system, the judge (at paragraphs 41 to 43) stated that he placed significant weight on the importance of preserving confidentiality, which was important to the asylum process "on two levels".

> "41. First, with respect to the individual asylum seeker, any breach of the confidentiality promised to that asylum seeker may risk harm to that person or to members of their family and to friends and acquaintances in their country of origin. Given the circumstances that drive individuals to seek asylum, such harm may extend to a breach the right to life under Art 2 or the right to freedom from torture or other cruel of inhuman treatment under Art 3 (see *Re B (Disclosure to other Parties)* [supra] at [64] to [66] and *A Local Authority v A* [2010] 2 FLR 1757). However, and as have set out above, the extent to which this risk will manifest itself in a given case falls to be evaluated by reference to the *evidence* in that case.
>
> 42. Second, and more widely, I accept Mr Goss' submission that, beyond the need to keep individual asylum seekers safe, the confidentiality of the asylum system allows the Secretary of State to encourage full and frank disclosure from those seeking asylum and, in addition, increases the ability of the Secretary of State to make effective and accurate decisions about international protection and to produce guidance and policy in respect of the same from this crucial source of information about particular countries, trends, and migration and trafficking routes.
>
> 43. Within this twin context, I accept that there is a public interest in ensuring that the confidentiality of the asylum process is protected and I am satisfied that in this case that that public interest must attract significant weight in the balancing exercise."

32. Turning to factors on the other side of the scales favouring disclosure of the information, the judge identified, "as counterweights to the public interest in maintaining the confidentiality of the asylum process", the father's right to a fair trial under Article 6, the substantive and procedural elements of his rights under Article 8, and the common law principles of fairness and natural justice. He observed (at paragraph 47-8):

> "47. … I am satisfied that the Art 6 rights of the father and the procedural aspects of his Art 8 rights should be accorded very significant weight in the balancing exercise the court is required to carry out in determining whether to order the disclosure to the father of material relevant to the issues of fact before the court. In these proceedings under Part II of the Children Act 1989 the mother levels against the father allegations of the utmost seriousness, asserting that he is the perpetrator of domestic abuse and child sexual abuse. The father strongly disputes the allegations made by the mother (and indeed positively asserts they are fabricated). The nature of the allegations is such that if found proved they are likely to have a very significant impact on the future determination of H's welfare and, in particular, the extent to which the father and son are able to enjoy a relationship with each other. The mutual enjoyment by father and H of each

> other's company constitutes a fundamental element of family life within the meaning of Art 8(1) of the Convention and, subject to the provisions of Art 8(2), domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8(1).
>
> 48. Within this context, the authorities make clear that, when considering questions of disclosure and inspection in family proceedings, the court is required jealously to guard the Art 6 right of the father to a fair trial. It is a fundamental principle of fairness and natural justice that the father is entitled to have sight of all materials which may be taken into account by the court when reaching a decision adverse to him, including the determination of any allegations levelled at him. The same principles apply with respect to procedural elements of Art 8. A failure to disclose relevant documents to a parent within a process for determining contact arrangements between that parent and their child will not afford the requisite protection of the parent's interests as safeguarded by Art 8 unless that failure to disclose is justified by reference to Art 8(2) (see *McMichael v United Kingdom* (1995) 20 EHRR 205). In the circumstances, I am satisfied that it would be a highly unusual step to withhold from a parent facing serious allegations of domestic abuse and child sexual abuse evidence relevant to the determination of those allegations and a step requiring the strongest justification."

33. He rejected the Secretary of State's submission that the documents would add nothing to the fairness of the proceedings. Alleged consistencies and inconsistencies in the material offered potential lines of forensic enquiry and were relevant to the mother's credibility. He also rejected the submission that the information in dispute was sufficiently available elsewhere in a form that did not raise concerns about confidentiality. He observed that, considering the mother's credibility, there was no substitute for seeing contemporaneous documents recording her previous accounts and any corroborative evidence on which she relied in the asylum claim.

34. The judge also concluded that the child's right to a fair trial and his best interests and rights under Article 8 acted as counterweights to the public interest in maintaining the confidentiality of the asylum process. It was plainly in his best interests, which were the court's paramount consideration, for decisions as to his welfare, including the nature and extent of his future relationship with his father, to be taken on a fully informed basis. The judge added (at paragraph 52):

> "Within the context of the best interests of H being the court's paramount consideration in proceedings under Part II of the Children Act 1989, whilst the mother maintains that she does not seek to rely on this information the quasi-inquisitorial nature of the proceedings does not prevent the court from determining that this material, of which it is now aware and which is relevant to the proper determination of H's welfare, should be before the court (in which circumstances the father's Art 6 right to a fair trial also means he is also entitled to see the same)."

35. He therefore concluded (at paragraph 54) that in all the circumstances of the case the required balancing exercise came down in favour of the disclosure he was directing. The "strong public interest" in maintaining the confidentiality of the asylum system was overridden in this case by the Article 6 rights of the father and child in the procedural elements of their Article 8 rights, and by the child's best interests. Having reached that conclusion, the judge added these observations (paragraph 55 to 56):

> "55. …. The starting point must be that the father is entitled to consider all evidence that is relevant in that context, pursuant to his cardinal rights under the ECHR and the common law principles of fairness and natural justice, as is H. Given the gravity of the allegations in issue and the evidence before the court regarding the contended for risk of harm to the mother and H of disclosure, I am satisfied that these considerations outweigh the risk of harm to the mother and H and that the same is not, in this case, a clear and proper objective justifying withholding relevant evidence from a parent facing allegations of physical and sexual assault and child sexual abuse. Further, I am likewise not satisfied in this case that the public interest in maintaining the confidentiality of the asylum system generally is sufficient to justify the grave compromise of the fair trial and family life rights of father and H which non-disclosure of relevant corroboratory and contradictory evidence concerning allegations of domestic abuse and child sexual abuse of the utmost seriousness would entail on the facts of this particular case. For the reasons I have given, it would be an exceptional course for a parent in family proceedings, facing serious allegations of this nature, to be disadvantaged in comparison to other parents 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. In these circumstances, I am not satisfied that the accepted need to safeguard integrity of asylum process generally justifies in this specific case undermining the operation of cardinal rights that are one of the very reasons this jurisdiction is considered a safe haven for those seeking asylum.
>
> 56. Finally, I accept that my decision will result, upon the determination of H's claim for asylum, in the disclosure of certain documents from the asylum process to a person considered in the context of the asylum system to be a perpetrator. However, for the reasons I set out in my previous judgment, the fact that the person seeking disclosure is considered within the context of the asylum process to be a persecutor does not mean that, at the outset, the scales are weighted against disclosure and inspection following a successful claim for asylum. 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 between the various competing rights and interests on the basis of those facts. It is the balancing of those rights and interests on the facts of the particular case, and not the application of a general policy, that properly leads to the conclusion of whether disclosure should or should not take place in a given case. Within this context, this judgment constitutes no more than a decision on the particular facts of this case."

36. MacDonald J ended with two concluding paragraphs which, to my mind, summarise his approach to the issues arising on this appeal:

> "57. As I noted in my previous judgment, 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 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.
>
> 58. Within this context, 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. In this case, that balancing exercise comes down in favour of disclosure of the documents I have listed. In other cases, the balancing exercise will produce a different result on the facts. As I have stated, and repeat, this decision does not signal any change in the general approach to disclosure into family proceedings of asylum documentation. Rather, it constitutes no more than the application of settled legal principles to the very particular facts of this case."

Submissions on appeal

37. On behalf of the Secretary of State, Mr Alan Payne QC, leading Mr John Goss, re-crafted the grounds of appeal into the following four propositions.

(1) The judge's summary of the relevant principles in the first judgment failed to afford sufficient weight to the critical importance of confidentiality *vis a vis* the "persecutor" which underpins the Geneva Convention and the Procedures Directive. It was contended on behalf the Secretary of State that none of the information in the asylum documents should be disclosed to the father as the "persecutor" against whom allegations of abusive behaviour had been made which the tribunal judge had found to be credible.

(2) The judge's summary of the principles failed to afford sufficient weight to the public interest in maintaining the confidentiality of the asylum process as recognised in the analysis of Hayden J in his decision in *F v M*.

(3) The judge erred in making an order for disclosure of asylum material when the claim for asylum in respect of the child was still pending.

(4) The judge erred in failing to provide any or any adequate reasons for reaching a different conclusion as to the disclosure than that arrived at by HHJ Corbett in the Hague Child Abduction Convention proceedings.

38. With regard to her first argument, the Secretary of State drew attention to the absolute terms of paragraph 339IA – "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" (emphasis added), which reflects the wording of Article 22 of the Procedures Directive. Mr Payne relied on the statement in paragraph 22 of Lord Kerr's judgment in *R v McGeough* that

> "obviously such information should not be disclosed to those who have persecuted the applicant."

He submitted that this principle applied not only during the asylum proceedings but also afterwards, whether or not the claim for asylum has been established. The effectiveness of the asylum process hinges on asylum seekers having confidence in the assurances they are given that any information provided by them will remain confidential. Anything that undermines the assurances is likely to undermine the willingness of asylum seekers to provide full and frank disclosure which, in turn, would hamper the Secretary of State's ability to make effective and accurate decisions about international protection, whether in relation to individual cases or more widely. Mr Payne submitted that the judge failed to explain how the public interest in maintaining confidentiality acts as a complete bar to disclosure to the alleged persecutor during the asylum process but, once the claim has been established, the fact that disclosure is to the persecutor carries little or no weight. By saying, as set out in paragraph 56 of the second judgment, that the balancing exercise "depends on all of the facts of the individual case and the balance that is struck between the various competing rights and interests on the basis of those facts", the judge ignored the increased harm to the public interest in the confidentiality of the asylum process arising from an order for disclosure to a persecutor.

39. In respect of the second point – the confidentiality of the asylum process generally – Mr Payne submitted that, despite the judge acknowledging the need to attach significant weight to that confidentiality, it is clear from both judgments that he regarded the "cardinal right" to disclosure as the paramount consideration. This was evident, in

particular, from the observations at the conclusion of the second judgment in paragraph 55 that "it would be an exceptional course for a parent in family proceedings, facing serious allegations of this nature, to be disadvantaged in comparison to other parents 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." The Secretary of State contends that the terms in which this observation was couched illustrates the minimal significance the judge attached to the confidentiality of the asylum process. Under the judge's principles, the mere fact that material is *prima facie* relevant suffices to displace the public interest in maintaining confidentiality of the asylum process. Mr Payne submitted that the fact that material is *prima facie* relevant should be the starting point, as opposed to the endpoint, in the balancing exercise. As this Court observed in *Dunn v Durham County Council*, relevance is a matter of fact, degree and proportionality. Consequently, when carrying out the balancing exercise, judges are required to assess the degree of relevance and the prejudice arising from non-disclosure in order to determine the extent to which a party's Article 6 rights are compromised. Similarly, without a proper assessment of the degree of relevance, any conclusion about the impact on the child's best interests from non-disclosure is flawed. Furthermore, in this context the judge was wrong to decide that it was not relevant that significant aspects of the factual basis of the asylum claim were available to the father from material already disclosed.

40. In respect of her first and second arguments, the Secretary of State further submitted that the judge had failed to follow the approach of Hayden J in *F v M* by not accepting the submission that the public interest in maintaining confidentiality applied *a fortiori* when disclosure was sought from a refugee. Furthermore, he failed to have sufficient regard to the observation made by Hayden J 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.

41. As for the third point – the fact that the child's asylum was still pending when the judge reached his disclosure decision – Mr Payne drew attention to the apparent contradiction between the judge's comment in paragraph 72 of the first judgment – 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" – and his decision in the second judgment to make an order for disclosure of asylum material when the claim for asylum in respect of the child was still pending. It was submitted that, in making the order, he failed to consider the potential adverse impact on the willingness of the child to provide information in the course of the asylum claim. Furthermore, the decision was taken without knowledge of the details or outcome of the claim.

42. Finally, Mr Payne argued that the judge should have followed, or at least attached greater weight to, Judge Corbett's decision, in which she gave proper recognition to the views of the Secretary of State, as the person entrusted by Parliament with the operation of the asylum system and with ensuring that the UK complies with its international obligations.

43. On behalf of the mother, Mr Christopher Hames QC stressed that the mother opposed disclosure not because she feared that it would adversely affect her credibility in the fact-finding hearing but because the experiences described in the documents were distressing to her, and she feared that disclosure would infringe her right to confidence

and therefore her rights under Article 8. She never considered that material of a highly distressing and personal nature would be disclosed to the very person responsible for that distress. A further reason for opposing disclosure was that she feared the consequences for the third parties who had helped in her country of origin. Even the heaviest redaction of the documents would leave them vulnerable. As the father resides in that country, he is beyond the remit of the courts of this jurisdiction to control the wider dissemination of the material.

44. Mr Hames adopted the Secretary of State's interpretation of international instruments and case law. In particular, he submitted that the confidentiality provided by Articles 22 and 41 of the Procedures Directive was not confined to the asylum processes and that in paragraph 22 of his judgment in *McGeough* Lord Kerr was expressing a far broader principle. That interpretation was adopted by Hayden J in *F v M* but not by MacDonald J in this case. The judge's reliance on the analysis in *Re B* was inappropriate because Munby J in that case had not been concerned with a corresponding principle of confidentiality requiring significant weight. There was an even more compelling need for maintaining confidentiality where third parties provide information in the expectation that it would not be disclosed.

45. As to the conduct of the balancing exercise in the second judgement, Mr Hames submitted that the judge had failed to give sufficient weight to the mother's rights of confidentiality and privacy in the information she provided to the Secretary of State. Instead, he had wrongly rested his analysis on the father's "cardinal" Article 6 rights. He failed to consider the relevance of each document by reference to the specific allegations made in this case. He ought to have identified the specific reasons for ordering disclosure of each document and, in addition, his reasons for not ordering the disclosure of other documents sought by the father where he had concluded that the balance came down the other way. In reality, the relevance of the documents was marginal. The judge ought to have reached the same conclusion as arrived at by Judge Corbett that the father and the court already have the basis of the mother's narrative case from the judgment of the First-tier Tribunal.

46. Mr Hames contrasted the judge's observation in paragraph 43 of the first judgment – in which he accepted that the public interest in maintaining confidentiality of the asylum process should attract significant weight in the balancing exercise – with the assertion in paragraph 70 of the second judgment that no right would start with preferential weight. Mr Hames accepted that the test to be adopted was not one of "exceptionality" but nonetheless required very substantial weight to be placed on the confidentiality of the asylum file. In the event, the approach ultimately taken by the judge (in paragraph 55 of the second judgment) amounted to an introduction of a test of exceptionality the other way – that it would be an exceptional case for disclosure of the asylum file not to be ordered.

47. On behalf of the father, Mr Edward Devereux QC leading Ms Mehvish Chaudhry described both judgments as well-structured and comprehensive – they are, in Mr Devereux's words, "Rolls Royce judgments" in which the judge fully recorded the arguments presented to him and set out his analysis in considerable detail. In the first judgment, the judge carefully analysed the Procedures Directive and rightly concluded that it did not have the reach or impact contended for by the Secretary of State. There was no justification for ring-fencing a class of documents in the manner she proposed. Whilst acknowledging the importance of giving appropriate weight to the

confidentiality of the asylum process, the judge correctly identified that Article 22 of the Procedures Directive is of narrow ambit. He adopted and confirmed the approach, set out by Hayden J in *F v M*, that the court had to undertake a balancing exercise of the engaged ECHR rights, where no one might have preference over another, having regard to the particular facts of the individual case. Having analysed the principles in the first judgment, he repeated the core part of the analysis in the second judgment and then applied it to the facts of the case, taking into account the competing arguments of the parties. Reading the two judgments together, it was incorrect to say that he had regarded the right to disclosure as the cardinal right of paramount consideration. The approach he followed, as summarised in paragraph 55 of the second judgment, was entirely appropriate.

48. It was submitted that the Secretary of State's argument that the judge was required to assess the degree of relevance of each document in contention was unrealistic and disproportionate. Such an assessment could only be carried out in the light of all the other evidence once the full hearing was underway. Mr Devereux reminded the court that so often what is initially thought to be a matter of marginal relevance may over the course of the proceedings, and in particular following oral evidence, come to be seen as more important.

49. It was submitted on behalf of the father that the judge's decision to order disclosure notwithstanding the fact that H's asylum application was still pending was appropriate in the circumstances. His application followed in the slipstream of his mother's and the information on which it was based was exactly the same. Having regard to the principles of proportionality and the overriding objective, there could be no sustainable challenge to the judge's decision to resolve the two issues at the same hearing.

50. Finally, Mr Devereux submitted that there was no merit in the appellants' complaint that MacDonald J failed to follow the course taken by Judge Corbett. As he recorded at the start of his first judgment, "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". In the event, he had received far greater argument on the legal issues and was fully entitled to come to a contrary view.

51. Having opposed the application for disclosure in the Hague proceedings on the grounds that they were summary proceedings which did not involve a fact-finding process, the guardian through counsel Mr Michael Edwards recognised that very different considerations arose in the Children Act proceedings. The guardian took a neutral position on the disclosure application before the judge, beyond opposing a suggestion made by the Secretary of State that she, the guardian, might be best placed to review the documents herself.

Discussion and conclusion

52. In my judgment, it is clear from the passages of his judgments, which I have set out at some length above, that in his first judgment the judge correctly identified the applicable principles of law and in the second he applied them in a way which was fully within his discretion and cannot be successfully challenged in this Court.

53. I do not consider it necessary to embark on a lengthy further analysis of the principles or a restatement of the approach to be applied, which was succinctly set out by Maurice

Kay LJ in the passage from his judgment in *Dunn v Durham County Council* cited above. That approach is to be followed whenever a party or person asserts exemption from disclosure. Faced with such an assertion, the judge must conduct a balancing exercise, having regard to the competing ECHR rights, in particular 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, bearing in mind that the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary.

54. This approach applies to a range of documents in respect of which disclosure is often sought in family proceedings – police records, local authority files, information held by central government departments, medical records, therapeutic and counselling notes. As my Lord Phillips LJ observed during the hearing, all contested applications for disclosure involve private information. If the information was publicly available, no application would be needed. The weight to be attached to the confidentiality of the information varies from case to case, but the approach to the balancing exercise is the same. As this Court emphasised in *Dunn v Durham County Council*, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary because, as Munby J observed in *Re B*, in most cases the needs of a fair trial will demand that there be no restrictions on disclosure. It follows that the judge was right to say, at paragraph 55 of the second judgment, that the starting point in any analysis must be that a party to family proceedings is entitled to consider all evidence that is relevant, pursuant to his cardinal rights under the ECHR and the common law principles of fairness and natural justice.

55. For my part, I am not persuaded that the confidentiality of information relied on by an asylum applicant should be treated any differently from other categories of confidential information. The fact that the information was provided to the asylum authority on a confidential basis, and the public interest in maintaining the confidentiality of the asylum process, are both factors which the judge must take into account. The fact that, if disclosed, the information would be seen by the person accused of persecuting the applicant is manifestly a factor which carries weight in the balancing exercise. It is not, however, determinative. It is true that both Article 22 of the Procedures Directive and paragraph 339IA of the Immigration Rules impose a prohibition on the disclosure of information to the alleged persecutor but the preliminary words of both the Directive and the paragraph qualify that prohibition. In both instruments, the prohibition is expressed as applying "for the purposes of examining individual applications for asylum". As my Lord Phillips LJ pointed out during the hearing, these words indicate that the provisions of the Article in the Directive and the paragraph in the Rules are intended to give instructions as to how to deal with the information when considering applications for asylum. They do not prevent a court from ordering disclosure. Mr Payne sought to draw support from Lord Kerr's comment in paragraph 22 of his judgment in *McGeough*. But in the next paragraph, Lord Kerr observed that the stipulation in Article 22 "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 Supreme Court decision therefore provides no support for the Secretary of State's submission to us. On the contrary, it is a very strong indication that the judge's approach was correct. In my judgment, he was right to conclude that "neither the Refugee Convention, the EU Charter and Directives [n]or the

Immigration Rules provide for blanket confidentiality with respect to any alleged persecutor."

56. I do not accept the submission that the judge adopted the approach that the fact that disclosure is to the persecutor carries little or no weight or that he ignored the increased harm to the public interest in the confidentiality of the asylum process arising from an order for disclosure to a persecutor. Those submissions are unsustainable in the light of the repeated statements to the contrary in both judgments, in particular paragraph 71 of the first judgment (repeated at paragraph 13 of the second judgment), paragraphs 41 to 43 of the second judgment, and the judge's summary of his approach at the conclusion of his second judgment, that:

> "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".

57. I do not detect any significant difference between the judge's analysis of the principles and the earlier observations of Hayden J in *F v M*. I do not agree, however, with the observation of Hayden J at paragraph 62 of his judgment in *F v M* 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. On the contrary, it is the judge who is best placed to carry out the balance exercise since the judge alone has access to all of the evidence.

58. I would endorse the guidance as to the procedure to be adopted when considering an application for disclosure of this category of information set out by MacDonald J in paragraph 77 of his first judgment. I do not accept that it was incumbent on the judge to identify the specific reasons for ordering disclosure of each document. I agree with Mr Devereux that to require a judge at a case management hearing to assess the degree of relevance of each document in contention would be unrealistic and disproportionate. Furthermore, I do not agree with the Secretary of State's objection that the judge should have postponed a decision on the disclosure of documents until after the child's application for asylum had been determined. It was right to postpone the *disclosure* until the asylum process had concluded but to postpone a decision on whether the documents *should be disclosed* would have been unnecessary and disproportionate.

59. Equally, there is no merit in the Secretary of State's final argument that the judge failed to provide any or any adequate reasons for reaching a different conclusion to that arrived by Judge Corbett in the earlier proceedings. The proceedings under the Hague Child Abduction Convention were of a wholly different kind than the current proceedings under the Children Act. Whereas the former involved an application for summary return of the child without any consideration of welfare issues, the latter involve a fact-finding hearing leading to a full welfare evaluation. Unsurprisingly, as MacDonald J noted at paragraph 4 of his judgment:

> "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."

If the judge was obliged, as all parties agreed, to consider the question anew in the new forensic context, the fact that he reached a different conclusion from that arrived at by Judge Corbett does not call for any explanation, nor give rise to any ground of appeal.

60. As for the judge's conduct of the balancing exercise in the second judgment, it seems to me to be unimpeachable in this Court. As demonstrated in the passages cited above from the second judgment, he plainly had regard to all the relevant factors to be placed in the scales on either side. I have considered Mr Hames' submission that the judge failed to give sufficient weight to the mother's rights of confidentiality and privacy in the information she provided in support of her asylum application. But in paragraph 69 of the first judgment, he expressly identified that, 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 [emphasis added]"

This passage from the first judgment is cited in paragraph 13 of the second judgment. When carrying out the balancing exercise, the judge looked for evidence to support the mother's assertion that she was at risk of harm if the information she had given in confidence was disclosed but found that no such evidence had been filed. This demonstrates that he had her claim to confidentiality firmly in mind when conducting the balancing exercise. In my judgment, there is no merit in the submission that the judge overlooked the mother's rights.

61. I am satisfied that in the second judgment MacDonald J fairly and carefully applied the principles that he had correctly identified in the first. For these reasons, I concluded that the appeals should be dismissed.

PHILLIPS LJ

62. I agree that the appeal should be dismissed for the reasons given by Baker LJ.

PETER JACKSON LJ

63. I gratefully adopt Baker LJ's account of the international and domestic legal framework and for his analysis of the two judgments and the parties' submissions. I subscribed to the dismissal of these appeals for the reasons that I now give.

64. I would start by putting the legal issues into their factual context. In February 2016, when the mother and child came to this country, the child was aged 4½. He is now 9 and has not seen his father since. The father's Hague Convention proceedings seeking the child's return to the country of origin were withdrawn in June 2019, with HHJ Corbett having refused disclosure from the asylum file in May 2019. They were replaced seamlessly with Children Act proceedings in which the father seeks contact

and out of which these appeals arise. Some indirect contact has been taking place, but no substantive progress has been made with the proceedings themselves. A 5 day fact-finding hearing was finally due to begin before MacDonald J on 15 June (the week following the hearing of the appeals), but we are told that it was adjourned because the mother wishes to consider a further appeal.

65. In this way the father's application for disclosure from the asylum file has, I am afraid, become a cuckoo in the nest, severely delaying the resolution of important welfare issues. It has led to the judge giving one very substantial judgment of principle in November 2019 and another substantial disposal judgment in May 2020, followed by these appeals. As yet, the proceedings have no end date.

66. How then did the disclosure issue come about? The mother came to the UK, having managed to leave her country of origin by using a forged affidavit, which she readily admitted when she arrived here. She claimed asylum and was interviewed in August 2016. Her account was accepted but her claim was refused on the basis that she could relocate internally. The FTT disagreed and allowed her appeal in September 2017. When the father issued his Hague Convention summons in December 2018 (he had approached the authorities in his home country in July 2016, but they had taken over two years to forward his application), the mother exhibited the refusal letters and the FTT decision to her statement. The position was summarised in this way by HHJ Corbett:

> 45. … 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. …"

The question at that point was whether the child was settled in this country. HHJ Corbett found, rightly in my view, that further disclosure from the asylum file could add nothing in relation to that matter. The parties and the Secretary of State played a full part in the process.

67. The issue of disclosure was then raised again in the current proceedings, which have a broader remit. The judge read the asylum file and ordered disclosure of some 120 pages of documentation. He described those documents in this way at paragraph 35:

> " … each touches and concerns the accounts given by the mother of the matters of fact now in issue before the court. As I have observed, that documentary material might be said, *prima facie*, to lend some support to the mother's case in terms of a degree of consistency that is apparent across the accounts provided by the mother within the asylum process and the accounts provided by her within the family proceedings, as well as containing inconsistencies that offer potential lines of forensic enquiry for the father and are relevant of credibility of the mother."

68. The essential legal principles, set out by Baker LJ, have never been in doubt:

(1) A balance has to be struck between two important public interests: the right to a fair trial and the integrity of a confidential asylum process both for the individual applicant and for applicants generally.

(2) The approach to be taken to an exercise of this sort is set out by this court in *Durham County Council v Dunn* [2012] EWCA Civ 1654.

(3) Absolute confidentiality only applies during the process of examination of the asylum application: *R v McGeough* [2015] UKSC 52.

69. These principles were not contentious as between the parties. Instead, their submissions were aimed at persuading the judge to give preferential treatment on principle to confidentiality (the Secretary of State and the mother) or to procedural fairness (the father). That process has been replicated on appeal, with the parties submitting the judge's judgments to close textual analysis to show that at this point he wrongly privileged one consideration and at that point he wrongly privileged another: 'grave compromise' [55]; 'exceptional course' [55]; 'cardinal right' [57], and so on.

70. I believe that this jostling for position is wrong in principle. There must, as Baker LJ says, be a starting point and in any application for non-disclosure that will be framed by the question of whether non-disclosure is necessary. But that does not mean that the court holds a tilted scales. It is common ground that documents can be withheld from a litigant where necessary without breaching the right to a fair trial, and also that documents can be disclosed from an asylum file where necessary without imperilling the integrity of the confidential asylum system. The court's task is to identify which interest should prevail in the case before it and the answer is not to be found in legal generalities or contestable adjectives but in a close study of the individual circumstances.

71. It was in my view open to the judge to determine the father's application by a relatively swift application of established principles, particularly as there had just been a dress rehearsal of the arguments in the child abduction proceedings. As it was, he reached a considered decision with which we should be slow to interfere, particularly where he was so familiar with the issues and where he had read the asylum file, which we have not.

72. I nevertheless feel some hesitancy about the outcome. Taking the judge's description of the material at paragraph 35, quoted above, the existence of 'potential lines of forensic inquiry relevant to credibility' in the midst of an otherwise consistent account might have persuaded me that the grounds for withholding this disclosure had been made out. I may have given more weight to the importance of confidentiality for the asylum system, which resonates beyond the end of each individual application. That is particularly so where the father knows the case against him, the mother is not relying on the material to support her case, and the court will have a full opportunity to assess the witnesses. It was open to the judge to refuse disclosure for these reasons, but he reached a different conclusion after careful consideration. That was a judgement for him to make and it is not in my view open to us to say that his decision was wrong.