



Neutral Citation Number: [2020] EWHC 1036 (Fam)

Case No: FD19P00347

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

R

Applicant

-and-

G

First
Respondent

-and-

H

Second
Respondent

-and-

Secretary of State for the Home Department
(No.2)

Intervener

Mr Edward Devereux QC and Ms Mehvish Chaudhry (instructed by Bindmans) for the
Applicant

Mr Christopher Hames QC (instructed by Broudie Jackson Canter) for the **First**
Respondent

Mr Michael Edwards (instructed by CAF/CASS) for the **Second Respondent**

Mr Alan Payne QC and Mr John Goss (instructed by The Government Legal Department)
for the Intervener

Hearing dates: 1 April 2020

(The hearing was conducted remotely on Skype for Business)

Approved Judgment

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

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 4 May 2020.

MR JUSTICE MACDONALD

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in it) to be published on condition always that the names and the addresses of the parties and the children must not be published.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

Mr Justice MacDonald:

INTRODUCTION

1. The court remains concerned with a dispute between the parties regarding the disclosure and inspection of documentation from the successful asylum claim of the mother, G, represented by Mr Christopher Hames, Queen’s Counsel, into private law family proceedings between her and the father, R, represented by Mr Edward Devereux, Queen’s Counsel and Ms Mehvish Chaudhry of counsel. The family proceedings concern the welfare of H, born in June 2011 and now aged 8 years old. H is a party to these proceedings and is represented through his Children’s Guardian by Mr Michael Edwards of counsel.
2. Given the issues raised in this case, the Secretary of State for the Home Department has been given permission to intervene on this issue. The Secretary of State is represented at this hearing by Mr John Goss of counsel. The court has before it a Skeleton Argument drafted by Mr Alan Payne, Queen’s Counsel and Mr Goss.
3. The issue of disclosure and inspection of documents now before the court arises in circumstances where the private law proceedings in respect of H under Part II the Children Act 1989 will involve a finding of fact hearing in which the disputed allegations of physical and sexual assault and child sexual abuse made by the mother against the father, and which formed the foundation of the mother’s successful asylum claim, will fall to be determined by this court on the balance of probabilities as a precursor to determining the welfare issues in respect of H by reference to the principles set out in s.1 of the 1989 Act.
4. On 18 November 2019 I handed down a judgment following a hearing at which the court determined a dispute between the parties as to the correct legal principles to be applied and the correct procedure to be adopted where one party to private law proceedings under s. 8 of the Children Act 1989 seeks disclosure and inspection of documentation from the successful asylum claim of the other party for use in the family proceedings. That judgment was published as *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)* [2019] EWHC 3147 (Fam). The Secretary of State sought permission to appeal from the Court of Appeal but permission was refused by King LJ on the grounds that the application was premature, this court not yet having determined whether or not to order disclosure in this particular case based on its formulation of the applicable legal principles. That is the question that now falls for determination and the question which this second judgment addresses.
5. In deciding whether, and if so which, documents from the asylum process should be disclosed into the private law proceedings under the Children Act 1989 I have had the benefit of being provided with a copy of that documentation and have read it prior to the commencement of this hearing. Pursuant to the procedure I articulated in *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)* at this hearing I first heard submissions from Mr Goss on behalf of the Secretary of State and from Mr Hames on behalf of the mother with respect to the documents that are the subject of the application in the absence of Mr Devereux and Ms Chaudhry and Mr Edwards. Thereafter, I heard submissions from Mr Devereux and Ms Chaudhry and Mr Edwards in the presence of Mr Goss and Mr Hames on the wider points of

principle that the Secretary of State and the mother prayed in aid in opposing disclosure of the documents in issue, notice of which arguments of principle had been given to the father and to the Children's Guardian in writing.

BACKGROUND

6. The background to this matter is set out in my first judgment in *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)*. It is not necessary to repeat it here save to observe that the allegations on which the mother relied to make good her claim for asylum upon her arrival in the United Kingdom with H, and which she now pursues findings in respect of in these family proceedings, are as follows:
 - i) The father became domestically violent to the mother during the year following the year in which they were married and would physically and sexually abuse her;
 - ii) The mother reported the violence to the police who stated they would make an arrest, but this did not happen;
 - iii) The father's family have connections with the police in [country given];
 - iv) The father was arrested for fraud in 2014 and served nine months in prison;
 - v) On the morning of 24 January 2015 the mother witnessed the father sexually abuse H;
 - vi) The mother feared that if she returned to [country given] the father would kill her as she had witnessed the sexual abuse and she feared further domestic violence from the father.
7. It is also important to note again the following further matters that are relevant to the question of disclosure that is now before the court.
8. First, and as noted in the previous judgment of the court, the Secretary of State accepted the mother's claims of domestic abuse and of the sexual abuse of H but did not accept the mother's allegations that the father had made threats to kill her or that he had influence with the police in [country given]. On 24 April 2017 the Secretary of State nonetheless refused the mother's application for asylum on grounds that the mother had failed to demonstrate a genuine subjective fear and that, even if the mother's fears of the father were well founded, she could relocate internally in [country given] to a place where she would not face a real risk of harm.
9. The mother exercised her statutory right of appeal to the First Tier Tribunal. By a determination dated 11 September 2017 Judge Agnew, holding that the sole issue before the First Tier Tribunal was the validity of the Secretary of State's conclusion on internal relocation, allowed the mother's appeal, holding as follows within the context of the relevant standard of proof, namely a reasonable degree of likelihood:

“[18] I found the [mother] to be articulate, detailed, specific, consistent and credible in her evidence. I accept her claims that she and her son would be located in [country given] on return by [the father] via his family members and computer records. She gave details of the names of the appellant's

brothers and their positions within the police and prison force. This is far more information than is usual with asylum seekers claiming that they fear persons with influence in the security forces of the country from which they have fled. I accept that [the father] has filed a missing person's report and that the immigration authorities would be alerted to this fact on their return to the airport. Assuming they were returned, I find it has been established that there is a real risk both the appellant and her son would face ill treatment at the hands of [the father].

[19] The [mother] has been found to be credible in her claims which includes the claim that she cannot safely relocate with her son in [country given]. She has established that her fears of persecution on return are well-founded. The Refugee Convention is engaged and she has established that she and her son are entitled to international protection.”

10. Second, on 25 January 2019 Roberts J ordered the mother to file and serve in these family proceedings copies of her asylum application, all evidence in support of her asylum claim, her asylum interview and all of the decisions of the Secretary of State for the Home Department. On that date, no objection was raised by the mother to such disclosure and the documents were provided to the father's solicitors in accordance with the order of Roberts J. However, subsequently the mother *did* raise objection to the disclosure of documents from the asylum process. This appears to have been based on the mother's concern that the documentation contained names and pictures of people who had provided information which could compromise the safety of themselves and their families. At a hearing on 9 April 2019, and in light of her objection, the mother's asylum documentation was returned to her and the issue of disclosure of the asylum documentation was listed for determination before HHJ Corbett, who refused to order disclosure. That order was made in the context of then ongoing summary proceedings brought by the father under the Child Abduction and Custody Act 1985 for relief pursuant to the provisions of the 1980 Hague Convention.
11. On 13 June 2019 the father sought and was granted permission to withdraw his application under the Child Abduction and Custody Act 1985 for relief pursuant to the 1980 Hague Convention. The father issued his application under s. 8 of the Children Act 1989 for a child arrangements order on 2 July 2019 and again sought disclosure of the material from the asylum process, contending that such disclosure was now necessary for him to have a fair trial on the allegations of physical and sexual assault and child sexual abuse on which the mother now sought specific findings on the balance of probabilities in the proceedings under the 1989 Act, the father contending that the documents in the asylum process go, or may go, directly to the credibility of the mother. Ultimately, no party sought seriously to dispute that the changed procedural and forensic context resulting from the withdrawal of the summary proceedings under the Child Abduction and Custody Act 1985 and the instigation of the welfare proceedings under the Children Act 1989 required the question of disclosure and inspection of the asylum documentation to be considered anew by this court.
12. Third and finally by way of background, at the time this court delivered its first judgment in *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)* in consequence of that changed forensic context a separate asylum claim that had been made by the mother in respect of H appeared to be dormant. As I observed in

that first judgment at [9], following the mother being granted refugee status, with H being granted leave to remain with the mother, an application for asylum was also made for H but this had not been progressed and no material had been filed in support of it. In a Position Statement dated 13 May 2019 the Secretary of State asserted that “The SSHD is confident however, that the child’s asylum file does not contain any additional material which is of relevance to the balancing exercise”. The Secretary of State confirmed that this did not affect the leave that H was granted as a dependent of the mother. At this hearing however, the court has been informed that, whilst the mother had failed to respond to repeated requests for confirmation of her position in respect of the application for H (the last request having been made on 10 March 2020), on 26 March 2020 the Secretary of State received a statement from the mother in support of the application in respect of H. The Secretary of State confirmed to the court that an asylum interview will now be arranged. At this hearing the mother confirmed that she *is* now progressing the asylum application in respect of H and has submitted to the Secretary of State as part of that application all of the documents that are in issue at this disclosure hearing.

THE TEST

13. In *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)*, having heard extensive submissions from the parties, I held as follows with respect to the correct legal principles to be applied and the correct procedure to be adopted where one party to private law proceedings under s. 8 of the Children Act 1989 seeks disclosure and inspection of documentation from the successful asylum claim of the other party, for use in the family proceedings:

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

[69] Depending on the facts of the case, the rights engaged may include the rights of the refugee (and potentially third parties) under Arts 2 and Art 3 of the ECHR and will include the rights of the refugee under Art 8, the rights under Art 6 and Art 8 of the party seeking disclosure and the rights of the child under Art 8. As Munby LJ (as he then was) observed in *Durham County Council v Dunn* at [45]:

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

[70] Whilst no right will start with preferential weight, the authorities make clear that, when considering questions of disclosure and inspection,

the court is required jealously to guard the Art 6 right of the parties to a fair trial. Within this context, the court will bear in mind at all times that it is a fundamental principle of fairness and natural justice that a party is entitled to have sight of all materials which may be taken into account by the court when reaching a decision adverse to that party, including the determination of any allegations levelled at them. Any qualification of the right to see documents relevant to the issue to be determined by the court will only be acceptable if directed towards that clear and proper objective and any non-disclosure must be limited to what the situation imperatively demands and will be justified only when the case for non-disclosure is compelling or strictly necessary. To this end, the court will be rigorous in its examination of the feared harm disclosure will cause.

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

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

[73] Mr Payne submits that provision of material to an alleged persecutor following a successful asylum claim into family proceedings can only take place in the most “exceptional” circumstances. However, in line with the decision of Hayden J in *F v M*, I have already rejected the notion that there is presumption of exceptionality when considering the question of disclosure. Further, in *R v McGeough* the Supreme Court (in observations that were not dependent on the factual matters that distinguish that case from this one) made clear that Art 22 of Directive 2005/85/EC (from which Paragraph 339 IA of the Immigration Rules is derived) containing the prohibition on disclosure to an alleged perpetrator is specifically relates to the process of examination of the claim and does not extend beyond its

determination. Within this context, nowhere in the Directive or the Immigration Rules is it suggested that a test of exceptionality applies following the successful (or unsuccessful) conclusion of an asylum claim. Within this context, whether disclosure and inspection takes place following a successful or unsuccessful claim for asylum will depend on the balancing exercise set out above executed by reference to the particular facts of the case.

[74] Within this context, I cannot accept Mr Payne’s submission that a prior finding of the Secretary of State or the First Tier Tribunal that the person seeking disclosure is a persecutor must mean that, at the outset, the scales are heavily weighted against disclosure and inspection following a successful claim for asylum. In some cases it may have that consequence, but in 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.”

SUBMISSIONS

Secretary of State

14. During the course of this hearing, on behalf of the Secretary of State Mr Goss has made further submissions regarding the relative weight that the court should attach to the various factors that inform the balancing exercise in this case. However, now that the application for asylum in respect of H is being pursued, as regards the *timing* of any disclosure the court might order if it is not with the Secretary of State, Mr Goss reminds me again of paragraph [72] of my previous judgment in which I observed as follows:

“[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.”

15. Within this context, Mr Goss submits that whatever the outcome of the balancing exercise with respect to disclosure by reference to the legal principles articulated above, on my own reasoning and conclusions any disclosure ordered could not take place until such time as H’s pending asylum application has been determined. Mr Goss further submits that in the circumstances it would be premature to consider the question of disclosure pending the determination of that asylum claim as, he submits, the balancing exercise the court must undertake cannot be properly calibrated without knowledge of the outcome of that claim.

16. With respect to the balancing exercise itself, whilst conceding that there is material in the mother's asylum file that can be said to be relevant to the issues that arise for determination in the family proceedings, Mr Goss submits that in this case that relevant material should not be disclosed to the father for the following reasons.
17. First, and unsurprisingly, Mr Goss once again urges the court to give very great weight to the confidentiality of the asylum process and the duty Secretary of State to ensure that a group of adults and children who are extremely vulnerable, namely asylum seekers and refugees, have their rights protected within a process that deals with those who have endured ill-treatment, including torture, and have arrived from areas of the world in which coming to the attention of the authorities is dangerous in the extreme. Within this context, Mr Goss submits that there is a strong public interest in not providing disclosure to a person who is considered within the asylum process to be a perpetrator, such disclosure risking harm to both the person seeking asylum and, potentially, to members of the asylum seeker's family and community remaining behind in the country of origin, particularly where the latter have in the past given assistance to the asylum seeker.
18. More widely, Mr Goss again submitted that it is vital for the effective overall functioning of the asylum system that such persons are able to engage fully with the authorities in this jurisdiction and to provide all the information necessary to ensure their international protection in an appropriate case. Within this context, Mr Goss again submits that to order disclosure and inspection in such circumstances would have a devastating effect on confidence in the asylum process, a chilling effect on the willingness of those seeking international protection to provide information and would prevent the United Kingdom authorities discharging their international and domestic obligations. Mr Goss again highlights the fact that asylum seekers are informed when they claim asylum that the information they provide will be kept confidential and will only be disclosed where there is a requirement in law to do so and that, in circumstances where asylum examinations are conducted in private, the asylum seeker has a reasonable expectation of privacy. Within this context, he again reminds the court that the provision of information by asylum seekers is at the heart of that which the confidentiality of the asylum process is designed to protect.
19. In further particularising the impact of disclosure in this context, Mr Goss submitted that, beyond cutting across assurances given to individual asylum seekers and the need to keep individual asylum seekers safe, disclosure of the documents in issue would impact on the ability of the Secretary of State to encourage full and frank disclosure from those seeking asylum generally, with disclosure of material from the asylum process increasing the likelihood that other asylum seekers will withhold details about or aspects of their claim. Mr Goss submits that this in turn hampers 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. Further, and at a systemic level, Mr Goss submits that where initial screening interviews and substantive interviews provide a crucial source of information for the Secretary of State about particular countries, trends, and migration and trafficking routes, any decrease in candour on the part of asylum seekers will again prejudice the ability of the Secretary of State to formulate policy and guidance in this vital area.
20. Within this context, Mr Goss sought to draw an analogy with the position with respect to those who provide referrals in respect of harm to children. Mr Goss submits that

the need to protect the confidentiality of the asylum system has a similar genesis to the need to protect the identity of persons who make a referral to social services or other child protection agencies, which confidentiality is, Mr Goss submits, usually protected by the courts. In this regard, and again by way of analogy, Mr Goss relies on the case of *D v NSPCC* [1978] AC 171.

21. In the foregoing circumstances, Mr Goss again submits that the fundamental principle of the asylum process that information from that process is not provided to an alleged persecutor must weigh *extremely* heavily in the balancing exercise when the court is considering whether and if so what documents from the asylum process to disclose to the father, as must the wider need to protect the confidentiality of the asylum process as a means of protecting its operational integrity overall. Indeed, Mr Goss submits that the need to prioritise international protection via the asylum process is determinative of the application in this case.
22. Second, and acknowledging that the Art 6 right to a fair trial is a counterweight in this case, Mr Goss submits that the disclosure of the documents in issue will add nothing to the fairness of the finding of fact hearing in the family proceedings. Mr Goss submits that the accounts provided by the mother and recorded in the asylum file (on the landing card, the initial screening interview and in the substantive interview) are all broadly consistent with the evidence provided by the mother in these proceedings. Within this context, the Secretary of State submits that this material does not provide any real assistance with respect to the father's case in that it does not undermine the credibility of the mother or offer lines of inquiry that are not already open to the father. In the circumstances, the Secretary of State submits that disclosure of these documents is not required to protect the Applicant father's right to a fair trial and that there is nothing in the material that justifies overriding the public interest in the confidentiality of the asylum process in this case.
23. The Secretary of State accepts that there are some inconsistencies disclosed in material in the asylum file and that these inconsistencies offer potential lines of forensic enquiry for the father and are relevant of credibility of the mother. However, the Secretary of State further submits that to the extent that there are inconsistencies or omissions from earlier accounts, they are not such as would fundamentally affect the reliability of the mother's account, either because they are minor or because they relate to areas where it is unsurprising that she was not initially fully forthcoming when providing her account on arrival in the jurisdiction and thereafter. Within this context, Mr Goss submits that these examples constitute understandable and explicable omissions on the part of the mother, rather than forensically significant inconsistencies, rendering it unlikely that weighty forensic points could be made from them. In these circumstances, Mr Goss further submits that it would be disproportionate to order disclosure of the documents in issue where their impact on the fairness or otherwise of the finding of fact hearing would be, in the submission of the Secretary of State, so slight.
24. In addition to these points, Mr Goss submitted that if the court was minded to order disclosure from the asylum file into the family proceedings it should in any event remove two categories of information from the material disclosed. First, any material that might identify third parties not involved in the family proceedings before this court. Second, the operational details of the Secretary of State's decision-making process that are not in the public domain which it would be contrary to the public

interest to disclose, including timeframes for decision making, descriptions of internal documents and details of liaison with other public authorities and non-government organisation.

25. Finally, Mr Goss submitted that to order disclosure in this case would, for reasons he particularised in his oral submissions, risk adversely affecting international cooperation, interstate confidence and comity, both in the field of asylum and immigration and in other fields. As I indicated during the course of Mr Goss' submissions, I found myself unpersuaded by this point and it was not pressed by Mr Goss.

The Mother

26. On behalf of the mother, once again, the submissions of Mr Hames largely, and understandably, reflected those of the Secretary of State. At the last hearing, Mr Hames accepted on behalf of the mother that the issues of credibility "peculiar to a fact finding hearing" mean that the father should be able to understand the mother's position in the asylum process in detail. Mr Hames submits however, that the father is placed in that position by the material that is already before the court in the form of the evidence that the mother has filed in these proceedings, which is consistent with the accounts she has given within the asylum process, and by reference to the material from the asylum process that the father does have access to, in particular the decisions of the Secretary of State and of the Tribunal. Within this context, Mr Hames submits that it is not necessary for further disclosure from the asylum file to be ordered by this court.
27. During the course of his oral submissions, and in circumstances where the documentary material that is in issue 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 (and accepting that there are also, as I have noted, inconsistencies that offer potential lines of forensic enquiry for the father and are relevant of credibility of the mother), I asked Mr Hames whether the mother did not herself wish to rely on that material in support of her case. Mr Hames was clear that the mother did not wish to do so and that he had no instructions to seek disclosure of the material into the family proceedings, indeed the mother actively opposed the same. Whilst maintaining fidelity to those instructions, Mr Hames properly accepted that if the court took the view that its role within proceedings under the Children Act 1989 was a quasi-inquisitorial one, the mother's position does not prevent the *court* from determining that material that might be said to be relevant to and to support the mother's case should be before the court, notwithstanding that she objects to that course.

The Father

28. In submissions on behalf of the father, as they did at the last hearing Mr Devereux and Ms Chaudhry again submit that in circumstances where he is facing the gravest allegations of physical and sexual assault and child sexual abuse such that the court has determined that a finding of fact hearing is required ahead of any welfare determination under s. 1 of the Children Act 1989, the father's Art 6 rights and the common law principles of fairness and natural justice, which entitled him to see all

evidence that is relevant in that context, must weigh very heavily in the balance. Mr Devereux and Ms Chaudhry again remind the court that it is a serious matter for the court to exclude relevant evidence, citing the observations to this effect made in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 at [89]. In this context, Mr Devereux and Ms Chaudhry submit that in circumstances where the father faces grave allegations that are to be determined by this court and where the information from the asylum process is relevant to his answering of those allegations, both the Art 6 and the domestic imperatives of a fair trial that have existed for hundreds of years demand disclosure of that material to the father. They submit that it would be wholly exceptional for a party to family proceedings facing serious allegations of domestic and sexual abuse to be disadvantaged in comparison to parties in a similar position simply by virtue of the fact that evidence relevant to the determination of those allegations has been the subject of prior consideration in the asylum process.

29. Within this context, Mr Devereux and Ms Chaudhry further submit that as an essential part of the fact finding exercise that the court will make directions for contemporaneous material from third parties, most often from the police, local authority and medical professionals. Such evidence, they contend, provides an essential evidential landscape within which the allegations in issue can be tested and the parties' credibility assessed. Within this context, and with the necessary limitation that they have not had the opportunity to see the documentation in issue, Mr Devereux and Ms Chaudhry make the following points regarding the relevance of the documents in issue, the likely nature of which they have been able to infer from context:
- i) With respect to the asylum interviews undertaken by the mother, those interviews and their consistency with the accounts given by the mother in these proceedings, whether the mother has made any contradictory or inconsistent statements, are clearly relevant to the assessment of the mother's credibility within these proceedings and the truthfulness of the allegations she levels against the father and which are the subject of the fact finding hearing.
 - ii) Any other documentary evidence that relates to the allegations made by the mother and which are the subject of the fact finding hearing must, *a fortiori*, be relevant and relevant to the assessment of the mother's credibility and assessment of truthfulness of the allegations.
 - iii) Any accounts provided by the mother to agencies in [country given] with respect to the allegations in issue will likewise be relevant and relevant to the question of the consistency of the allegations.
 - iv) Any corroborating evidence provided by third parties will also be relevant. By way of demonstration, Mr Devereux and Ms Chaudhry ask rhetorically whether any witness statements provided are consistent with the accounts given by the mother in her asylum claim and the family proceedings? Who are the witnesses? Does the father know them? Does the father have a response to these accounts and can he provide evidence which contradicts and/or challenges these accounts? Are any witnesses in the asylum claim the same four witnesses that have been called to give evidence within the family proceedings?

30. Having submitted that the father can plainly satisfy the test of relevance regarding the documentary material in issue in this application, Mr Devereux and Ms Chaudhry submit that the factors prayed in aid by the mother and the Secretary of State do not lead to an outcome in which the required balancing exercise comes down in favour of non-disclosure. In particular, Mr Devereux and Ms Chaudhry submit as follows:
- i) The mother has failed to articulate *how* the disclosure sought will place her or H at greater risk of harm, given that the mother has already set out in extensive detail the serious allegations against the father in her evidence within the family proceedings.
 - ii) Further, the mother has failed to articulate how the disclosure sought will place the third parties at greater risk of harm, there being no evidence to support the assertion that the father would act in an inappropriate or harmful manner against any third parties.
 - iii) As the court has already determined, the wider public interest in maintaining the confidentiality of the asylum process does not prevent a court ordering disclosure and inspection of such documents into proceedings under the Children Act 1989 in an appropriate case. Whilst confidentiality is a factor to be weighed in the balance, it is outweighed by the other factors in this case.
 - iv) The father does not seek disclosure of any information that will lead to the mother or H's whereabouts being revealed.
 - v) The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Art 8 of the Convention and domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8 of the Convention. Currently the father's contact with H is limited to indirect contact.
 - vi) The mother has alleged that the father perpetrated a direct sexual assault on the child on 24 January 2016. Given the profound seriousness and gravity of the allegations made by the mother in these proceedings it is well established that the father is entitled to all relevant evidence for assessing and challenging those allegations.
 - vii) A refusal to disclose relevant documents to the father within these proceedings will not provide the requisite protection of the father and child's interests as safeguarded by Arts 8 and 6 of the ECHR.
 - viii) Insofar as disclosure may result in interference in the Art 8 rights of others, disclosure has the legitimate aim of protecting the father and the child's right to respect for private and family life and is necessary to ensure and a proportionate means of ensuring that the Art 6 rights of the father and H are protected by ensuring the essential elements of a fair trial on the allegations are maintained.
 - ix) A proper and fair forensic analysis of the allegations before the court will promote H's best interests, which proper and fair forensic analysis can only be achieved by ensuring that all the relevant material is before the court and

subject to examination by the parties, including H's legal representative and the Children's Guardian.

- x) Within this context, the denial of disclosure and inspection is limited to circumstances where denial is strictly necessary and in some cases a balance may be struck by making a limiting or restricted order if this meets the test of strict necessity.
31. Within the context of the foregoing submissions, Mr Devereux and Ms Chaudhry contend that in this case the balance falls clearly in favour of the relevant documents being disclosed. With respect to the timing of such disclosure, whilst submitting that the mother's decision now to pursue the asylum claim in respect of H smacks of a tactical decision in circumstances where it means that the documents in issue are once again within a pending asylum claim, Mr Devereux realistically acknowledges that in light of this court's conclusion regarding the effect of that position on disclosure, this will affect that the timing of any disclosure that the court is minded to order.

The Child

32. On behalf of the child, Mr Michael Edwards was likewise unable to make detailed submissions on documents he had not seen. He however, noted that at the previous hearing no indication had been given that H's asylum application would be proceeded with.

DISCUSSION

33. I have had the opportunity to review the documents from the asylum process contained in the Home Office asylum file now in the mother's possession. Having done so, and applying the legal principles I set out in *R v Secretary of State for the Home Department (Disclosure of Asylum Documents)* I am satisfied that the following documents should be disclosed into the family proceedings once the asylum application in respect of H has been determined, with suitable redaction where indicated, as being relevant to the issues of fact that this court is required to determine at the finding of fact hearing:
- i) Handwritten letter from the mother dated 28 January 2019 [pages 5 to 7 of the HO file] subject to redaction of all postal addresses given by the mother.
 - ii) Mother's application for a travel document dated 5 April 2018 [pages 33 to 38] of the HO file] subject to redaction of all postal addresses, email addresses and telephone numbers given by the mother.
 - iii) Translation of the Facebook Messenger conversation dated 30 July 2017 and certificate of translation [pages 40 to 41 of the HO file] subject to redaction of the identity of a third party the mother is conversing with.
 - iv) Chronology [pages 49 to 50 of HO file] subject to redaction of name of a third party mentioned in the entry for 30 July 2017.

- v) Witness statement of the mother dated 21 August 2017 [pages 51 to 60 of the HO file] subject to redaction of third parties' names at paragraphs 26, 31, 32, 39, 40, 43 and 44).
- vi) WhatsApp message between third parties [page 79 of the HO file] subject to redaction of identity of a third party.
- vii) WhatsApp messages between mother and third party [pages 80 to 92 of the HO file] subject to redaction of all identifying features of a third party.
- viii) Documents from the public domain relied on by the mother to demonstrate that mother would not be safe in [country given] by reason of the father's family [pages 93 to 103 of the HO file].
- ix) Forged affidavit of the father [pages 105 to 106 of HO file] subject to the redaction of the to the name and stamp of commissioner of oaths/solicitor.
- x) Initial Contact and Asylum Registration Form dated 18 February 2016 [pages 197 to 206 of the HO file] subject to redaction of the address and email address of the mother.
- xi) Statement of evidence form [pages 207 to 212 of the HO file] subject to redaction of the addresses given by the mother.
- xii) Interview record [pages 213 to 238 of the HO file] subject to redaction of the identity of any third parties.
- xiii) UKBF landing card [pages 358 to 361 of HO file] subject to redaction of phone number.
- xiv) GCID Case Record Sheet [pages 397 to 425 of HO file] subject to redaction of the mother's address.

My reason for deciding that the aforesaid documents should be disclosed into the proceedings under the Children Act 1989, subject to the redactions set out above, are as follows.

34. Whilst I am satisfied, having regard to the observations I made at paragraph [72] of my previous judgment, that it would not be appropriate for disclosure to take place until such time as H's application for asylum has been determined, I am satisfied that the balancing exercise the court must undertake to decide whether disclosure to the father should take place thereafter can be completed prior to the resolution of H's claim. As the court understands it, the resolution of that claim will be based on the same material that grounded the mother's claim. If H's claim is successful, he will be in no different position to that which the mother is in now *viz* the current application for disclosure. In these circumstances, I am not persuaded that the court needs to wait before determining the application for disclosure in order to calibrate that determination by reference to the outcome of H's application, albeit that the *implementation* of any decision to disclose will have to await that outcome. Further, this court must have regard to the overriding objective in Part 1 of the FPR and in particular the duty to deal with issues expeditiously and fairly, to save expense and to

allot the matter an appropriate share of the court's resources while taking account of the need to allot resources to other cases. Within this context, it would not be proportionate to have a third hearing on this issue in circumstances where the fact of the pending claim on behalf of the H does not materially impact on the balancing exercise for the reasons I have given.

35. I am satisfied that the documents that I have listed above satisfy the test of relevance. In this case the court has determined that a fact finding hearing is necessary to determine the serious allegations of domestic abuse and child sexual abuse made by the mother against the father in proceedings under the Children Act 1989. The mother has filed in these proceedings a schedule of those allegations and it is clear from the documentation that is before the court with respect to the asylum process that those allegations are the same as those made by the mother during the course of her claim for asylum, namely that the father was a perpetrator of serial domestic abuse and sexually abused H in [country given]. Having considered the documents listed above, it is apparent that 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 to the 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.
36. Turning to the factors relevant in the balancing of rights and interests that determines whether such relevant material should be disclosed to the father within the family proceedings, as I noted in my previous judgment in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 the court held that whilst a limited qualification of the Art 6 right to see the documents may be acceptable if directed towards that clear and proper objective, any non-disclosure must be limited to what the situation imperatively demanded and was justified only when the case was compelling or strictly necessary, with the court being rigorous in its examination of the feared harm and any difficulty caused to the litigant counterbalanced by procedures designed to ensure a fair trial. With respect to the procedural elements of Art 8 similar principles apply, with a failure to disclose relevant documents to a parent within a process for determining contact arrangements between that parent and their child not affording 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). With respect to the question of H's best interests an analogous analytical paradigm likewise applies. 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.

37. I deal first, and within the foregoing context, with the factors that tend to militate against disclosure. In this case the feared harm that is said to justify non-disclosure of the relevant material in issue in this case is threefold. Namely, harm to the mother or to third parties were the father to be provided, as a person identified in the asylum process as a perpetrator, with information from the asylum documentation, harm to H flowing from the same circumstances and, finally, 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 asylum system's efficacy.
38. With respect to the contended for harm to the mother and to third parties, in rigorously examining that feared harm to determine whether non-disclosure of the relevant evidence is imperatively demanded and strictly necessary in this case I am satisfied that there is some force in the submission of Mr Devereux and Ms Chaudhry. The mother has adduced no evidence that articulates how the disclosure sought by the father will now place the mother at greater risk of harm in this jurisdiction, nor how the disclosure sought will place the third parties at greater risk of harm, where the disclosure sought is into proceedings that are by their nature confidential, where the father remains unaware of the address at which mother and H are residing in this jurisdiction and where the father does not seek disclosure of the same. I take account of the fact that such evidence is not easy to adduce where it may have to be sourced from a foreign jurisdiction, but court must nonetheless act on evidence. I accept that the tribunal concluded that the mother and H would be located in [country given] by the father via his family members and computer records if they returned and, assuming they were returned, that it was established that there was a real risk that both the mother and H would face ill treatment at the hands of the father. Further, whilst neither the Secretary of State nor the mother has pressed submissions on the question of whether these risks are sufficient to breach her rights under Art 2 or Art 3 of the ECHR, I accept that, generally, in 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 or inhuman treatment under Art 3. However, within the context of these confidential family proceedings, the mother and H now reside in this jurisdiction and face no risk of being returned to [country given]. With respect to risk to any third parties, there is likewise no cogent evidence before this court to support the assertion that the father would act in an inappropriate or harmful manner against third parties as a result of disclosure to him of relevant documents in these proceedings. In any event, in so far as such a risk is contended for it can be ameliorated by the appropriate redaction of documents in circumstances where the identity of any third parties is, I am satisfied, of marginal relevance to the issues before this court.
39. A similar position pertains when asking whether disclosure of the relevant material in issue would involve a real possibility of significant harm to H. Again, I acknowledge that the tribunal concluded that the mother and H would be located in [country given] by the father if they returned and that, assuming they were returned, there was a real risk that both the mother and H would face ill treatment at the hands of the father. However, once again the mother and H now reside in this jurisdiction and face no risk

of being returned to [country given]. Within this context, weighing on the one hand the interest of H in having the material relevant to the issues before the court 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, I am satisfied that the greater risk of harm to H in this case lies in relevant evidence not being disclosed and the court reaching the wrong decision as a result on factual issues fundamental to the determination of the welfare issues in respect of H.

40. With respect to the contended for 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, I have placed significant weight on the importance of preserving the confidentiality of that system. As Hayden J observed in *F v M*, 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 is the confidentiality of the asylum process. Within this context, 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. In these circumstances, I have taken account of the importance of the confidentiality of 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)* [2001] 2 FLR 1017 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.
44. Turning to the factors relevant to balancing exercise that tend to favour disclosure of relevant evidence from the asylum file to the father, in the circumstances of this case I am also satisfied that the father's right to a fair trial pursuant to Art 6 and the procedural elements of Art 8 of the ECHR and the common law principles of fairness

and natural justice fall to be placed in the balance as counterweights to the public interest in maintaining the confidentiality of the asylum process. In addition, I am satisfied that H's right to a fair trial and H's best interests and Art 8 rights also act in the particular circumstances of this case as counterweights to the public interest in maintaining the confidentiality of the asylum process.

45. In respect to the finding of fact hearing to determine the mother's allegations the father benefits from the right to a fair trial under Art 6 of the ECHR. Within the context of the father being required to answer serious allegations of domestic abuse and child sexual abuse, I place in the balance the fact that Art 6 requires that the father be afforded an equal opportunity to present his case under conditions that do not place him at a substantial disadvantage, that this includes the right to the disclosure of relevant documents (see *Feldbrugge v The Netherlands* (1986) 8 EHRR 425) and that the right to a fair trial thus demands that, ordinarily, all relevant documents and information be before the court (*Re D (Adoption Reports: Confidentiality)* [1995] 2 FLR 687). This means not only that the father is entitled to have access to relevant material that may assist his case, but to have access to material on which the mother will rely to support her own case. Within a domestic context, these cardinal principles also find expression in the common law principle of natural justice. In *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38 at [3] the Supreme Court observed that:

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

46. I am also satisfied that the father's Art 8 rights are engaged procedurally on the question of disclosure, by reason of the nature of his substantive rights under Art 8. Substantively, the father has a right to respect for family life with H pursuant to Art 8. Any decision making process concerning measures which would have the effect of interfering with his rights under Art 8 must be fair and must itself be conducted in a manner which ensures the efficacy of those rights protected by Art 8 (see *TP and KM v United Kingdom* [2001] 2 FCR 289 at [7]). Within this context, the father's Art 8 rights will be the subject of interference if he is not able fairly and fully to advance a case before a court for the effective implementation of those rights through an ongoing and developing relationship with H. In the circumstances, the father's rights under Art 8 also include the right to disclosure of information relevant to issues before the court that engage Art 8 (see *R (P) v Secretary of State for the Home Department; R (Q) v Secretary of State for the Home Department* [2001] 2 FLR 1122), subject to the usual principles of legality, necessity and proportionality. These procedural elements of the father's Art 8 right to respect for family life accordingly also fall to be placed in the balance when considering the question of disclosure in this case.
47. Within the foregoing context, 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) 29 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.
49. Within this context, I regret that I cannot accept the submission of the Secretary of State that the relevant documents in issue will add nothing to the fairness to the father of the family proceedings in circumstances where, on the submission of the Secretary of State, the information contained therein is broadly consistent with the evidence of the mother in these proceedings. First, and as I have noted, the documents in issue do also contain certain inconsistencies that offer potential lines of forensic enquiry for the father and are relevant to the credibility of the mother. As part of a fair trial, the father would ordinarily be entitled to see evidence that undermines the case against him. Second, insofar as the mother sought to advance a general assertion in the family proceedings that the documentation in the asylum proceedings demonstrates that she has been consistent in her allegations, as part of a fair trial the father would be entitled to see the documents that are said to make good that submission in order to have the opportunity to challenge them if appropriate. Third, and a point which I address further below, even were the mother not to seek to rely on evidence of prior consistent statements, the court may nonetheless consider that it is in H's best interests for such material to be before the court so as to ensure a fully informed decision on the facts in issue relevant to his welfare.
50. I am also unable to accept the submission of the Secretary of State that the court can conclude at this stage and without more that any inconsistencies or omissions from earlier accounts given by the mother are not such as would fundamentally affect the reliability of the mother's account and, accordingly, do not require disclosure to ensure a fair hearing for the father. Part of the rationale for full and frank disclosure to a party of material that potentially undermines the case against that party is so that that party can consider by way of inspection, with his or her legal representatives, the

material in light of the legally privileged instructions given by that party. Neither the Secretary of State nor the court is privy to the instructions given by the father to his legal advisers, which legally privileged discussions may point up lines of enquiry and/or challenge that are not immediately apparent to either the Secretary of State or the court but which the father would be entitled to pursue as part of a fair hearing of the allegations against him.

51. H's right to a fair trial and his rights under Art 8 are likewise engaged by this application. As a party to the proceedings, pursuant to Art 6 and the procedural elements of Art 8, H is entitled to a fair trial of the issues before the court that impact on his welfare, including with respect to the determination of factual issues that will bear on the decisions the court ultimately takes with respect to his welfare. Further, it is plainly in H's best interests, which are the court's paramount consideration within the proceedings under Part II of the Children Act 1989, 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, which must include an accurate assessment of any past harm he has or has not suffered. This requires that the court has before it all of the evidence relevant to determining that issue.
52. In this latter context, I return to the fact that the documentary material in issue might be said, *prima facie*, to lend some support to the mother's case in terms of a degree of consistency (accepting again that there are also, as I have noted, inconsistencies that offer potential lines of forensic enquiry for the father and are relevant of credibility of the mother). 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).
53. In undertaking the foregoing balancing exercise, the court will also consider if the information in dispute is available elsewhere in a form that does not raise the concerns regarding confidentiality or public interest immunity, as the mother contends it is. Having done so, I am not able to accept that contention. The general assertions and documentation relied on by the mother and by the Secretary of State in this regard are no substitute, when considering the credibility of the mother's allegations, to seeing the contemporaneous documents recording the accounts she gave and any corroborative evidence she relied on in the asylum claim. In this case I am satisfied that compelling the father to rely only on this material would cause him prejudice. In addition, whilst I accept that the father has access to the decisions of the Secretary of State and the First Tier Tribunal, within that context, I note once again that in *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475 (Fam) at [55] and [56] the President held as follows:

“[55] Turning to the second issue, namely the role of the family court in assessing risk in FGMA proceedings where the risk has previously been assessed by the FTT, I am unable to accept the Secretary of State's submission that an FTT assessment must be the 'starting point' or default position for the court and that the court should only deviate from the FTT assessment if there is good reason to do so.

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

54. Within the foregoing context, in all the circumstances of this case I am satisfied that the required balancing exercise comes down in favour of the disclosure that I have listed at Paragraph [33] above, subject to the redactions set out in that list. Whilst I accept that there is a strong public interest in maintaining the confidentiality of the asylum system, that public interest may be overridden by a competing right. In this case, I am satisfied that it is overridden by the Art 6 rights of the father and H and the procedural elements of their Art 8 rights, and by H's best interests.
55. As matters stand, the court does not know whether H is at risk of harm from his father. The allegations that are said by the mother to ground a risk of physical and sexual harm must be properly investigated and tested so that H can either be protected by the court from any risk of harm his father presents to him or can resume a relationship with his father if those allegations are not made out. 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.

CONCLUSION

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.
59. That is my judgment.