Neutral Citation Number: [2022] EWHC 2134 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2022

Before :

MRS JUSTICE KNOWLES

- -

Between :

AB	Applicant
- and -	
CD	Respondent
and	
G	

- -

Re G (Inherent Jurisdiction Return: Disclosure of Asylum Documents)

- -

Mr Richard Harrison QC and Miss Samantha Ridley (instructed by Lyons Davidson Solicitors) for the father.
Mr Teertha Gupta QC and Miss Fitzrene Headley (instructed by Duncan Lewis Solicitors) for the mother.
Mr Michael Gration QC and Mr Christopher Osborne (instructed by CAFCASS Legal) for G through his Children's Guardian

Hearing dates: 1-2 August 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

1. These proceedings concern the Applicant father's application ("the father"), pursuant to the inherent jurisdiction, for an order for the return of the parties' son, G, now aged 11 years, to the jurisdiction of country X. The First Respondent to the proceedings is the mother ("the mother") and the Second Respondent is G himself, through his Children's Guardian. The father is represented by Mr Richard Harrison QC and Miss Samantha Ridley; the mother by Mr Teertha Gupta QC and Miss Fitzrene Headley; and G by Mr Michael Gration QC and Mr Christopher Osborne of Cafcass Legal.

2. This judgment concerns itself with the father's application for disclosure and inspection of documentation from the successful asylum claims of the mother and of G. The Secretary of State for the Home Department ("SSHD") was invited to intervene and filed some limited written submissions but was not represented at the hearing. The issue of disclosure and inspection of the asylum documentation arose in the context of a listed fact-finding hearing later this year when the court will be invited to determine allegations made by the mother of physical and emotional abuse in the context of a coercive and controlling marital relationship and allegations of sexual assault of G by the father and/or a paternal uncle. For his part, the father alleges that the mother frustrated his relationship with G after the parties' divorce in 2012 and that she was physically abusive towards G both during and after the parties' relationship. He also alleges that the mother abducted G from country X in the latter part of 2020 and lied to the court about how she and G arrived in this jurisdiction. In essence, his case is one of wholesale deception and fabrication by the mother in order to inhibit any relationship he might have with G. The court's findings of fact on these issues will form a foundation for the assessment of G's welfare at a hearing listed early in 2023.

3. In deciding whether, and, if so, which documents from the asylum process should be disclosed into these proceedings, I was provided with a copy of the asylum file and scrutinised it very carefully before the start of the hearing. Adopting, in part, the procedure described by MacDonald J in paragraphs 77 and 82 of R v Secretary of State for the Home Department (Disclosure of Asylum Documents) [2019] EWHC 3147 (Fam) subsequently endorsed by the Court of Appeal in paragraph 58 of Re H (A Child) (Disclosure of Asylum Documents) [2020] EWCA Civ 1001, I first heard submissions on the applicable legal principles and on the merits in general from all the parties. I then heard briefly from the mother and the child in the father's absence before, once more, hearing from all parties. All parties had the opportunity of speaking to each other's skeleton arguments though, at my direction, the mother and the child had also provided skeleton arguments addressing the contents of the asylum documentation which were not disclosed to the father and which I considered in the short, closed hearing. I note that both the mother and the child had access to the documents in the asylum claim, though these were necessarily withheld from the father. The child had access in accordance with my directions, adopting the suggestion made by the Supreme Court in paragraph 167(c) of G v G [2021] UKSC 9. I make some observations about this at the conclusion of this judgment.

4. At the conclusion of the hearing, I informed the parties of my decision and explained that my reasons for disclosing a limited number of the asylum documents, all redacted in the manner I describe in paragraph 38 below, would be set out in a reserved judgment.

Background: Summary

5. The parties married in 2009 in country X and G was born in 2011. The marriage broke down in 2012 when the parties were divorced according to the Islamic faith. In 2014, the parties were divorced legally. After his parents' separation, G lived with his mother and visited his father from time to time, including staying overnight. According to the father, G began to live with him from the age of 7 in 2018, this being in accordance with the family law of country X. By agreement with the father, G is said to have spent Thursdays to Saturdays each week staying with his mother. There is a dispute between the mother and the father about the arrangements for G prior to October 2020 as, for example, the mother asserted that she was forced to surrender custody of G to his father in spring 2020. By September 2020, G visited his mother from Thursdays to Saturdays each week.

6. The circumstances in which G was removed from country X are bitterly contested. The father said that, on a date in the latter part of 2020, he went to collect G from the mother's home but discovered that no one was in the property and no one in the mother's family had any information about her whereabouts. Later that day the father received a text message from the mother that she and G were in a safe place. The following day, the father said he received a phone call from the mother's brother, informing him that the mother and G would arrive in this jurisdiction by plane later that day. The day after that, the father contacted security staff at the alleged departure airport and asked them to investigate. Those investigations suggested that, shortly before the departure date suggested by the father, the mother had allegedly travelled from country X to country Y for a few days, but had then returned to country X. Following the mother's departure with G, the father also commenced legal proceedings in country X and a judgment from the court provided that the mother should return G to his care.

7. Following an investigation by the authorities in country X, the father was eventually provided with surveillance camera videos from the alleged departure airport, showing the mother, G, and one of the mother's sisters leaving country X. The investigation conducted by the authorities in country X concluded that the mother and G had travelled to England by aeroplane via two other countries and had arrived at an airport on a date in the latter part of 2020. Some of the material garnered during the investigation by the authorities in country X, including the surveillance camera videos, was disclosed to the father and forms part of his evidence in these proceedings.

8. It was the mother's case that she and G did not leave country X in the manner suggested by the father. Both the mother and G entered this jurisdiction as illegal immigrants and the mother maintained that she claimed asylum immediately on their arrival.

The Proceedings

9. On 5 November 2021, the father issued proceedings for the return of G to country X. A location order was made on 18 November 2021 and the mother and G were found on 22 November 2021. At a hearing on 20 December 2021, both parties were represented by counsel and the mother indicated that she intended to defend the father's application on a number of grounds, namely: (a) that the father did not have the right to determine the child's place of residence and/or did not have rights of custody; (b) that there was a grave risk of physical or psychological harm to G if he were to be returned to country X; (c) that G objected to a return and was of an age and degree of maturity where his

view should be taken into account; and (d) that both the mother and G were seeking asylum in this jurisdiction. In addition to a variety of directions securing G's presence in this jurisdiction, the court joined G as a party to these proceedings by a children's Guardian and listed a hearing before me on 21 February 2022.

10. On 21 February 2022, I directed that form EX660 be completed and lodged with the court by the SSHD. I also sought confirmation that the mother and G's claim for asylum had been allocated to the expedited team set up to deal with claims for asylum associated with either Hague Convention proceedings or proceedings for return orders pursuant to the inherent jurisdiction. I invited the SSHD to intervene and participate in the proceedings as an intervenor and to attend the next hearing via counsel to assist the court with (amongst other things) disclosure and inspection of documentation from the asylum process. I made a variety of other directions for the filing of evidence by the parties and for a brief report by G's Guardian with respect to interim contact with the father.

11. Prior to the next hearing on 8 April 2022, the mother's solicitors confirmed that both she and G had been granted asylum and had five years permission to stay in this jurisdiction until 24 March 2027. Thereafter, both the mother and G could apply to extend their stay in this jurisdiction. On 5 April 2022, the SSHD sent a letter to the court in which she indicated that she objected to the disclosure of the asylum file within these proceedings but would comply with any direction of the court in that regard and did not intend to intervene further in the proceedings. The Guardian's report on interim contact recorded that G did not want to see his father via video link. G was worried that he may be returned to country X and said that he did not miss either his father or his home country. Additionally, G disclosed to the Guardian physical abuse by his father.

12. On 8 April 2022, I determined that a separate fact-finding hearing was necessary and listed this to commence in late November 2022. I directed that the parties should each file a document, setting out the findings they sought against each other. Those documents were filed in late June 2022. With respect to the disclosure of the asylum documentation, I directed that the SSHD send a full copy of the asylum file to the court (for onward disclosure to the mother and to G's legal representatives) and invited her to attend the hearing at which disclosure would be considered to make any oral representations she considered appropriate (in addition to those set out in her letter dated 5 April 2022). If she did not wish to attend that hearing, the SSHD was at liberty to make further representations in writing. I gave directions for the structure and subject matter of this hearing, including the filing of witness statements and skeleton arguments to address the application for inspection and disclosure of the asylum documentation. This hearing was originally due to take place in early June but had to be adjourned to the beginning of August.

13. By email to the parties on 20 May 2022, the SSHD reiterated her opposition to the disclosure of the asylum documentation into the children proceedings and confirmed that she would not be represented at the hearing in August 2022. She submitted that, if the court was minded to order disclosure of the file to the father, the court should also make an order prohibiting the father from using or disseminating the documentation outside the children proceedings without the court's express permission. The SSHD asked to be informed if the court made an order for disclosure of the asylum documentation.

Disclosure of the Asylum Documentation: The Law

14. Part 21 of the FPR 2010 governs the disclosure and inspection of evidence and Rule 21.3 addresses claims to withhold inspection or disclosure. As MacDonald J made clear in R v Secretary of State for the Home Department (Disclosure of Asylum Documents) [2019] EWHC 3147 (Fam) (R v SSHD) at paragraph 77, a person who seeks to withhold either disclosure or inspection of relevant evidence must make an application (otherwise there is an onus on them to provide full and frank disclosure of all relevant material).

15. The approach to an application to withhold disclose derives from the decision of the Court of Appeal in Dunn v Durham County Council [2012] EWCA Civ 1654, [2013] 1 WLR 2305. It was endorsed in Re H (A Child) (Disclosure of Asylum Documents) [2020] EWCA Civ 1001, and G v G [2021] UKSC 9. At paragraph 53 of Re H, the Court of Appeal emphasised that *'the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary*'.

16. The Court of Appeal in Dunn summarised the approach to be taken at paragraph 23:

> *"First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include "train of enquiry" 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 such other order. Again, the limitation or restriction must satisfy the test of strict necessity."*

17. Having endorsed the above summary from Dunn, Baker LJ said at paragraph 54 of Re H:

> *"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 (Disclosure to Other Parties) [2001] 2 FLR 1017, 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 judgement 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."*

Baker LJ went on to say in paragraph 55 that asylum material was no different in this context from any other type of confidential material.

18. In Re B (referred to in the passage above), Munby J (as he then was) stated the following:

> *"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 a 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, rigourous 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 required 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."*

19. To deny a party sight of relevant material which all other parties and the court have seen represents a substantial breach of the principles of natural justice. Those principles have been repeatedly emphasised by the courts. In Kanda v Government of Malaya [1962] AC322, Lord Denning in the Judicial Committee stated at 337:

> *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."*

A more recent statement of that principle was enunciated by Lord Dyson in paragraph 12 of Al Rawi and others v Security Service and others [2011] UKSC 34:

> *"... trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance."*

Submissions of the Parties

20. I have summarised the parties' respective contentions below, including the written submissions made by the SSHD.

21. First of all, **the father** highlighted the stark factual dispute between the parties. On the one hand, the mother alleged that she and G had been abused by the father. She also

made an allegation of sexual abuse against the father's brother and asserted that the father was *"an extremist"* who wished to radicalise G. On the other hand, the father alleged that G had been the victim of serious abuse by the mother. His most significant allegation was that, without justification and by means of a carefully planned deception, the mother had abducted G from his home country and severed his ties with his paternal family and friends. In the father's view, G was the victim of parental alienation at the top of the scale, involving being kidnapped from his primary carer and he was the subject of the bogus asylum claim. The latter had the potential to cause him substantial long-term harm by causing him falsely to believe that his paternal family and his home country presented a danger to him. Further, the father submitted that the outcome of the fact-finding hearing would have profound implications for both parents and for G himself. On the mother's case, G would never again return to his home country and might have no further relationship with his paternal family for the remainder of his childhood and beyond. In order for the court to conduct a fair trial and make fact-finding decisions which formed a solid and reliable foundation for the ultimate welfare decision , it was essential that all parties should have access to all relevant information. That was the context in which disclosure of the asylum file fell to be considered.

22. Second, the father submitted that the *"relevance"* strand of the test was easily met. G was suddenly taken to this jurisdiction by the mother as part of a carefully planned and executed removal from country X. There was evidence within the children proceedings suggesting that the mother had been dishonest as to the circumstances of that removal. She had obtained refugee status for herself and G, thereby creating a legal impediment to G's return. It was imperative that the father, who faced allegations of the utmost seriousness, was appraised of the entire factual matrix and the basis upon which the SSHD had granted refugee status to the mother and to G.

23. Third, the father submitted that the court should consider all evidence of relevance to the question of whether it was in G's interest to return to country X. This must obviously include any evidence which suggested that either G or his mother would be at risk of persecution in that jurisdiction. It would be unfair for the court only to concern itself with the allegations which the mother had made against the father and his brother and to deem irrelevant allegations made by the mother within the asylum process against either third parties or the state authorities in country X.

24. Fourth, the court must conduct fact-finding and welfare exercises in respect of factual matters alleged by the mother to constitute reasons why G could not return to country X. In the event the court determined that G should return to country X, any order for return was incapable of being implemented for as long as G retained the status of refugee. In such a scenario, Mr Harrison QC submitted that the father's only recourse would be to request that the SSHD reconsider her decision on asylum, having regard to any findings which this court might have made. It would be wrong in principle for the court to have made its factual determination and welfare evaluation on the basis of different allegations and evidence from that presented to the SSHD. Mr Harrison QC drew my attention to Re R (Asylum and 1980 Hague Convention Application) [2022] EWCA Civ 188, in which it was held that it was legitimate to seek findings within judicial proceedings with a view to placing such findings before the SSHD and inviting reconsideration of an asylum decision about a child. At paragraph 81, the Court of Appeal referred with approval to the Scottish decision in Re (A Child) [2021] CSHI 52, 5 October 2021, where the following was said:

> *"[28] In our view the present proceedings remain important notwithstanding the grant of asylum to M. They are the process in which M's best interests may best be established. Any order or findings which the court makes would be likely to be of significant interest to the Secretary of State. The Lord Ordinary's reference to the pursuers having an "ulterior" purpose which was "more properly" addressed elsewhere infers that the purpose is an illegitimate one. We disagree. In our opinion the obtaining of any such order or findings with a view to placing them before the Secretary of State is neither improper nor illegitimate. On the contrary, it may be an important step towards obtaining the remedies which the first conclusion seeks. Moreover, if the Secretary of State does decide that the grant of asylum should be revoked, it will be necessary for the pursuers to obtain and implement the order".*

25. In paragraph 97 of Re R, the Court of Appeal stated:

> *"Secondly, some of the submissions made on behalf of the Respondents to this appeal were similar to those made in Re (A Child), and accepted by the Lord Ordinary but rejected by the Inner House, namely that the father's purpose in pursuing his application under the 1980 Convention was somehow improper or illegitimate. I agree with, and would adopt, the response given by Lord Doherty to the effect that seeking to obtain an "order or findings with a view to placing them before the Secretary of State is neither improper nor illegitimate". It is clear from G v G and from Re (A Child), that seeking to obtain reconsideration by the SSHD of the grant of asylum, following the determination of an application under the 1980 Convention, is not an improper use of the proceedings under the 1980 Convention. That subsequent use of a reasoned judgement was clearly anticipated in G v G and does not make a parent's pursuit of the proper determination of his application either improper or illegitimate. This was recognised in the submissions made in G v G on behalf of the UNHCR, as referred to above. I would also repeat that the judgments in G v G make clear that a return order can still be made in 1980 Convention proceedings after asylum has been granted, either by way of initial consideration or on a reconsideration".*

26. Fifth, Mr Harrison QC submitted that, in circumstances in which the court and the Guardian had already received full disclosure of the asylum file, wholly exceptional circumstances would need to be established before the court acceded to the mother's application to withhold disclosure. Without sight of relevant material to which the court and all the other parties were privy, it was difficult to see how the father could have a fair trial. It was highly pertinent that the Guardian was of the clear view that the material was relevant to the overall welfare analysis, whether or not the mother relied on it in these proceedings. The Guardian had suggested that, if it were necessary to withhold disclosure of this material from the father, the court would need to consider some other means by which it could be considered and, if necessary, appropriately challenged by him. Mr Harrison QC submitted that the court should not countenance adopting such a course since this would make a fair trial impossible and impinge on both the father's rights and those of G himself. He questioned whether the court had jurisdiction to order a closed material procedure involving a Special Advocate in the absence of a statutory

power to do so. Even if such a jurisdiction existed, it was impossible to see how, using such a procedure, a trial would be fair. The court would have to balance the risk to the child from disclosure against the breach of the child's and father's rights and, in particular, the detriment to the child of deciding his future on the basis of an unfair and unreliable procedure.

27. Sixth, the mother's statement appeared to accept that the material in the asylum documentation was relevant. However, she asserted three grounds for objecting to disclosure: first, the public interest in protecting confidentiality in the asylum process which she said outweighed the necessity of disclosure; second, the asylum application related mainly to sensitive and distressing factors unconnected to the father which the mother experienced prior to coming to this jurisdiction (though she accepted that some mention had been made of the treatment which she and G had received from the father and his family); and third, her belief that the father would disclose the asylum papers to the authorities in country X which would place the mother and G at real risk from that state and from rogue state agents. As to the first objection, Mr Harrison submitted that the public interest argument was a generic one which arose in every case. With respect to the second objection, the fact that the material might be sensitive and distressing did not assist the mother in discharging the test of what was *"strictly necessary"*. With respect to the third objection, there was no evidence before the court to suggest that the father was any more likely to leak confidential documents received in the court disclosure process than any other litigant in family proceedings.

28. In conclusion, Mr Harrison QC submitted that the case for disclosure was even stronger than in R v G given the profound welfare issue which lay at the heart of this case.

29. For her part, **the mother** submitted that no disclosure of the asylum documentation, either wholly or in part, redacted or otherwise, should be permitted. First, she relied upon her concerns that the father would use information from the asylum documentation to initiate reprisals against either her or members of her family who remained in country X. Any disclosure would place her, and possibly G, at risk. She drew my attention to the production by the father in these proceedings of highly confidential CCTV footage from the alleged departure airport in circumstances where the father would have had no access to this material in the ordinary course of events. Further, no promise or undertaking given to this court by the father with respect to the asylum documentation was likely to be enforceable in country X. However, Mr Gupta QC conceded that, despite the father's awareness of the successful asylum claim made by the mother and G, nothing had occurred in country X since the latter part of 2020 which gave rise to any concerns about the welfare of the maternal family.

30. Second, the mother asserted that the father was conducting a *"fishing exercise"* in seeking disclosure of material from the asylum file. Though there were allegations in that file which related to the father's conduct, these were duplicated within these proceedings and the father had already responded to them.

31. Third, the application for asylum was based upon matters other than the allegations of domestic abuse and sexual assault made against the father. Much of the material was fundamentally different to that contained in the court bundle and to disclose all or part of it would be unnecessary and disproportionate and would create a potentially serious risk to the mother's and to G's safety, both now and in the future.

32. Fourth, Mr Gupta QC drew my attention to the fact that the mother had given information in the asylum process on the understanding that her legal representatives in that process had advised her that any information she gave would be confidential to her and the SSHD because of the strong public interest in protecting the confidentiality of the asylum process.

33. Finally, Mr Gupta QC submitted that it would be helpful for the court to seek further submissions from the SSHD on the particular circumstances of this case before ordering any disclosure. He accepted that this would import delay into the court's decision making, but submitted that there was sufficient time to take this course before the fact-finding hearing took place.

34. **On G's behalf**, Mr Gration QC drew my attention to three broad categories of information within the asylum documentation: first, information about the mother's activities and experiences within country X which placed her at risk of serious physical harm or death (and through her, G was also at risk); second, information as to how the mother travelled to this jurisdiction from country X; and, third, the mother's allegations that both she and G were at risk of harm from the father and the father's family. To date, the mother had not raised the first category of information within the proceedings. She had touched briefly upon her journey from country X to England but not in the detail that appeared within the asylum documents.

35. With respect to the impact upon the mother and the child of material from the asylum documentation being disclosed, Mr Gration QC submitted that it was difficult to see what risk the mother and G faced for as long as they remained in this jurisdiction at an address unknown to the father. With respect to possible risk to maternal family members in country X, that risk arose if relevant material were disclosed and the father then disclosed that information to state actors in country X, who used it as a reason to approach or interfere with the mother's family. The Guardian was unable to offer a view either as to whether disclosure of the asylum file gave rise to a risk for the maternal family or as to the efficacy of any undertaking offered by the father not to disclose information or documentation from the asylum process.

36. From the Guardian's perspective, the information contained within the asylum documentation, which had so far not been deployed by the mother within these proceedings, was of obvious relevance to the overall welfare analysis. Whether the mother chose to rely on it in these proceedings was neither here nor there since both the Guardian was aware of it as was the court. That material would fall to be considered when deciding whether it was in G's interests to be returned to country X and, if not, whether and if so how he could maintain a relationship with his father in the future. Accordingly, Mr Gration QC submitted that, if material from the asylum documentation were not to be disclosed to the father, it would be necessary to consider some other means by which the court could take account of it and, if necessary, permit appropriate challenge by the father.

37. **The SSHD's** letter dated 5 April 2022 stated the following with respect to disclosure of the asylum documentation:

> *"... in the light of the outcome of the asylum process, the strong public interest in protecting the confidentiality in the asylum process outweighs the necessity of disclosure of the asylum documents into these proceedings.*

> *My client accepts however, that it is for the Court to conduct the balancing exercise, in accordance with G v G UKSC 2020/0191 and other relevant case law, as to whether or not the particular circumstances of this case outweigh the strong public interest in protecting the confidentiality in the asylum process. If, following the balancing exercise, the Court finds that the public interest is outweighed, my client's position is disclosure should only be to the judge at first instance and then, only after review by the Judge if he/she still finds that the balancing exercise falls in favour of the father, should documents be disclosed to him."*

The email from the SSHD dated 20 May 2022 added nothing of substance to those submissions.

Discussion

38. I had the opportunity to review carefully all the documents from the asylum process contained in the file disclosed by the SSHD. Having done so and applying the legal principles set out in this judgment, I am satisfied that the following documents should be disclosed into the family proceedings with suitable redaction as indicated, since this material is relevant to the issues of fact and welfare which this court is required to determine:

A) Letter from the mother's legal advisors to the Home Office, advancing additional grounds on behalf of the mother and G dated 30 November 2020, subject to redaction of a) the identity of the mother's legal advisors and their address and (b) the Home Office reference numbers belonging to the mother and G [A14-18 of the asylum file];

B) The mother's statement in support of her claim for protection dated 20 November 2020, subject to redaction of (a) her address, (b) the Home Office reference number, (c) the mother's place of work in country C after 2016, (d) the name and gender of the persons who either assisted her to leave country X (see paragraph 23) or who were otherwise involved with the mother's activities in country X, and (e) details of where the mother had her screening interview [A34-43];

C) The Home Office Minute Sheet dated 20 October 2020, redacted to remove (a) the port reference number as this is the same as the Home Office reference number and (b) details of the Home Office official [A57-58];

D) Contact and Asylum Registration Questionnaire dated 20 October 2020, redacted to remove (a) the Home Office reference number, (b) the interviewing official and their place of work, (c) the details of the mother's living arrangements in response to question 1.5, and (d) the place where the mother was fingerprinted [A79-90];

E) Statement of Evidence Form, Asylum Interview dated 10 March 2022, redacted to remove (a) the office location and the details of the official interviewing the mother together with their place of work, (b) the port reference number and Home Office reference number, (c) the name and details of the mother's legal representatives, (d) the maternal grandmother's occupation and address, (e) the details of where other maternal relatives lived and their occupation/business, (f) the name and location of the organisation assisting the mother contained in the response to questions 14 and 93, (g) the names of those offering support to/working with the mother and G, (h) the

type of interview conducted with the mother, (i) the number of the Home Office interpreter and (j) the date and time of that interview [A142-173];

F) Letter from the mother's legal advisors to the Home Office dated 10 March 2022 making additional submissions in relation to the mother and G's asylum claims, redacted to remove (a) the details of the mother's legal representatives, (b) the Home Office reference numbers, (c) the address to which the letter was sent, and (d) the location of the mother's interview [A174-181];

G) Letter from the mother's legal representatives to the Home Office dated 18 March 2022, redacted to remove (a) details of the mother's legal representatives, (b) the Home Office reference numbers, (c) the address to which the letter was sent, (d) the name and details of the worker and organisation assisting the mother on page 2 and the organisation to which the mother was referred by that worker together with the type of assessment of the mother conducted by that worker, (e) the title and location of an another organisation involved with the mother and the nature of that involvement, and (f) details of the referral requested by the mother's legal representatives and details of the Home Office official involved [A182-185];

H) Letter about the support offered to the mother and child, redacted to remove (a) the worker's name and the name of the organisation (including on the letterhead and the foot of the page) together with a telephone number and the dates when that worker was available, (b) details of the organisations to which the mother and child were referred, (c) details of the assessment carried out on the mother, and (d) details of a crime reference number [A189];

I) The mother's medical records, redacted to remove (a) her address, (b) NHS number, (c) the name of her GP or any doctor, (d) the address of her GP or any doctor, (e) the name of any nurse or health professional associated with her care/GP practice, (f) any telephone number and (g) any email address or method by which the mother could contact the GP surgery [A192-199]; and

J) The asylum decision letters, redacted to remove (a) the Home Office reference numbers (b) details of the mother's legal advisors and (c) the name of the Home Office official.

39. The undisclosed material was irrelevant, either because it consisted of duplicate documents to those already filed within these proceedings or because it consisted of duplicate administrative forms and the like which provided no relevant information.

40. My reasons for deciding the above listed documents should be disclosed into the proceedings, subject to the redactions set out above, were as follows.

41. First, I was unpersuaded that I should adjourn to ascertain whether the SSHD had any further submissions to make with respect to particular circumstances of this case. My directions made on 8 April 2022 had given her an opportunity to make submissions pertinent to the circumstances of this case other than the general submissions made in her letter dated 5 April 2022. In that regard, I note that the SSHD had been provided with all orders and documents within these proceedings by my order dated 21 February 2022. Thus, the circumstances of this case were known to her at the time of her April letter and indeed, from perusal of the asylum documentation, it was evident to me that

the mother's asylum interview conducted on 10 March 2022 had been informed by sight of some of the material in these proceedings. Notwithstanding my invitation on 8 April 2022, the SSHD had chosen not to add anything of substance to her submissions about the disclosure of the asylum documentation. In those circumstances and when considering the mother's application for an adjournment, this court must have regard to the overriding objective in Part 1 of the Family Procedure Rules 2010 and, in particular, the duty to deal with matters expeditiously and fairly to save expense, and to allot the matter an appropriate share of the court's resources. Within that context, it would not be proportionate, in my view, to have further written submissions on this issue from the SSHD and from the parties in response. The content of any submissions from the SSHD might require a process whereby they were disclosed initially to the mother and to G's representatives before being disclosed to the father. An adjournment for this purpose would import significant delay and could, in my view, compromise the efficient management of and preparation for the fact-finding hearing later this year. Given the amount of time which has already elapsed since G's removal from country X, further unwarranted delay in these proceedings would be inimical to his welfare.

42. Second, I accept the submissions made by the father about the context in which the disclosure and inspection of the asylum documentation fell to be considered. No other party challenged what was said by Mr Harrison QC about the stark factual dispute between the parties. Though it may be trite to do so since many of these cases raise very serious issues requiring the court's determination, I observe that the stakes – as described by Mr Harrison QC – were particularly high for each party to the litigation, including the mother. She might ultimately find the grant of asylum revoked if this court accepted the father's case and thereby be required to return to a country where, on her case, she and G were at life-threatening risk.

43. Third, I was satisfied that the documents listed above fulfilled the test of relevance. I applied a generous filter as to what was relevant and what was not because to do otherwise ran the risk that potentially relevant material would be withheld from the father and his legal representatives, running the risk that a further disclosure exercise would be necessary, possibly during either the fact-finding or the welfare hearing. Were that to be so, the parties' preparation for both hearings could be significantly compromised with all the implications for a fair process to which that might give rise.

44. It was clear that the mother's allegations against the father and his family featured in her asylum claim although, **unlike the position in R v SSHD** (my emphasis), those were not the principal matters upon which the mother relied in seeking asylum for herself and G. The documents listed touched on and concerned the three categories of information identified by Mr Gration QC, all of which were relevant to either the fact-finding exercise or the welfare disposal. Further, the asylum documents revealed, at first glance, a degree of consistency in the mother's accounts of her treatment by the father both within the asylum process and within these proceedings but also contained inconsistencies which offered potential lines of forensic enquiry for the father and which were relevant to the credibility of the mother.

45. For the avoidance of doubt, I was wholly satisfied that, in seeking disclosure of material from the asylum file, the father was not engaged in what Mr Gupta QC described as a fishing exercise.

46. Turning to the factors relevant in the balancing of rights and interests which informs whether relevant material from the asylum file should be disclosed within the family proceedings, I reminded myself that any non-disclosure must be limited to what the situation imperatively demands. The ECHR Article 6 and 8 rights of both parents and G were obviously engaged, but the mother raised fears as to ill-treatment and death which also engaged Articles 2 and 3. Additionally, I reminded myself that third party interests may likewise be engaged in this process, namely the Article 2 and 3 rights of the maternal family living in country X.

47. First, the factors which militated against disclosure were as follows: (a) harm to the mother (and indirectly to G) and to maternal relatives were the father to be provided with information from the asylum documentation because he might reveal the same to the authorities in country X and (b) harm to the public interest in the operational integrity of the asylum system as a result of disclosure which was confidential to this system, such confidentiality being fundamental to the effectiveness of that system. With respect to the feared harm to the mother and to maternal relatives, I considered very carefully whether that fear had substance in this particular context. The mother adduced no evidence which explained how the disclosure sought by the father would place her and G at greater risk of harm in this jurisdiction. The father was not aware of their whereabouts in this jurisdiction and did not seek that information. The information provided to him could be carefully redacted to remove any identifying information of this sort.

48. With respect to third parties in country X, the mother likewise adduced no evidence which explained how they might be placed at greater risk of harm by disclosure to the father of information from the asylum file. In circumstances where the father knew about both the application for and the grant of asylum to the mother and G, this knowledge alone - if communicated to the authorities in country X – would, on the mother's case, be sufficient to engage their immediate attention and possibly ire towards the mother and her maternal relatives. Nothing untoward had materialised either here or in country X which suggested this information had already been shared. However, I accept that the situation would be very different if the mother and G returned to country X because of the basis upon which asylum was contended for and granted to the mother and G. The harm they might experience could be life-ending or amount to torture or to cruel or inhuman treatment within the meaning of Article 3. Notwithstanding that caveat, I was not persuaded on the evidence that there was a real possibility of significant harm either to the mother or to G <u>in this jurisdiction</u> if information were to be disclosed to the father from the asylum documentation. Likewise, I was not persuaded on the evidence that there was a real possibility of significant harm to maternal relatives in country X.

49. Mr Gupta QC also relied on the ineffectiveness of any undertaking given by the father as to the confidentiality of material disclosed to him from the asylum file. Country X was not a party to any international instrument through which this court might seek to enforce the breach of an undertaking and there was no evidence whether such a breach would be capable of enforcement according to the law of country X. Mr Harrison QC conceded that enforcing any undertaking given by the father would be difficult given his presence in country X, but accepted that, as requested by the SSHD, an undertaking should be given by him. He also accepted my refinement of the undertaking sought by the SSHD, namely that the father should undertake not to use or disseminate documents

or information contained in those documents disclosed to him from the asylum file outside these proceedings without the express permission of the court. Whilst I note the mother's concerns about the father's access to confidential CCTV information from the alleged departure airport, namely that this was suggestive of an inappropriately close relationship with officialdom in country X, I was not persuaded that this concern - unsupported by any evidence - weighed sufficiently in the balancing exercise to deny the father outright access to material from the asylum file.

50. I note that the father hopes to obtain a visa to travel here for the fact-finding hearing later this year. If he is successful and enters this jurisdiction, this court would be able to address any breach of his undertaking which was evident at that time. Were there to be any interference by either the authorities in country X or any other state actors with the maternal family, the inference that the same was attributable to the disclosure of information from these proceedings would be difficult to resist. In those circumstances, the father's case for G's return to country X would be likely compromised and deemed inimical to G's welfare. These proceedings would likely reach a swift and summary resolution in favour of the mother.

51. With respect to the contended for harm to the public interest in the operational integrity of the asylum system were material confidential to that system to be disclosed, I have given significant weight to the importance of preserving the confidentiality of that system. I accept that there is a public interest in ensuring the confidentiality of the asylum process is protected and this must attract significant weight in the balancing exercise. However, I was also satisfied that the father's right to a fair hearing pursuant to Article 6 and the procedural elements of Article 8, together with the common law principles of fairness and natural justice, were counterweights to the public interest in maintaining the confidentiality of the asylum process. G's right to a fair trial and his best interests and Article 8 rights were also counterweights to the public interest in that regard. Both the father and G were entitled to have access to material on which the mother would rely to support her case at both the fact-finding and welfare stages and which would be available to the court when reaching its decision. To deny either access to this material – in the context of this case – would be highly unusual and require the strongest justification.

52. It is plain from my analysis that the three categories of information identified by Mr Gration QC were of relevance to the mother's case both at the fact-finding and welfare stages and that either the father or G himself should be entitled to examine and, if necessary, challenge this material. Further, this material could not be obtained from a source other than the asylum file – there was no decision by a First-tier Tribunal in the Immigration and Asylum Chamber which might have set out and particularised the evidence advanced by the mother in support of her claim for asylum. Moreover, the SSHD's decision letters provided no details at all about the basis upon which the grant of asylum was made.

53. Any reassurances as to the confidentiality of information given to the mother by her legal representatives in the asylum process could not, in my view, increase the weight given to the confidentiality of that process beyond that which it would otherwise bear. The difficulty with the advice given by the mother's legal representatives in that process was that it might provide a reassurance which could not be maintained if there were any legal proceedings of this sort concerning a child who was part of a parent's asylum claim.

54. Drawing the threads of the balancing exercise together, I was satisfied that the balancing exercise fell in favour of the disclosure I identified in paragraph 38 above, subject to the redactions set out. The strong public interest in maintaining the confidentiality of the asylum process was overridden by the Article 6 and 8 rights of the father and of G himself as well as by G's best interests.

55. I now draw attention to an additional feature which did not form part of the balancing exercise I undertook, namely that, whether or not the mother relied on the same, material relevant to the overall welfare analysis was known to the mother, the Guardian and the court, but not to the father. If disclosure were withheld, the Guardian raised the prospect of some other process having to be devised by which the father was able to respond to this material and, if necessary, challenge it. In a supplemental skeleton argument filed on the morning of 1 August 2022, Mr Harrison QC raised some profound difficulties with the court's processes if the court decided that disclosure of this material would cause harm to G.

56. To summarise Mr Harrison QC's submissions, it was debateable whether the court had jurisdiction to order what was – to follow the logic of the Guardian's suggestion - likely to be a closed material procedure involving a special advocate in the absence of a statutory power to do so. Even if the court did, it was impossible to see how the father might have a fair hearing using such a procedure. The court would need to balance the risk to G from disclosure against the breach of his and the father's rights, especially the detriment to G of deciding his future on the basis of an unfair and unreliable procedure.

57. Mr Harrison QC relied on Re A (A Child) (Family Proceedings: Disclosure of Information) [2013] 2 AC 66, in which the Supreme Court held in paragraph 22 that, unless disclosure of the material might cause harm to the subject child (rather than another person), *"as the common law stands at present, in the absence of a statutory power to do so, the choice is between the case going ahead without the court taking account of this material at all and disclosing it to the parties"*. Though the Supreme Court did not exclude the possibility of a hearing concerning a child's welfare in which a special advocate would consider the material on behalf of the father, it found that two formidable difficulties arose. First, there was no statutory power to adopt such a procedure in civil proceedings. The Supreme Court left the issue of jurisdiction in children proceedings unresolved as it decided that disclosure did not need to be withheld. Second, the deficiencies of a closed material procedure meant that it would be difficult for a person who stood to lose their rights to challenge the essence of the case against them.

58. I did not need to hear detailed argument on this aspect of Mr Harrison QC's case given my conclusion that G would not be harmed by disclosure of the material I had identified from the asylum file. However, I have drawn attention to it because it is not difficult to see that an asylum file might – as in this case – contain information highly pertinent to either the fact-finding or welfare decisions which does not already form part of the children proceedings. In circumstances where disclosure of material from that file might be held, at the disclosure stage, to harm the child with whom the court is concerned yet where that material was highly relevant to the welfare exercise in its broadest sense, a court will be faced with an acute dilemma (a) in reconciling the respective rights in play and (b) in devising a procedure which is fair to all concerned thereafter.

59. Second, the process suggested by the Supreme Court in paragraph 167(c) in G v G which I adopted in this case – namely, ordering disclosure of the asylum file to the child prior to hearing argument on the application for disclosure and inspection made by a parent – could be construed as reinforcing the complexities of balancing the rights in play in a difficult case and in deciding on a process fair to all thereafter. Thus, the fact that the Guardian had already seen the material and formed a view on its relevance to the welfare outcome was prayed in aid of Mr Harrison QC's submission that disclosure to the father should be permitted. It may seem obvious that a child who is the subject of a claim for asylum in their own right or reliant upon a claim made by a parent should be entitled to have disclosure of (a) the material from the asylum process in advance of any court determination about disclosure to another party not engaged in that process and (b) know in detail the harm which might prevent the disclosure of relevant material to a parent. The procedure adopted by MacDonald J in R v SSHD (prior to the Supreme Court's decision) – namely, hearing submissions from the mother alone in a closed part of the hearing – did not appear to involve any disadvantage to the child concerned whose interests were jealously safeguarded by the court itself. However, having reflected, I have come to the conclusion that the course suggested by the Supreme Court has the clear advantage to the child of upholding her/his right to make representations about disclosure from the asylum process in which s/he is almost invariably involved. Secondly, even if disclosure of relevant material were to be withheld from a parent/party for reasons of harm, it is almost inconceivable that the nature and gravity of that harm could be properly withheld from the child's representatives. In my view, navigating the dilemmas identified in paragraph 58 would be arguably even more acutely difficult if the child remained in ignorance of any identified harm.

Conclusion

60. This case is of interest in that, unlike R v SSHD, the asylum claim was not founded solely on the father's behaviour towards the mother. Here, there were factual matters supportive of the grant of asylum to the mother and G which had not been raised within the children proceedings to date. Secondly, those matters were highly relevant to G's future welfare and thus to the court's determination.

61. That is my judgment.