Neutral Citation Number: [2021] EWHC 2642 (Fam)

Case No: FD20P00168

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 September 2021

Before :

THE HONOURABLE MRS JUSTICE ROBERTS DBE

- -

Between :

VR **Applicant**

-and-

YD

-and-

MVR
(by his Children's Guardian, LM)

1st and 2nd Respondents

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Intervenor

- -
- -

Richard Harrison QC and Mehvish Chaudhry (instructed by **Osbornes Solicitors**)
for the **Applicant**
Catherine Wood QC and Emma Spruce (instructed by **Brethertons Solicitors**)
for the **First Respondent**
Christopher Hames QC and Charlotte Baker (instructed by **Goodman Ray Solicitors**)
for the **Second Respondent**
Alan Payne QC (instructed by **the Government Legal Department**) for the Intervenor

Hearing date: 30 June 2021

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APPROVED JUDGMENT

Mrs Justice Roberts :

1. The issue before the court can be described shortly. It relates to an application for disclosure in the context of proceedings brought under the 1980 Hague Convention. The subject matter of the application is material generated in the context of an application for asylum made by the child who is at the centre of the mainframe Convention application in which his father seeks his return to Ukraine. Counsel who have appeared today to make submissions on behalf of their respective clients agree that the disclosure application requires a wider consideration of the impact upon, and status of, those proceedings in circumstances where the Secretary of State for the Home Department ("SSHD") has recently granted asylum to the child. As a consequence of the principle of refoulement, the child cannot now be required to leave this country. In circumstances where there are orders made by this court requiring his return to Ukraine, subsequently upheld by the Court of Appeal prior to the grant of asylum, does this court have locus or jurisdiction to take any further steps in the 1980 Convention proceedings or do they now come to an end by operation of law?

2. That is the wider context in which Mr Harrison QC and Ms Chaudhry make their application for disclosure on behalf of the father. I was asked to consider these matters in the context of the judgment recently delivered by the Supreme Court in *G v G* [2021] UKSC 9, [2021] 2 WLR 705. In that case their Lordships considered the interplay between the 1980 Hague Convention on the one hand and asylum law on the other, including the Convention and Protocol relating to the Status of Refugees adopted on 25 July 1951 (Cmd 9171) and 16 December 1966 (Cmd 3906) ("the 1951 Geneva Convention"). It is accepted by all parties to this litigation that the grant of asylum to this child now prevents his expulsion or return to a country where, as the SSHD has accepted, he is likely to face persecution as a result of his particular circumstances.

3. The father had, and has, no locus in the asylum proceedings. He does not know on what basis the SSHD reached her decision nor the evidence which was submitted to her in support of the child's application. It is the provision of that information which he seeks in the context of his current application within the Hague Convention proceedings. Immediately prior to the grant of asylum to the child ('M'), the focus of the 1980 Convention proceedings was the applicant father's applications for implementation and enforcement by committal of the previous return orders. When this hearing was listed, there had been no decision by the SSHD and thus no specific consideration of how the court should deal with the issues which

flow from that very recent decision in relation to the current status of the Hague Convention proceedings.

A brief background: the course of the litigation to date

4. The child with whom the court is concerned is M who is now 12 years old. The applicant is his father who is now 67 years old. The respondent is his mother. She is 45 years old. M's parents are both academics from professional backgrounds. They had a short relationship whilst the father was married to another woman. M was born as a result of that relationship. All three are Ukrainian citizens and, until the institution of the Convention proceedings, each was living in Ukraine which is where M was habitually resident. M's mother subsequently married a British citizen with whom she had been in relationship for two years.

5. Until 2016, it appears that M had been having some contact with his father in Ukraine. Whilst the frequency and consistency of that contact was disputed by the parties in the course of the Convention proceedings, it is accepted that M has not seen his father since mid-2016 and he has been clear in his wish to avoid any resumption of contact at least in the context of the foreseeable future. He is currently living with his mother and step-father in a home which they share in this jurisdiction.

6. In January 2018, some six months after her marriage, the respondent made an application in the Ukrainian court seeking permission to remove M abroad for a period of seven years. She had by that stage secured a spousal visa to come to England to join her husband who was working in this jurisdiction as a transport infrastructure consultant. She was obliged to make that application because the applicant held, and holds, parental responsibility for M under Ukrainian law. She had previously applied to terminate those rights although no order was made in the context of that application and the applicant continued to provide financially for M despite the difficulties over the contact arrangements.

7. The parties were able to reach an interim agreement in the context of those Ukrainian proceedings whereby M and his mother would be permitted to travel to England for a period of six months from January to July 2018. That agreement was incorporated into a Ukrainian court order on 25 January 2018 and shortly thereafter the respondent travelled with their son to join her husband in this jurisdiction. M was enrolled at a local English school.

8. The respondent did not return with M to Ukraine at the end of the six month period. The applicant commenced proceedings in that jurisdiction seeking a residence order in respect of M. He referred the wrongful

retention of M to the Central Authority and made a formal complaint to the Ukrainian police. His application under the 1980 Hague Convention was heard by Theis J at a contested hearing in May 2019.

9. Theis J rejected the respondent's case that the applicant had consented to M's permanent removal from the Ukraine. She found that there was a specific and time-limited agreement between them on which the applicant was entitled to rely. Ordering a return of the child to Ukraine, she recorded in her judgment that *"This case cannot be viewed in any other way than a blatant retention of [M] here by the mother after an agreed time limited stay here"*. The respondent's Article 13(b) defence was similarly rejected. That defence was founded on a submission that M was at grave risk of harm in circumstances where he would be uprooted from a settled home and school environment in the UK. That risk, on the respondent's case, was likely to be compounded by the possibility of a deterioration in a health condition from which he suffered. The court rejected both limbs of the Article 13(b) defence on the basis that the evidence relied on by the respondent had not established either a credible risk to M or a risk which passed the high threshold required under Article 13(b). The final limb of the respondent's defence to an order for summary return was based upon M's own objections. Whilst accepting that the child was then articulating an objection to returning to Ukraine, Theis J declined to exercise her discretion on this basis.

10. As a result, the respondent returned with M to Ukraine. The collective expectation at the time was that she would apply immediately in the domestic courts in that jurisdiction for permission permanently to remove M to live with her and her husband in the home they had established in England. That did not happen. After what appears to have been a somewhat peripatetic existence, she left Ukraine at the beginning of October 2019 and travelled via Lithuania back to England.

11. Predictably, that wrongful removal (for such it undoubtedly was) prompted the applicant's second Hague Convention application which was issued on 23 March 2020. It is that application which provides the platform for the disclosure application now made by the applicant following substantive determination by Robert Peel QC (as he then was) sitting as a Deputy High Court Judge on 25 and 26 June 2020. On that occasion, the judge described the respondent's actions in these terms:

> "This was a blatant act by a person who did not truly accept the decision of the English court in May 2019 and elected to take the law into her own hands by fleeing clandestinely to the UK" (para 25).

12. The judge rejected each of the defences which the respondent re-ran on the basis that they amounted to little more than an attempt to relitigate the very same issues which Theis J had rejected in the first set of proceedings. In para 44 of his judgment, the judge said this of the defences raised by the respondent:

> "They were all advanced, and failed, just over a year ago. Nothing in the way of compelling new evidence, whether by reference to events since May 2019 or otherwise, has been presented to me. And there is the opportunity for therapeutic engagement in the Ukraine if M chooses to access it on [the child's] behalf."

13. Concluding his judgment with a further order for M's summary return to Ukraine, the judge made the following findings (para 53):-

> "(iii) I cannot ignore the plain fact that M has taken the law into her own hands once again in a determined effort to achieve that which she wants. 4 months after a return order made in this country, she abducted [M] from the Ukraine. She did so, I am satisfied, knowing and understanding that she was in breach of the Convention. She did so without informing F. She did so without seeking prior legal authorisation in the Ukrainian courts.
>
> …..
>
> (v) A return order was made a year ago and then disregarded by [the mother]. To my mind that increases the relevance of the underlying policy considerations of the Convention, rather than decreases it. The court having already made a decision a year ago, I would require powerful reasons to exercise a discretion against a return and in my view no such powerful reasons exist."

14. On 3 August 2020, Moylan LJ refused the respondent's application for permission to appeal on the basis that such an appeal would have no real prospect of success. The court thus confirmed the order requiring her to return with M to Ukraine no later than 5 August 2020. The day before she was due to fly, she issued an application seeking a stay of that order on the basis that she herself was unwell and she was concerned about compromising M's health, as well as her own, as a result of the Covid pandemic which had resulted in local restrictions on internal travel in Ukraine. That application was dismissed by Keehan J on 17 August 2020. On 24 August 2020 the respondent issued a further application seeking the set aside of the return order pursuant to r. 12.52A of the Family Procedure (Amendment) Rules 2020 (now incorporated into the 2010 FPR) because of what she alleged to be "a significant deterioration in [M's] mental and physical health". In support of that application, the respondent sought to

rely on a report which had been produced by an independent social worker (ISW) and other medical evidence. On 22 September 2020, that application was dismissed and the order for summary return was confirmed. A further application for a stay of the return order followed on 9 October 2020 on the basis that Covid-19 restrictions were preventing the respondent from travelling to Ukraine with M. She also sought to resurrect concerns about her own and M's health. On 16 October 2020 Williams J rejected that application and made directions in relation to an application which the applicant had advertised in relation to the respondent's committal to prison in the event of a continuing breach. The order for summary return was confirmed with an extended date of 26 October 2020 with the committal listed for 26 November. Finally, on 26 October 2020 the respondent issued a further application for a stay of the return order pending determination of an application for asylum which M had made in his own right on 20 October 2020. This was followed ten days later by the applicant's committal application. By that stage the respondent was in breach of four High Court orders requiring the summary return of M to Ukraine.

15. The Court of Appeal's judgment in *G v G* [2020] EWCA Civ 1185 was handed down on 15 September 2020. Following the guidance set out in that decision, on 26 November 2020 Holman J invited the SSHD to keep the High Court informed of the progress of the asylum application and, if possible, to expedite her determination. The papers generated within the Hague Convention proceedings were released to the SSHD. CAFCASS became involved in the proceedings.

16. With the appeal to the Supreme Court in *G v G* pending, on 22 January 2021 the applicant applied for disclosure of M's asylum application.

17. That is the application which I heard on 30 June 2021. M has been joined as a party to these proceedings and appears through his CAFCASS Guardian, Ms Lynne Magson. There are now three separate reports before the court since her appointment as Guardian. The complete asylum file has been made available to the Guardian and to the court but not to either of M's parents. I have set out the background in order to provide a context for the position in which the applicant now finds himself and the submissions as to the way forward which are now advanced on his behalf by Mr Harrison QC and Ms Chaudhry.

18. Before turning to the parties' submissions, I turn first to the law.

The Law

19. The approach to be followed in a case where one party to litigation asserts exemption from the normal process of disclosure was set out by the Court of Appeal in *Dunn v Durham County Council* [2012] EWCA Civ 1654, [2013] 1 WLR 2305. This approach applies in Hague Convention proceedings in the context of the disclosure to the alleged 'persecutor' of asylum records: see *Secretary of State for the Home Department v RH* [2020] EWCA Civ 1001, [2021] 1 FLR 586, [2021] 1 FCR 48. It rests on two substantial pillars: relevance and a subsequent balancing exercise having regard to the competing rights under the European Convention on Human Rights. In particular, the court must carefully weigh and consider the right to a fair trial of the party seeking disclosure and the privacy and confidentiality rights of the other party and any other person whose rights might require protection. In principle, the denial of disclosure is limited to circumstances where such denial is strictly necessary because, in most cases, the need to ensure a fair trial process militates against restrictions on disclosure.

20. In *RH*, the mother's defence to the application for the summary return of the child to another Convention Member State relied on the child having 'settled' in this jurisdiction. Her parallel claim for asylum to the SSHD relied on allegations of chronic domestic and sexual abuse inflicted upon her by the father and witnessed by their child. She maintained that she was at risk of serious harm or even death at the hands of the father or his family were she to be forced to return. Those claims were accepted in relation to the immigration appeal and both mother and child were granted asylum. The father withdrew his application for the child's summary return and issued instead an application for a child arrangements order. In the context of these private law proceedings, he once again sought disclosure of the documents generated by the asylum process on the basis that, without them, he would not have a fair trial. Both the mother and the SSHD resisted disclosure.

21. The trial judge at first instance, MacDonald J, ordered the disclosure of some of the documents from the asylum proceedings redacted where appropriate. Permission to appeal was granted on the basis that the judge had failed to give sufficient weight to the confidentiality of the asylum process. The appeal failed.

22. Baker LJ endorsed the approach which MacDonald J had adopted in his approach to the balancing exercise. It is important to stress that the balancing exercise in *RH* was ultimately conducted in the context of an application for disclosure of the asylum material into private Children Act proceedings during the course of which the judge was required to consider

and make findings in relation to serious allegations of potential harm to the child at the centre of those proceedings. At paragraph 55 of MacDonald J's judgment, he said this:-

> "[55] …. The starting point must be that the father is entitled to consider all evidence that is relevant in that context, pursuant to his cardinal rights under the ECHR and the common law principles of fairness and natural justice, as is H. Given the gravity of the allegations in issue and the evidence before the court regarding the contended 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 the 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….".

23. In contrast, the procedure for determining the outcome of an application for the summary return of a child to the country of his or her habitual residence under the 1980 Hague Convention is a truncated summary process. Elements of welfare and child protection are clearly built into the defences available to a 'removing' parent but the court does not for these purposes undertake a full holistic welfare evaluation based upon a determination of the underlying facts. Such a fact-finding enquiry would inevitably prolong the process and defeat one of the primary objectives of the Convention which is to secure the prompt return of children to the country of their habitual residence in order that such an enquiry can be conducted in their domestic courts.

24. In paragraph 55 of his judgment delivered in the Court of Appeal in *RH*, Baker LJ rejected the notion that the confidentiality of information relied on by an asylum applicant should be treated any differently from other categories of confidential information. Whilst the fact that, if disclosed, the information would be available to an alleged persecutor is clearly a factor to be balanced in the equation, it is not determinative. His Lordship rejected the submission made by the SSHD that provisions prohibiting

such disclosure in the Immigration Rules[1] and the statutory scheme underpinning the asylum jurisdiction should be embraced within other jurisdictions as a complete bar on disclosure. Furthermore, as is plain from the judgment delivered by the Supreme Court in *R v McGeough* [2015] UKSC 52, absolute confidentiality only applies during the process of examination of the asylum application itself.

25. In this context, as Peter Jackson LJ confirmed in his judgment in *RH* at paragraph 70,

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

The parties' submissions

The applicant father

26. As I have said, Mr Harrison QC and Ms Chaudhry advance their submissions on behalf of the applicant without sight of the asylum documents. The submissions which I have received from the respondent mother and the SSHD have been 'open' for these purposes and thus the legal arguments in relation to the next steps have been fully ventilated on that basis.

27. On behalf of the applicant, it is submitted that the material generated in the context of the asylum application is plainly relevant since it forms the basis upon which he is being denied a remedy in the Convention proceedings to recover his abducted child in breach of his established parental rights. Furthermore, it is submitted on his behalf that the Convention proceedings continue as a potential jurisdictional basis for further orders to be made by this court even if the recovery of the child can no longer be pursued at this stage of the present application. Mr Harrison QC informed the court that it is his client's ultimate intention to pursue enforcement of the orders which have already been made for M's return to the Ukraine despite the fact that he acknowledges "this is not presently

[1] Art 22 of the Procedures Directive and para 339IA of the Immigration Rules

possible". Whilst he does not identify the jurisdictional route which his client intends to take to pursue this end, he points to the following contexts in which disclosure of the asylum material is, or may become, relevant:-

(i) an application to set aside the return order and/or any fresh consideration of the Article 13(b) defence;

(ii) a subsequent enforcement of a fresh return order made in that context;

(iii) a consideration of any direct and indirect risks to the child's welfare in the event he is returned to Ukraine;

(iv) the likelihood of the father being able to provide care for the child and/or have contact with him even if these issues fall for consideration in the context of an application in English private law proceedings;

(v) any public law remedy which he may seek to pursue to challenge the decision of the SSHD (such as judicial review of the grant of asylum); and

(vi) the outstanding committal application.

28. As to the court's continuing jurisdiction to make orders in the Convention proceedings, Mr Harrison QC relies on FPR rule 12.52A which provides in paragraphs (1) to (3) as follows:

"**Application to set aside a return order under the 1980 Hague Convention**

12.52A

(1) In this rule –

"return order" means an order for the return or non-return of a child made under the 1980 Hague Convention and includes a consent order;

"set aside" means to set aside a return order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule.

(2) A party may apply under this rule to set aside a return order where no error of the court is alleged.

(3) An application under this rule must be made within the proceedings in which the return order was made."

29. In paragraph 158 of his judgment in *G v G*, Lord Stephens confirmed that the court retains the power under this rule or its inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention: see *B (A Child) (Abduction: article 13(b))* [2020] EWCA Civ 1057, [2021] 1 FLR 721. Mr Harrison QC submits on behalf of the applicant that in such a scenario it was not suggested that the role of the court should simply terminate. On this basis, he invites me to proceed on the basis of a deemed application by the respondent mother and/or by M himself to set aside the return order on the basis of the grant of asylum. In that event, he submits that the asylum material is plainly relevant to an assessment of the direct and indirect risks to the child in the event that he is returned to Ukraine. Early disclosure of the asylum material is, he submits, consistent with the court's international obligations under the Convention and relevant in the context of both the implementation and enforcement stages of an application including the extant committal application in respect of the respondent's breaches.

30. In terms of the balancing exercise which must follow once relevance is established, Mr Harrison QC submits that:-

    (i) confidentiality in the asylum process does not act as trump card and any argument to the contrary is unprincipled, wrong and contrary to the authorities;

    (ii) the court must draw a distinction between this sort of situation involving a family unit and one where the risk of persecution derives from an unconnected party or a foreign state where disclosure might lead to risk of persecution against members of the asylum seeker's family or other unconnected third parties;

    (iii) the applicant's Article 6 and Article 8 rights are fully engaged. He cannot have a fair trial without disclosure of the allegations in the asylum material and the absence of the information goes to the heart of M's best interests and his own entitlement, as well as his father's, to a family life;

    (iv) in circumstances where the Family Division of the High Court has made repeated orders for the child's return to Ukraine, it is impossible without the disclosure sought for the applicant to understand the basis upon which another arm of the state (the SSHD) has considered it necessary or appropriate to act in a manner which is inconsistent and in direct contradistinction to those orders;

(v) nowhere in the evidence filed by the respondent in the Hague Convention proceedings is there any reference to a fear of persecution from the applicant or from any other external source. In this context, Mr Harrison QC reminds me what was said by Mr Robert Peel QC (as he then was) in his judgment about the substance of the respondent's Article 13(b) defences as her case was articulated in both the first and second set of Hague proceedings. This lacuna must be seen in the light of the applicant's strong suspicion, grounded in part by the evidence of the CAFCASS report and the child's insistence that he wants no contact at all with his father, that M has been subjected to parental alienation by his mother.

The respondent mother

31. On behalf of the respondent, Ms Wood QC and Ms Spruce support the submissions made by the Guardian and the SSHD. She does not accept that the applicant has surmounted the first hurdle of establishing that the asylum documents are relevant. In any event she submits that disclosure would infringe M's Article 8 rights to confidentiality in his family life and further that, if released, the court would lose all control over wider dissemination of the asylum material.

M's Guardian

32. On behalf of the Guardian, Mr Hames QC and Ms Baker oppose the disclosure of any material in the asylum file to the applicant father. They submit that as a result of the decision to grant M asylum, the court must set aside the return order by operation of law and thus the asylum file has no relevance for the purposes of the first limb of the test in *Dunn.* The grant of asylum has created a jurisdictional vacuum and there is no longer any 'live' context for the grant of further relief in the 1980 Convention proceedings which are effectively concluded. Mr Hames QC concedes that different considerations would apply were the applicant to engage a substantive welfare-based jurisdiction, for example in private law proceedings under the Children Act 1989.

33. He invites the court to set aside the current return order on the basis that, in the absence of any remaining 'live' applications which could affect their currency, the proceedings must come to an end. He submits that the disclosure application has no relevance to any further matters which require a decision by this court and must therefore be dismissed. Put simply, he maintains that there is no further need for any judicial evaluation on the part of this court given the decision of the SSHD and thus no discretion arises.

34. If, contrary to his primary submission, the court were to consider the asylum material to be relevant, Mr Hames QC submits on behalf of the Guardian that the balance falls firmly in favour of refusing the disclosure application. In this context, he maintains that the applicant's Article 6 rights have to be viewed in the context of the mandatory obligation imposed on this court now to set aside the return order. The applicant cannot use these proceedings to challenge the SSHD's decision. Even if that were not the case, it is the Guardian's view that M's rights under Articles 2, 3 and 8 of the ECHR should take precedence over the applicant's Article 6 and 8 rights.

35. Whilst the Guardian understands and sympathises with the applicant's position where he is seemingly left without a remedy, Mr Hames QC submits on her behalf that this situation arises as a result of the inability of a third party to challenge an asylum decision made by the SSHD. The disclosure application in essence amounts to an attempt to use these proceedings and this court's process as the vehicle for such a challenge. If a parent in the applicant's position is to be given the right to challenge or enquire into the reasons for a decision affecting his or her child, this must be a matter for Parliament and a change in the current law. Mr Hames QC submits that, on the current state of the law, I cannot and should not allow "a limping set of proceedings" to be used as the vehicle to right a perceived wrong.

36. Finally, he submits that in the Guardian's view there are powerful and child-centric reasons why M's wishes to remain in his home with his mother and stepfather should be respected. She has little doubt that the best way for this father to rebuild his relationship with his son is to respect and acknowledge those wishes.

The position of the SSHD

37. On behalf of the SSHD, Mr Payne QC submits that, following the grant of asylum to M on 28 May 2021, there is now an absolute bar on his removal to Ukraine. In resisting the disclosure application now made by the applicant, he relies on what he refers to as "quintessential policy considerations" which inform the importance of maintaining confidentiality of the asylum system over and above the need to safeguard potential asylum seekers. The evidence provided by claimants and witnesses is key to identifying genuine claims for asylum. If those individuals believed that the information they provided was likely to be disclosed to the alleged perpetrator, it would act as a compelling deterrent giving rise to a risk that genuine refugees are not identified as such. Such an outcome would jeopardise the ability of the SSHD to ensure that the United Kingdom complies with its international obligations under both the

Refugee Convention and European law. As Mr Payne QC submits, these policy considerations come into sharp focus in circumstances where a claim for asylum has been allowed and, by implication, a real risk of persecution established.

38. In response to the argument advanced on behalf of the father that different principles, or less weight, should be attached to the confidentiality of the asylum process where the alleged persecutor is a parent of the subject claimant child, Mr Payne QC makes three points:-

    (i) the fundamental confidence enshrined in the process and the importance of ensuring that those who seek asylum feel safe to provide information in support of their cases crosses all boundaries no matter who the alleged perpetrator may be;

    (ii) it would be dangerous for the court to embark upon a process of trying to identify different classes of asylum cases. A significant volume of cases put before the SSHD involve allegations of persecution perpetrated by individuals rather than bodies of another state. Even where allegations are made against an individual parent, the need to preserve confidence in the wider asylum system remains a factor of central importance to be weighed in the balance;

    (iii) it is statistically incorrect to say that the typical asylum claim involves a risk of persecution from a third party state. Many cases involve an alleged risk of persecution by either parents or spouses (most typically in the context of female genital mutilation).

Discussion and analysis

General principles: G v G in the Supreme Court

39. In addition to hearing legal argument from the SSHD, the Supreme Court delivered its wide-ranging judgment in *G v G* having had the benefit of oral and/or written submissions from several interveners including:

    (i) International Centre for Family Law, Policy and Practice;

    (ii) Reunite International Child Abduction Centre;

    (iii) Southall Black Sisters;

    (iv) United Nations High Commissioner for Refugees;

    (v) International Academy of Family Lawyers.

40. The five-judge court thus had the benefit of comprehensive argument focussed upon a number of different legal and practical aspects of the two different sets of proceedings before the court and the interplay between them. As their Lordships acknowledged from the outset, the 1951 Geneva Convention concerning the protection afforded to refugees[2] and the 1980 Hague Convention which was and is designed to protect children from the consequences of unilateral and unlawful removal or retention by a parent in a foreign jurisdiction without the consent of the other are driven by different objectives.

41. Their Lordships recognised the tension between the time which it can take to resolve an asylum claim and the much shorter and abbreviated summary process envisaged by the 1980 Convention which was designed to ensure the swift return of abducted children to the country of their habitual residence where the domestic court would be available to adjudicate on any disputes between the child's parents. Deterrence underpins those aims and that policy consideration was likely to be frustrated if asylum claims were permitted to introduce significant delay into the process and thereby enable the taking parent to avoid the consequences of their unlawful actions by emasculating a summary order for return: see paragraphs 3 and 4.

42. In *G v G*, Lieven J at first instance had been told (wrongly) that there was no separate asylum application by the child who was named as a dependent on her mother's claim for asylum. In these circumstances, and in the absence of a determinative ruling by the SSHD in relation to the mother's claim, the Court of Appeal had lifted the stay on the order for summary return of the child. Their Lordships decided that, had G made her own application for asylum, whilst a return order in 1980 Convention proceedings could be made by a first instance court, it could not be implemented during the pendency of that application.

43. The Supreme Court decided that a child who was named as a dependant on his or her parent's asylum request and who could objectively be understood to have sought international protection from the requested State was to be afforded protection from refoulement pending the determination of that application. In these circumstances, pending that determination, an order for summary return under the 1980 Convention could not be implemented.

[2] The 1951 Geneva Convention has not been incorporated into English domestic law but it is recognised as the model for the regime which governs our system of asylum applications: see para 78 of *G v G* and *R v Asfaw (United Nations High Commissioner for Refugees intervening)* [2008] UKHL 31, [2008] AC 1061, para 29. And see s. 2 of the Asylum and Immigration Appeals Act 1993 which provides that the Immigration Rules incorporating much of the 1951 Convention into domestic law must not adopt any practice which is contrary to the principles of the Convention.

44. The chronology in *G v G* is relevant here in terms of the twin-track process adopted in the management of that case. The stay order in respect of the 1980 Convention proceedings was made by Lieven J on 5 June 2020. Whilst the asylum claim was progressing through the delays generated in part by the Covid-19 restrictions in place through the summer of that year, the Court of Appeal delivered its judgment on 15 September 2020. Shortly thereafter, the mother's representatives submitted to the case-working team within the Home Office her medical report and her proposed amendments to the interview record. Permission to appeal to the Supreme Court was granted on 15 December 2020. The appeal was heard in the Supreme Court over three days between 25 and 27 January 2021. On 4 February this year, the court was told that the SSHD had informed the mother the previous day that her application for asylum had been refused. Judgment reflecting these developments was handed down by the Supreme Court on 19 March 2021 at which point the case was remitted to the Family Division for further consideration of the 1980 Hague Convention application which the father had made. The order made in the Court of Appeal setting aside the stay made by Lieven J was upheld.

45. That chronology has to be considered in the context of the issues which arise for decision in this case and the facts which are now agreed as the evidential basis for those decisions. In this case, as opposed to the facts in *G v G*, M has secured in his own right a grant of asylum after due deliberation of the evidence submitted to the SSHD. There has, as yet, been no challenge to that decision which, as it stands, engages a clear and established principle of law which binds this court and which is not in contention as between the advocates in this case. As a result of that decision and the grant of refugee status to the child, there is now an absolute bar to any order in family proceedings which seeks to return the child to the country in respect of which asylum has been granted. That principle of law arises as a result of the cumulative effect of the 1951 Geneva Convention[3], immigration legislation and rules, and Council Directives 2004/83/EC ("the Qualification Directive") and 2005/85/EC ("the Procedures Directive) which provide that the determination of the

[3] Article 33 of the 1951 Geneva Convention sets out the "Prohibition of Expulsion or Return ('Refoulement') in these terms:-

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

refugee status of any adult or child falls within "an area entrusted by Parliament to a particular public authority" (in this case the SSHD). In these circumstances it is not open to the High Court, however wide its powers, to intervene on the merits of the determination of refugee status itself. The fact that the SSHD has acted for these purposes in an administrative, rather than a judicial, capacity makes no difference to this principle: see *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791, [1985] 2 WLR 892, [1985] 2 All ER 301, HL(E) as confirmed in *F v M and Another (Joint Council for the Welfare of Immigrants intervening)* [2017] EWHC 949 (Fam), [2018] Fam 1 (per Hayden J in paragraph 41 following a comprehensive analysis set out in paras 23 to 40). As Lord Scarman said *In re W* at page 797:

> "The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen authority is one which acts administratively whereas the court, if seized of the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority."

46. That principle was left undisturbed by their Lordships' judgments in *G v G* and confirmed in paragraph 134 by Lord Stephens, delivering the judgment of the full court:

> "I consider that an applicant has protection from refoulement pending the determination of that application, so that until the request for international protection is determined by the Secretary of State a return order in the 1980 Hague Convention proceedings cannot be implemented. The two Conventions are not independent of each other but rather must operate hand in hand."

47. For present purposes, the successful grant of asylum to M must be treated from his perspective as a final determination since he has secured an effective remedy as a result of his application. He needs no further avenue of challenge or appeal whether pursuant to article 39 of the Procedures Directive or otherwise. There is, as yet, no challenge from elsewhere to the grant of asylum status to M. One of the questions which was remitted to the Family Division in *F v M* was whether there was a process open to the 'left behind' parent whereby he could challenge the decision of the SSHD. Unusually in that case, voluntary disclosure had been made in that case by the SSHD that asylum had been granted on the basis of serious allegations of violence which the father denied. Paragraphs 338A and

339AB of the Immigration Rules provide for the revocation of a grant of refugee status in circumstances where the SSHD is satisfied that the underlying facts have been misrepresented by a claimant and that misrepresentation or omission of the facts, including the use of false documents, was decisive for the grant of such status. Such rules embody the basic tenets of administrative law that, in order to be lawful, the position of the SSHD must be both "reasonable" and "rational".

48. It was acknowledged on behalf of the SSHD in *F v M* that it would in principle be open to the father to judicially review a failure by the SSHD to revoke the grants of asylum on public law grounds: see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351. Such a challenge faces significant hurdles. In this case the SSHD has already been provided with the entire bundle of material produced during the currency of the 1980 Convention proceedings to date, including the orders flowing from the earlier judgment of Theis J and the subsequent judgment of Mr Robert Peel QC. That evidence was available to her for the purposes of her review of the evidence provided by, or on behalf of, M independently in the context of his asylum claim. She reached her decision in the full knowledge of the public law duty to which she was, and is, subject to consider any material relevant to her decision. All the evidence given by the father in the family proceedings to date has been made available to the SSHD as well as the previous judicial findings based upon that evidence.

49. In *F v M*, Hayden J was considering these issues in circumstances where the material information relevant to the asylum claim had already been disclosed to the father by the SSHD on a voluntary basis. As the judge acknowledged, this was not the usual course taken in asylum cases and there are powerful reasons for preserving the confidentiality of this material. He acknowledged that whilst procedural fairness to all parties was part and parcel of the Article 8 rights of both the 'left behind' parent and the child, the duty of confidence owed to an asylum claimant (and that duty survives any successful grant) also falls within the embrace of Article 8: see paragraph 60 and *Campbell v MGN Ltd* [2004] 2 AC 457. As his Lordship acknowledged in this context, a reasonable expectation of privacy "is intrinsic to the operation both of the asylum system generally and the proper discharge by the UK of its obligations under the Refugee Convention, Qualification Directive and the ECHR".

50. In *G v G*, the Court of Appeal had held that the duty of non-refoulement and the article 7 duty to allow asylum applicants to remain do not prohibit the taking of decisions which are preliminary or ancillary to actual return :

see paragraph 142. That position was confirmed in the Supreme Court. It is clear from paragraph 157 that the court is perfectly entitled to consider the merits of the 1980 Hague Convention proceedings even if the factual issues overlap with the asylum claims provided that the prohibition on determining the claim for international protection (i.e. the asylum claim) is not infringed. As I have already said (paragraph 29 above), Lord Stephens further acknowledged (paragraph 158):

"Furthermore, if as a result of the decision of the Secretary of State in relation to the asylum process a reconsideration of the 1980 Hague proceedings is required, then the court has power in England and Wales under FPR rule 12.52A or under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention: see *B (A Child) (Abduction: article 13(b))*."

51. Further, in analysing the interplay between the two sets of proceedings, Lord Stephens said this:

> "164. …. the 1980 Hague Convention proceedings are separate from the asylum process. Frequently, the same factual background forms the basis for both (i) an application for asylum by a child and (ii) a "defence" to an application for a return order under article 13(b) (grave risk to the child). In determining an application for a return order under the 1980 Hague Convention, the court does not impinge in any way upon the Secretary of State's exclusive function in determining refugee status. Rather, information in the 1980 Hague Convention proceedings and the court's decision may inform the determination by the Secretary of State of a person's asylum claim or as to whether the Secretary of State revokes refugee status. Similarly, information available to the Secretary of State such as country background information (though in this case that information is publicly available) and the decision of the Secretary of State may inform the court's decision in the 1980 Hague Convention proceedings.
>
> 165. For these Conventions to operate hand in hand, I consider that there are various practical steps which should ordinarily be taken, aimed at enhancing decision making in both sets of proceedings, where they are related. I consider that proceedings are related once it becomes apparent that an application for asylum has been made by a parent (regardless of whether the child is objectively understood to have made an application or been named as a dependant) or by a child."

52. In accordance with the guidance given in *G v G* (paragraph 167), the following steps have already been taken in these proceedings:-

    (i) there has been a clear line of communication between the court and the Home Office. For the purposes of the discrete disclosure application which is currently before this court, Mr Payne QC has been instructed by the SSHD to appear in order to make representations;

    (ii) M has been joined as a party to these proceedings with his own separate representation;

    (iii) the papers provided to the SSHD in relation to the asylum application which M has made have been disclosed to the Guardian and M's legal representatives.

53. The applicant father has no independent or free-standing locus within the asylum proceedings despite the fact that he has a biological family connection with M. There are prima facie important policy considerations which militate against the disclosure of confidential information disclosed in those proceedings to an alleged persecutor. That is why, of course, he seeks disclosure of the asylum material into these 1980 Convention proceedings in which, as a party, he is prima facie entitled to disclosure subject to the court's powers to restrict disclosure or redact in part any disclosure which is permitted. It is at this stage when, subject to the first hurdle of relevance, the balancing exercise envisaged in *Dunn* becomes engaged.

54. In this context, I set out below what Lord Stephens said in *G v G* about this aspect of the disclosure process.

> "170. …. [T]he court should give early consideration to the question as to whether the asylum documents should be disclosed in the 1980 Hague Convention proceedings. Article 22 of the Procedures Directive provides that:
>
> > "*For the purposes of examining individual cases*, member states shall not: (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to *the alleged actor(s) of persecution of the applicant for asylum*; (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin." (Emphasis added)
>
> In *R v McGeough* [2015] UKSC 62; [2016] NI 280; [2015] 1 WLR 4612, para 23 Lord Kerr of Tonaghmore, giving the judgment of the court stated

> that "the stipulation [in article 22] is that it should not be disclosed to alleged actors of persecution *and the injunction against its disclosure is specifically related to the process of examination in individual cases.* The appellant's case had been examined and his application had been refused. *The trigger for such confidentiality as article 22 provides for was simply not present*" (emphasis added). Paragraph 3391A of the Immigration Rules transposes article 22 into domestic law. That paragraph has a similar trigger containing the same limitation "For the purposes of examining individual applications …". The preliminary words of both article 22 and the paragraph qualify the prohibitions confining confidentiality of the asylum documents to the asylum process. The provisions of article 22 and paragraph 3391A are intended to give instructions as to how to deal with the information when considering applications for asylum. They do not prevent a court from ordering disclosure nor is it necessary to postpone disclosure until the asylum process has concluded. The Court of Appeal *In the matter of H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001, para 68(3), relying on *R v McGeough* stated that "Absolute confidentiality only applies during the process of examination of the asylum application". However, that confidentiality only applies for the purposes of examining individual cases within the asylum process. The article 22 trigger does not apply to the 1980 Hague Convention proceedings. There will be other aspects of confidentiality which are set out in *In the matter of H (A Child) (Disclosure of Asylum Documents)*. Therefore, the court at an early stage of a 1980 Hague Convention application should consider disclosure of the asylum documentation in the 1980 Hague Convention proceedings, applying the balancing exercise set out in *In the matter of H (A Child) (Disclosure of Asylum Documents)*.
>
> 171. In carrying out the balancing exercise a relevant factor will be whether the left-behind parent in the 1980 Hague Convention proceedings is "the alleged [actor] of persecution of the applicant for asylum"."

55. One of the specific recommendations made by the Supreme Court in *G v G* was that any asylum judicial review should normally be assigned to a Family Division High Court judge (although not the same judge who has conduct of the 1980 Hague Convention proceedings: see paragraph 175). The court's final recommendation (paragraph 177) was that it was desirable that the High Court should have oversight over and be in a position to co-ordinate both sets of proceedings until both have been concluded.

My conclusions

56. So where does this leave me ?

Preliminary conclusions in relation to the way forward

57. First, I do not accept that the timing of the asylum claim and/or the grant of asylum to M in this case neutralises or otherwise removes it from the reach or

application of the principles which were expressed by the Supreme Court in *G v G*. In this context I accept the submission made by Mr Payne QC on behalf of the SSHD that the principles, with appropriate modification, should apply irrespective of the precise time during the Hague proceedings when the claim for asylum is either made or determined. Lord Stephens specifically acknowledged the power which existed under either FPR r. 12.52A or the inherent jurisdiction to review and set aside a final return order made in Convention proceedings where a decision by the SSHD in the asylum process so required (paragraph 158).

58. Secondly, whilst there is a statutory appeal process in relation to the decision made by the SSHD, Parliament has decided that persecutors and/or other third parties should have no locus to challenge individual asylum decisions. In these circumstances, it is not open to the applicant father in this case to complain (i) that he was not involved in the investigation which resulted in the decision to grant the asylum claim and/or (ii) that he does not have a right of challenge or appeal against that decision. It follows in my judgment that he has no grounds for his complaint that, without transparency of the investigative process, he cannot take advice and make decisions about how to challenge that process. The lines of demarcation in terms of the responsibility for decision-making in relation to a grant of asylum are clearly delineated and it is not for this court to seek to take a course which Parliament has rejected. To that extent, I take the view that the application for disclosure of the asylum material within the 1980 Convention for the purposes of evidence-gathering with a view to launching a judicial review of the decision to grant M asylum is little more than a 'fishing expedition' which this court should not authorise.

59. However, that does not deal with the wider aspects of the disclosure application to which I shall come shortly. Because of the timing of the grant of asylum in this case, it was not specifically case managed on the basis that this would be the court's opportunity to consider an application by the respondent to seek to set aside the return order. Given that the grant of asylum was only recently communicated to the parties and the court, there is no formal set aside application before me. That is why Mr Harrison QC on behalf of the applicant invites me to proceed on the basis of a deemed application made by either or both of the respondent and/or M for set aside and to consider the application for disclosure within that context.

60. In accordance with the overriding objective set out in r. 1.1 FPR 2010, I regard it as wholly disproportionate in terms of time and cost, as well as inimical to the Convention requirements of swift determination, to defer full consideration of the disclosure application to a further hearing to allow for the issue of a formal set aside application on the part of the respondent or M, through his Guardian. I consider that I am in a position to deal with that application in the

course of this judgment. However, it follows that I reject the submission made by Mr Hames QC on behalf of the Guardian that I am obliged by operation of law to set aside the return order in circumstances where there is now "a jurisdictional vacuum". I accept that, unless and until there has been an effective challenge to the grant of asylum which operates to reverse that decision, this court is precluded from *enforcing* the existing return order. In these circumstances, I can see the force of Mr Hames QC's submission that, captured at this particular point in time on the litigation continuum in the Hague proceedings, it may appear that the court's hands are tied in terms of delivering an effective remedy to this father. But that, without more, does not in my judgment lead to a conclusion that, to use Mr Harrison QC's phrase, consideration of his client's disclosure application is no more than a "tick-box" exercise. The Court of Appeal has, in terms, rejected that position through its judgments in *Re B* and *RH* . FPR r. 12.52A makes specific provision for a procedural route to set aside a final return order and Lord Stephens has confirmed in *G v G* that the court retains a power to review and set aside a final order made under the 1980 Convention and this must be so whether or not an asylum application is pending or has been determined.

The relevance test in relation to the disclosure application

61. Thus I turn, first, to consider the issue of the relevance of the material contained within the asylum file to the merits of a set aside application. As was made clear in *Dunn*, relevance for these purposes can include "train of enquiry" points which go beyond mere fishing expeditions. These are matters of fact, degree and proportionality. As I have said (paragraph 58 above), disclosure of the asylum material for the purposes of deciding his next steps including the likely prospects of success in relation to a judicial review of the SSHD's decision would amount in my judgment to precisely the sort of 'fishing expedition' which is prohibited. In advance of reaching her decision, the SSHD has been provided with all the material from the Hague proceedings including the applicant's evidence and the respondent's evidence. She has weighed and considered that evidence alongside the evidence which supported the claim for asylum. Without more, I would regard it as an inappropriate and unwarranted use of this court's powers to order disclosure where its sole or dominant purpose was to breach the confidentiality of the asylum process simply to enable the applicant and his legal team to investigate the potential merits of fresh public law proceedings by way of judicial review.

62. The applicant has not at this hearing defined what his next steps might be. On the one hand, he seeks disclosure with a view to the ultimate enforcement of the existing return order. Whilst he might invite the court to reconsider the evidence put before the court in the context of the respondent's Article 13(b) defence with a view to enforcement, that course will not assist in any

enforcement of the return order whilst the asylum decision stands. Any attempt by this court to intervene in, or reverse, the asylum decision which has been taken by the SSHD is impermissible. On the other hand, he raises the possibility of subsequent enforcement proceedings in relation to a fresh order for the return of M to Ukraine. He does not suggest to this court what new information or facts, if established on the balance of probabilities, might demonstrate the fundamental change of circumstances which would be required in order for the court to grant him relief in any fresh proceedings. Short of an effective challenge to the asylum decision based upon a finding by the SSHD that the respondent and/or M had misrepresented the position in the claim for refugee status, it is difficult to see what this evidence might be. Mr Harrison QC suggested during the course of his submissions that the asylum material might prove relevant to consideration given by the court to any direct or indirect risks to M's welfare in the event he is returned to Ukraine but this submission presupposes that the absolute bar which currently exists in relation to enforcement of the current return order no longer exists.

63. In relation to the extant committal proceedings, I find it difficult to conceive of circumstances where a court would impose upon this mother a custodial or any other coercive penalty in respect of a failure to return M to Ukraine in circumstances where the child has now secured the legal right to remain in this country as a refugee, at least for the next five years. Whilst I did not hear specific submissions in relation to the future course of that aspect of the proceedings, I would not regard the extant committal application of itself, issued as it was prior to the grant of asylum, as providing without more the basis for disclosure of the asylum material. I accept that, were committal proceedings to be pursued against the respondent, the court would inevitably have to grapple with complex questions about the interrelationship between the rights of the mother in the light of M's status as a refugee and any established breaches of previous orders made by this court in the Convention proceedings. M was entitled as of right to make his asylum application. Whether or not his application was encouraged or supported by his mother (as the applicant suspects), the outcome has now been established and his current status as a refugee entitled to protection from refoulement confirmed as a matter of English law. It is that status and not the underlying material which supported the asylum application which will provide the respondent with a potential defence to any committal application. I agree with the submission made by Mr Payne QC that, unless and until the respondent mother seeks to rely on the grant of asylum to defend any committal proceedings, there is no basis for considering the asylum material to have any relevance.

64. I accept entirely that, were the applicant to issue fresh proceedings in relation to his ongoing relationship with M, whether under the Children Act 1989 or otherwise, different considerations might apply in relation to an application to

disclose the asylum material, or part of it, into *those* proceedings. In that event the court would be exercising a substantive welfare jurisdiction and not the summary process required by the 1980 Convention. It would be conducting a holistic and child-centric evaluation of M's best interests and the steps which were required to safeguard and promote those interests.

65. There is no such application before this court. The applicant has thus far declined to elect how he intends to proceed in the light of the asylum decision. For reasons which I understand, his present stance is to 'keep his powder dry' and retain for as long as he can the benefit of the existing return order for the purpose of progressing his enforcement application.

66. On the first issue of relevance, Mr Harrison QC's submissions amount to a powerful plea to this court to remedy the perceived injustice to this father which he seeks to redress by way of an application to the administrative court for a remedy in judicial review proceedings. That was expressly stated as one of his objectives in the written submissions which he put before the court on 15 June 2021 in response to an order which I made requiring him to confirm his position in respect of disclosure.

67. I acknowledge the frustration which the applicant feels at his present inability to enforce orders which he has secured from this court. As matters stand, he is fighting "blind" for so long as he remains in ignorance of what representations and evidence have been put before the SSHD. In circumstances where her asylum decision has effectively reversed the progress he has made over more than three years of litigation, he is entitled, in principle, to ask for an explanation as to the basis of that significant reversal. From the perspective of a 'left behind' parent, the potential unfairness of an administrative asylum process in which he or she has no right to see, let alone challenge, the evidence submitted in support of that claim needs little elaboration. The absence of any facility for that 'left behind' parent to present material within the asylum process and/or to request as a matter of course that documents from the asylum process should be introduced into the Hague Convention proceedings may appear to be a significant derogation of his or her Article 6 and 8 rights. Nevertheless, after hearing detailed submissions from all interested parties and organisations, this was not the route travelled by the Supreme Court in *G v G*, and neither did their Lordships consider it necessary to recommend any requirement on the SSHD to re-open or revoke the asylum decision if relevant material emerged in the 1980 Convention proceedings. The reasons for the court's decision and the guidance which flowed from it are fully set out in the context of the careful balancing act which the court conducted and which I have reflected in this judgment.

68. To an extent these perceived shortcomings expressed by 'left behind' parents have been addressed in part by the direction of travel taken in recent decisions

relating to the disclosure of asylum material such as *RH* and *FM*. Each case will always turn on its own facts but, in terms of redressing the balance, it is clear that documents or material generated in the context of an asylum claim will be subject to orders for disclosure just as any other material will be without impugning the integrity of the asylum system.

69. It would be difficult in these circumstances for me to hold, on any objective basis, that the material presented to the SSHD in the context of the asylum claim had no relevance whatsoever to the application to set aside the return order. In this context *absolute* confidentiality only applies during the process of examining the individual case in the asylum process. It falls to the court in the 1980 Convention proceedings to carry out the next stage of the process stipulated in *Dunn* and *In the matter of H (A Child) (Disclosure of Asylum Documents)* which is the critical balancing exercise. I have had the benefit of reading the asylum material as has M's Guardian. The basis of the child's application for asylum is anchored to the Article 13(b) defence which the respondent ran in these proceedings. I accept that it was a defence which was rejected by both Theis J and Peel J. The applicant is aware of the basis on which she ran that defence. In considering where the balance in this case lies, I have focussed on the additional information which was provided to the SSHD because it is the confidentiality of that information which is asserted as the basis for withholding disclosure from the applicant. I have considered the relevance of that information to any potential challenge to the SSHD's decision and in the wider context of M's welfare in the context of a summary return to Ukraine. I accept that there is an inconsistency in terms of the totality of the information which has been made available to the SSHD and that which has been placed before this court for the purposes of the earlier consideration which two previous judges of the Division have given to the respondent's Article 13(b) defence. In circumstances where the additional information might have resulted in different outcomes on both occasions in terms of the decision whether or not to order return, it is reasonable in principle for the applicant to wish to see that material in order to know the case which is advanced against him.

The balancing exercise

70. In relation to the applicant's rights, the immediate focus of the court in this context must be on his Article 6 rights to a fair trial. He sees his continuing inability to secure M's return to Ukraine as an interference in his Article 8 rights to a family life with his child. Also engaged are M's own Article 8 rights. He is a 12 year old child who has expressed in very clear terms to his Guardian and, through her, to this court his wish to remain living in this jurisdiction with his mother and stepfather. That is his present perception of *his* family life and, sadly, it does not appear to include his father whom he has

not seen for a number of years. M's views have become increasingly polarised and he has told the Guardian that he feels "angry" with his father for not accepting that he wishes to remain in England with his mother and stepfather. The reports which have been produced in the course of these proceedings acknowledge that his mother appears to have involved him inappropriately in the dispute between his parents and has shared material about the court proceedings. The applicant goes further and characterises her conduct as 'parental alienation'. This judgment is not the context for findings about these issues but I am satisfied that the views which M is, and has been, expressing about his wish to remain with his family in this jurisdiction are now genuinely held.

71. M has other rights which are engaged in this balancing exercise. He has been granted asylum in this country. The rights which flow from his status as a refugee are now protected by law. His Article 3 rights (including protection from degrading treatment or punishment) as well as his Article 8 rights to a secure family life as he experiences it in this jurisdiction are important considerations to be weighed in the balance when considering the applicant's own Article 6 and 8 rights.

72. Confidentiality in the asylum process remains another important factor of wider significance which must be weighed in the scales. These considerations go beyond this individual case and extend into the arena of public policy. In *G v G*, Lord Stephens referred to the submission made by the United Nations High Commissioner for Refugees about "the vital importance of confidentiality in the asylum process" and the "climate of confidence" which was essential if an applicant was to have an opportunity fully and properly explain his case. Lord Stephens referred to the "systematic importance of maintaining confidentiality in the asylum process" as an important part of the balance which has to be struck: see paragraph 171. In this case, I am considering confidentiality in the context of an asylum claim which has been successful. M made his claim in the knowledge that information provided to the SSHD would remain confidential and would not be provided to third parties, including the applicant. In this case, it is the 'left behind' parent who is the alleged persecutor in the context of the asylum claim. The respondent objects to the disclosure of the asylum material as does the Guardian on behalf of M. Any breach of confidentiality has the potential to impact on the rights of each under Article 8 to respect for their private and family life, their home and their correspondence. In this case those rights are engaged and entitled to as much respect as the equivalent rights which the applicant enjoys.

73. Weighing all these factors carefully in the balance, I have reached the following conclusions:-

(i) Insofar as the current disclosure application amounts to an enquiry into the prospects of a collateral challenge to the SSHD's decision in the asylum process (which I consider to be its principal focus), the application for disclosure should be refused.

(ii) In the context of a deemed application to set aside the return order, the combined weight of M's own Article 8 rights, those of his mother and the wider policy considerations underpinning the confidentiality of the asylum process operate in this case to tip the scales firmly in favour of refusing disclosure. I acknowledge that different considerations may apply in an alternative context.

(iii) If and insofar as the applicant decides to pursue in this jurisdiction alternative remedies which will involve the court in a fact-finding process which requires consideration of aspects of M's welfare and safety, the refusal of his current application for disclosure should not act as a bar to a fresh application in that specific context. There are aspects of the material submitted to the SSHD which the court may consider to be relevant if, for example, he seeks orders in respect of ongoing contact whether in this jurisdiction or in Ukraine. He has made an application in the Ukraine courts for an order that M should live with him. That application was made in part, I suspect, as an adjunct to the enforcement application in relation to the summary return orders made earlier in these proceedings. For so long as M continues to have the protection of the grant of refugee status, it is difficult to see how the applicant might successfully pursue an application for a residence order in this jurisdiction unless he proposes to couple that application with one which seeks the court's permission permanently to relocate with M to Ukraine. Were those issues before the court, and were he to succeed after a forensic examination of all the facts, that process might hypothetically provide him with a judgment which could in due course be sent to the SSHD with a request that she reconsider her decision in the light of any findings made by the court after a full forensic examination of all the evidence. I recognise that different considerations might apply in that event to any request for disclosure of the asylum file. Mr Payne QC acknowledges that in this event different considerations might apply in relation to both disclosure per se and any redaction required to preserve necessary elements of confidentiality.

74. Nothing which I have said above should be taken as judicial encouragement for yet more litigation over this child. I have deliberately refrained from expressing any preliminary or provisional views about the prospects of success

in any fresh private law applications. The applicant has the benefit of an experienced team of legal advisers who will no doubt guide any future decisions he makes. I share the Guardian's view that it would in all probability assist in the next steps of repairing the relationship between M and his father were he to be made aware that his father has reached an acceptance that his home is in England with his mother and step-father.

75. Mr Harrison QC invites me to make case management directions in relation to the deemed set aside application. He proposes a further round of written statements and a fresh listing for another hearing with a four-day time estimate. That proposal must be assumed to flow from an expectation that he would secure disclosure of the asylum file in the context of his present application. In circumstances where I have rejected that application, I can see no justifiable basis for continuing the current proceedings which would, in my judgement, contravene the overriding objective set out in FPR 2010 1.1 in terms of the wide case management powers entrusted to the court. I propose in these circumstances to set aside the return orders made in the 1980 Convention proceedings. I do so having followed as closely as the circumstances in this case permit the approach set out in *Re B (A Child) (Abduction: Article 13(b))* albeit that, in the particular circumstances of this case, I have adopted a conflated approach to the stages. This approach was endorsed by Moylan LJ in an appropriate case. At paragraph 90, his Lordship said this:

> "Having regard to the need for applications under the 1980 Convention to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. *Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing*." (my emphasis)

76. The facts in this case are different from those in *Re B*. The 'new facts and information' in that case related to the nature and extent of the mother's mental health and the consequences for both her and the child were the order for summary return to be enforced. In this case there has been a decision made by another arm of the state which operates to prevent the enforcement of an order for summary return to a different jurisdiction. I accept the submissions of the respondent, the Guardian and the SSHD that little purpose is served by allowing the 1980 Convention proceedings to 'limp' on without further purpose or effective remedy for the applicant. In the context of those proceedings there is nothing further for this court to examine. In accordance with paragraph 89 of *Re B* I have considered the applicant's request for disclosure of the asylum file which I have dismissed in the context of the Convention application. There is no further evidence which is relied on as

potentially relevant to the set aside decision. In the context of Mr Harrison QC's proposal that there might be a further round of written statements in anticipation of a further lengthy hearing, I ask myself what would inform the content of those statements? I have thus considered separately whether there is any purpose in prolonging the life of the proceedings and reached the conclusion that there is not.

The committal application

77. There is no information before the court at the present time to confirm whether or not the applicant intends to pursue his application for committal given the subsequent decision of the SSHD to grant asylum to the respondent and M. I have referred to this aspect of the proceedings in paragraph 63 above. I did not hear specific submissions from Mr Harrison QC and Ms Chaudhry as to the impact on the committal application in the event of a set aside of the return orders. That application was an aspect of enforcement designed to secure the summary return of the child to Ukraine. I recognise the importance of ensuring that orders made by this court, or any other, are respected and observed. It is unclear to me at present on what basis the application might be pursued and I recognise that there may be complex issues arising were the applicant to seek punitive sanctions on a parent for not returning their child to the country in respect of which asylum has been granted. In the circumstances, I propose to say nothing further in this judgment about the committal proceedings. If Mr Harrison QC or any of the other advocates wish to make further short submissions on this aspect of the case, I will consider them in the wider context of the orders which will flow from this judgment.

78. In terms of interim contact, I did not hear any detailed submissions about the way forward. I encourage the parties to consider how this can be taken forward. At this stage, and in the light of where we are at this point in time, I propose to say no more for the purposes of this judgment. I will, of course, deal with any further submissions should they arise.

Order accordingly