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No: FD19P00347

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2022

**IN THE MATTER OF THE CHILDREN ACT 1989**

**Before:**

**MR DAVID REES QC**

**(Sitting as a Deputy Judge of the High Court)**

**(In Private)**

**B E T W E E N :**

**R**

**Applicant**

**And**

**(1) G**
**(2) H**
**(by his Children's Guardian)**

**Respondents**

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**Edward Devereux QC** and **Mehvish Chaudhry** (instructed by Bindmans LLP) for the **Applicant**
**Andrew Powell** (instructed by MSB Solicitors) for the **First Respondent**
**Michael Edwards** (instructed by CAFCASS) for the **Second Respondent**

Hearing date: 27 and 30 September 2021

**Mr David Rees QC :**

## INTRODUCTION

1. These proceedings concern a child, H, who is now 10 years old. The substantive proceedings before this court consist of an application by his father, R, for a child arrangements order under section 8 of the Children Act 1989 governing contact between him and H. H and his mother, G, are foreign nationals who have been granted refugee status in the UK by the Secretary of State for the Home Department.

2. In November 2020 I held a five-day fact-finding hearing in this matter and handed down a judgment on 29 January 2021 setting out my conclusions on the factual disputes between the parents ("the fact-finding judgment"). Following that judgment and the receipt of further evidence I have, by consent, made a "lives with" order under section 8 of the Children Act 1989 which provides for H to live with the Mother and have made further orders providing for supervised video-contact between H and the Father. The progress of that contact is to be the subject of a further review later this year.

3. The issue with which I am concerned in this judgment is an application that has been made by the Father for the disclosure of my fact-finding judgment to the Secretary of State. The application arises because a number of factual matters that I was called upon to decide in the context of the fact-finding hearing had previously been considered by the Secretary of State and the First Tier Tribunal in the context of the Mother's asylum application and my conclusions on some of these issues differ from those of the Secretary of State and / or the First Tier Tribunal.

4. The Father is represented before me by Mr Edward Devereux QC and Ms Mehvish Chaudhry of counsel. The Mother, G, is represented by Mr Andrew Powell of counsel who, unlike the other counsel for the other parties, did not appear at the fact-finding hearing. H is a party to the proceedings and is represented through his Children's Guardian by Mr Michael Edwards of Counsel.

5. A number of earlier decisions in these proceedings have been published on an anonymised basis: see *R v G & H and the Secretary of State for the Home Department (Intervener)* [2019] EWHC 3147 (Fam); *R v G & H and the Secretary of State for the Home Department (Intervener) (No 2)* [2020] EWHC 1036 (Fam); and *Re H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001.

## BACKGROUND

6. I do not intend to set out any more background in my judgment today than is necessary to put the specific decision that I have now to make into context.

7. H and both of his parents are citizens of a foreign country which I will refer to as "Q". Until February 2016 they all lived in Q.

8. In February 2016 the Mother travelled to the UK with H and claimed asylum in this country.

9. The issues relied upon by the Mother in support of her application for asylum were (broadly) as follows:
   - i) The Father became domestically violent to the Mother during the year following the year in which they were married and would physically and sexually abuse her;
   - ii) The Mother reported the violence to the police who stated they would make an arrest, but this did not happen;
   - iii) The Father's family have connections with the police in Q;
   - iv) The Father was arrested for fraud in 2014 and served nine months in prison;
   - v) On the morning of 24 January 2016 the Mother witnessed the father sexually abuse H;
   - vi) The Mother feared that if she returned to Q the Father would kill her as she had witnessed the sexual abuse and she feared further domestic violence from the Father.

10. The progress of the Mother's asylum claim was described by MacDonald J in *R v G & H and the Secretary of State for the Home Department (Intervener) (No 2)* [2020] EWHC 1036 (Fam) at paragraphs [8] and [9] and I adopt his summary as follows:

> "[8] First, and as noted in the previous judgment of the court, the Secretary of State accepted the mother's claims of domestic abuse and of the sexual abuse of H but did not accept the mother's allegations that the father had made threats to kill her or that he had influence with the police in [Q]. On 24 April 2017 the Secretary of State nonetheless refused the mother's application for asylum on grounds that the mother had failed to demonstrate a genuine subjective fear and that, even if the mother's fears of the father were well founded, she could relocate internally in [Q] to a place where she would not face a real risk of harm.
>
> [9] The mother exercised her statutory right of appeal to the First Tier Tribunal. By a determination dated 11 September 2017 Judge Agnew, holding that the sole issue before the First Tier Tribunal was the validity of the Secretary of State's conclusion on internal relocation, allowed the mother's appeal, holding as follows within the context of the relevant standard of proof, namely a reasonable degree of likelihood:
>
> > "[18] I found the [Mother] to be articulate, detailed, specific, consistent and credible in her evidence. I accept her claims that she and her son would be located in [Q] on return by [the Father] via his family members and computer records. She gave details of the names of the appellant's brothers and their positions within the police and prison force. This is far more information than is usual with asylum seekers claiming that they fear persons with influence in the security forces of the country from which they have fled. I accept that [the Father] has filed a missing person's report and that the immigration authorities would be alerted to this fact on their return to the airport. Assuming they were

returned, I find it has been established that there is a real risk both the appellant and her son would face ill treatment at the hands of [the Father].

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

11. Consequent upon this decision, on 27 October 2017 the Mother was granted refugee status with H being granted leave to remain as a dependant of the Mother. An application was subsequently made on behalf of H for asylum in his own right. This application relied upon the same material that had been provided in support of the Mother's claim. H was granted refugee status in his own right by the Secretary of State on 12 May 2020.

12. The proceedings before this court had begun in 2018 as an application by the Father for a summary return of H to Q pursuant to the 1980 Hague Child Abduction Convention. That application was withdrawn in 2019 and in its place the Father issued his application for a child arrangements order under the Children Act 1989.

13. The same broad issues that the Mother had relied upon in support of her asylum claim formed the basis of her opposition to the Father's Children Act application. In particular she relied upon allegations of physical and sexual assault by the Father and the allegation that she had witnessed the Father sexually abusing H.

14. As a preliminary matter in the Children Act proceedings, the Father sought disclosure and inspection of documents from the Mother's asylum claim. This application was opposed by the Mother and by the Secretary of State for the Home Department who was permitted to intervene in these proceedings in relation to that application. The issue was determined by MacDonald J who permitted the disclosure of some (but not all) of the material sought by the Father. His decision in this regard was upheld by the Court of Appeal. These are the judgments that I identified at paragraph 5 above.

15. As I have already recorded, the Children Act proceedings came before me for a fact-finding hearing in November 2020. This took place over five days and I heard oral evidence from a number of witnesses including both parents and other family members. I also received a significant amount of written material, including the documents that had been disclosed from the Mother's asylum application pursuant to the orders of MacDonald J.

16. In my fact-finding judgment I found that a number of the allegations made by the Mother against the Father had been made out, and that the Father had been a controlling presence who subjected the Mother to domestic abuse and physical violence from the onset of their marriage. I accepted the Mother's evidence in relation to a number of specific incidents

that she sought to rely upon and, in particular, found that she had undergone an illegal termination of a pregnancy due to her fears about the Father's abusive and violent behaviour. I determined that the Mother's allegations of sexual violence and rape had not been made out having regard to the burden and standard of proof that I was required to apply, although I made clear that this did not amount to a finding that these allegations were necessarily untrue. However, I rejected parts of the Mother's evidence and concluded that her allegation that she had witnessed the Father sexually abusing H was untrue and had been fabricated by her. I set out my reasons for rejecting the Mother's evidence on this issue in detail and these are found at paragraphs [129] to [140] of my fact-finding judgment.

17. I have therefore reached a different conclusion in relation to some of the factual matters that were considered by the Secretary of State and the First Tier Tribunal in relation to the Mother's asylum application. Although many issues were common to both sets of proceedings, it is important from the outset to recognise that the material that was before me and the framework within which I had to consider the various issues that had been raised, differed from that which applied to the asylum application. Before me the Mother was required to prove her allegations against the Father on the civil standard of proof – that is to say the balance of probabilities. By contrast, within the immigration proceedings, the Mother was required to demonstrate a reasonable degree of likelihood that she was entitled to international protection as a refugee (a lower standard of proof).

18. In the course of the fact-finding hearing I received different and additional evidence to that which was adduced in the immigration proceedings. I received written and oral evidence from the Father and from other family members including four of the Mother's siblings. The evidence was also tested in different ways. The Mother was cross-examined by counsel for both the Father and for H and they were able to cross-examine her by reference to material that was not before the First Tier Tribunal. There were also issues where were pertinent to the asylum application (for example the Father's alleged connections with the police in Q) which I did not need to consider or make findings about in the context of the Children Act application,

19. I should record that the parents have both responded to my findings. The Father has broadly accepted my findings in relation to the Mother's account of domestic violence, although he continues to dispute the details of some of the specific incidents that I found to be proved. For her part, the Mother does not accept my finding that the allegation of sexual abuse was fabricated.

20. Following the handing down of my fact-finding judgment, on 17 May 2021 the Father issued an application seeking permission to disclose my fact-finding judgment to the Secretary of State. This application is made on the footing that the Father considers that it is necessary that the findings that I have made against the Mother in my fact-finding judgment should be disclosed to the Secretary of State so that she can consider whether any further action is required. This application is opposed by the Mother. H, through his

Children's Guardian has taken a formally neutral stance in relation to the application although Mr Edwards has helpfully identified a number of factors pointing for and against disclosure.

21. Although the Father seeks permission to disclose my judgment to the Secretary of State, his stated position, as confirmed to me by his counsel, Ms Chaudhry, at a hearing which took place on 19 May 2021 is that:

> "that that he fully supports [H] living in his mother's primary care in the United Kingdom; he seeks a full and proper relationship with [H], including spending time with [H] in both the United Kingdom and in [Q]."

The Father developed this position in a witness statement dated 8 July 2021 where he stated:

> "I will not formally challenge [H's] status in this country … as I do not believe that it is appropriate for me to do so.
>
> I accept that [H's] primary home is now in this country but I would like him to be able to visit Q in the future and spend time with me and his wider family members there. I am aware that if [H's] asylum status is extended, this will prevent him from being able to return to Q in the future. This is a real shame because this is the country where he was born and where he lived exclusively until he was five years old. Q will always be important to H in terms of his heritage and cultural identity and I consider that it is in his best interests to be able to visit the country where he comes from and where most of his wider family members still live."

Although this is the Father's formally recorded position, I note that the Guardian's report of 20 September 2021 describes him as commenting that if the outcome of this application is that H's asylum status and security in England is undermined "then so be it". Nonetheless the Father has consented to the "lives with" order that I have made.

## LEGAL PRINCIPLES

22. The Children Act proceedings, like other family proceedings, have been heard in private. As such the disclosure of information relating to these proceedings is liable to constitute a contempt of court. However, the court has a power permit disclosure of information relating to these proceedings either to the public at large or more narrowly. This power is contained at rule 12.73 of the Family Procedure Rules 2010 which also sets out certain limited circumstances under which communication of information relating to proceedings that have been held in private is automatically permitted. This is supplemented by rule 12.75 and the more detailed table set out at Practice Direction 12G which provides a general authority for the disclosure of information for certain specified purposes connected with the proceedings. It is common ground that none of these general exceptions apply here and that my fact-finding judgment can only be disclosed to the Secretary of State if I give permission for this to occur.

23. I therefore have a discretion under r.12.73(1)(b) as to whether such disclosure should be permitted. This discretion is not unconstrained and there is established guidance derived from the decision of Swinton Thomas LJ in *Re C a Minor (Care Proceedings Disclosure) sub nom Re EC (Disclosure of Material)* [1996] 2 FLR 725 to which I must have regard. In that case the judge held at 733:

> "In the light of the authorities, the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case:
>
> (1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.
>
> (2) The welfare and interests of other children generally.
>
> (3) The maintenance of confidentiality in children cases.
>
> (4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which s 98(2) applies. The underlying purpose of s 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.
>
> (5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.
>
> (6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.
>
> (7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children.

(9) In a case to which s 98(2) applies, the terms of the section itself, namely, that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place."

24. Despite changes in the underlying rules governing disclosure from family proceedings since the judgment in *Re C,* it has been made clear by the Court of Appeal in *Re M (Care Proceedings: Disclosure)* [2019] EWCA Civ 1364 that *Re C* continues to be the leading authority in this regard: see judgment of Sir Andrew Macfarlane P at [28] to [30]. At [70] the President held:

> "Mr Moloney conceded that this court would only consider establishing a new test for disclosure from family proceedings if it were established that *Re C* is no longer fit for purpose. For the reasons that I have given, to the contrary, I consider that the approach described by Swinton Thomas LJ in *Re C* continues to point to the likely relevant factors and describes how the balance is to be struck between the competing factors that are in play. There is no basis for this court now abandoning this well-established and familiar test, and I respectfully decline the invitation to do so.

**SUBMISSIONS**

**The Father**

<u>(1) The rule of law and the public interest in the administration of justice</u>

25. Within the framework laid down by Swinton Thomas LJ in *Re C* Mr Devereux QC, on behalf of the Father, emphasised the importance of the court upholding the rule of law. He referred to the gravity of the allegation of sexual abuse against the Father which I had found in my fact-finding judgment to have been fabricated by the Mother, and argued that the public interest in ensuring that the rule of law is upheld pointed towards my judgment being disclosed to the Secretary of State. In this regard he took me to a number of authorities where the Court had placed particular importance on co-operation and the sharing of information between judicial and public and administrative bodies.

26. The first of these was the decision of Singer J in *Re B (Abduction: False Immigration Information)* [2000] 2 FLR 835. That case involved proceedings under the 1980 Hague

Abduction Convention in the course of which it transpired that the mother had given, by her own admission, a false account of various matters to the immigration authorities. Singer J made an order for the child's summary return under the Convention and then considered the question of whether he should take steps to bring the mother's admitted lies to the attention of the Secretary of State. The judge was referred to *Re C* but noted that the first of Swinton Thomas LJ's factors – the welfare of the child and of other children generally, did not arise in the case before him, because he had made an order for the child's return and that welfare interests were matters to be considered by her country of habitual residence. The judge then continued at 837:

> "The second consideration mentioned by Swinton Thomas LJ was the maintenance of confidentiality in children cases and the importance of clarity and frankness. This lady has as to her antecedent history been frank in the account she has placed before me. It would be an odd way of upholding the importance of encouraging frankness if I were to permit her to continue to pull the wool over the eyes of another public authority, namely the Home Office, in discharge of its immigration duties.
>
> A principal consideration does seem to me in the particular circumstances of this case to be the public interest in the administration of justice. The administration of justice includes the appropriate operation of administrative procedures pursuant to the law such as those which the Home Secretary discharges in relation to immigration. The message, if there is to be a message, that goes out from the court in connection with the facts of this case is that no one should suppose that they will be protected if in the course of proceedings before a court of law evidence appears to establish, as here, that they are attempting or may be attempting to deceive another public authority in the discharge of its statutory or administrative duties. I am not saying that a case for such protection could not be established, only that it will do no harm for people to understand the importance of consistency and that the court's initial approach is likely to be to do what it can to avert miscarriages of justice in any part of the public system"

The judge concluded that he would have ordered disclosure of the relevant documents to the Secretary of State, but that it was no longer necessary for him to do so because the mother's lawyers had already taken steps to notify the relevant authorities that her initial account had been neither complete nor accurate.

27. The second example that Mr Devereux referred me to was the decision of Hayden J in *F v M (Joint Council for the Welfare of Immigrants Intervening)* [2017] EWHC 949 Fam; [2018] Fam 1. That case involved a mother and child from Pakistan who had been granted refugee status in the UK. The father sought a return of the child to Pakistan. The Court of Appeal had directed the hearing of preliminary issues to determine (i) whether a decision by the Secretary of State to grant the child refugee status provided an absolute bar to the court in family proceedings ordering his return to Pakistan and (ii) by what

process the father could challenge the refugee status, given that he denied the allegations of violence by the mother and the child on which their asylum claims had been based.

28. Hayden J held that the grant of refugee status to a child by the Secretary of State was an absolute bar to any order in family proceedings seeking to effect the return of the child to an alternative jurisdiction. He further held that the Secretary of State was actively obliged, pursuant to the relevant immigration rules, to revoke a grant of asylum where she was satisfied that the evidence established that the person's misrepresentation or omission of facts, including the use of false documents, had been decisive for the grant of refugee status; that the Home Secretary was bound by immigration rules and public law principles to ensure that her position was both reasonable and rational, did not ignore any material consideration and gave appropriate weight to the relevant factors; and that, accordingly, were the court in the family proceedings ultimately to make findings of fact which undermined the allegations made by the mother against the father in her asylum claim, the Home Secretary would be required to reconsider her decision with such findings included within the scope of her consideration.

29. The judge indicated at [63] an intention to release his judgment to the Secretary of State:

> "[63] In the course of the contemplated hearing F will be in a position, via his counsel, to advance any allegations that he wishes to make in relation to M's representations to the Secretary of State. I will, in due course, deliver a judgment, which will be released to the Secretary of State. At this point, of course, I have no idea, having not yet heard the evidence, what my findings might be. Hypothetically, were I to be satisfied that misrepresentations had been made, to the extent that they cast doubt on the legitimacy of the grant of asylum, the Secretary of State would be bound both by the Immigration Rules and by Public Law principles to have regard to them."

30. Mr Devereux also made reference to what he sought to argue was a "greater move" towards the exchange of information between the Family Courts and the immigration authorities and / or tribunals referring me to the *Protocol on Communications between Judges of the Family Courts and Immigration and Asylum Chambers of the First Tier Tribunal and Upper Tribunal* [2013] Fam Law 1197 and to the recent decision of the Supreme Court in *G v G* [2021] UKSC 9; [2021] 2 WLR 705. Finally, he also relied upon the more general comments of Sir James Munby P in *Re W (Children)* [2017] EWFC 61 where the President permitted the disclosure of papers from care proceedings for the purposes of a proposed action in the Queen's Bench Division. At [7] the President stated:

> "The applicable principles are well-known and do not require repetition. I merely observe that, subject always to the imposition of any necessary safeguards and conditions, family courts should not stand in the way of, and should, on the contrary, take all appropriate steps to facilitate, the proper administration of justice elsewhere.

This principle is well recognised in the authorities both in relation to the criminal justice system and in relation to tribunals as varied as those dealing with medical discipline and criminal injuries compensation. It is, of course, equally applicable in relation to the civil justice system."

31. Turning to the other specific factors identified by Swinton Thomas LJ in *Re C* Mr Devereux identified the following as providing particular support for his application for disclosure.

(2) <u>The welfare and interests of H.</u>

32. Mr Devereux, whilst recognising that H's welfare is a relevant factor for me to consider, argued that it should not be the determinative factor in this case. His argument was that I should not accept that the disclosure of my fact-finding judgment would necessarily lead to H and the Mother being removed from the UK, referring to the large number of legal hurdles that would stand in the way of such an outcome, and that any risk of removal was outweighed by the public interest in there being co-operation between public bodies in this case.

33. Further, Mr Devereux sought to argue that there were welfare reasons why the reconsideration of H's current status as refugee would be in his best interests. The Father's position is that he does not seek H's return to Q. However, he seeks direct contact with H which, he hopes in the future, will involve H being able to visit him and spend time with him in Q. His case is that it is very much in H's interests to be able to travel back to Q where not only the Father, but many other family members (both paternal and maternal) live. The Father argues that Q was H's home for the early part of his life, that it is an important part of his identity and heritage and it is important that he remains able to enjoy and develop his cultural origins.

34. It is not possible for the court to make orders that would enable H to visit Q whilst he has refugee status in the UK, as any order returning him to Q would breach the prohibition on refoulment contained in Art 33 of the 1951 Geneva Convention. The Father does not accept that H is at risk of persecution in Q and argues that my fact-finding judgment (and in particular my rejection of the allegation that the Father had sexually abused H) should be disclosed to the Secretary of State so that she can make a proper and accurate decision relating to H's immigration status in this jurisdiction.

35. The Father further argues that H's Art. 6 and Art. 8 rights under the ECHR are also engaged and that it is consistent with H's right to a fair trial and family life that there is a proper exchange of information between the authorities so that there can be a fully informed and fair determination of the future child arrangements and his immigration status in this jurisdiction.

(3) Other Matters

36. In relation to other factors raised by Swinton Thomas LJ in *Re C*, the Father argues that this is not a case where the importance of encouraging frankness in children's cases is relevant and the confidentiality of the current proceedings will be maintained even if my fact-finding judgment is disclosed to the Secretary of State as she is bound by principles of confidentiality when processing asylum and other immigration claims.

**The Mother**

37. The Mother opposes the Father's application for the disclosure of my fact-finding judgment to the Secretary of State. Mr Powell structured his submissions under four broad heads.

(1) Standard of Proof

38. The first point relied upon by Mr Powell relates to the fact that the immigration proceedings before the First Tier Tribunal and the Children Act proceedings before me engaged different standards of proof. Before the First Tier Tribunal it was for the Mother to show that she was to be afforded international protection as a refugee. The relevant standard of proof was that she had to show a "reasonable degree of likelihood" (see *R v Secretary of State for the Home Department ex p Sivakumaran* [1988] AC 958). By contrast matters before me were determined by reference to the civil standard of proof – that is to say the balance of probabilities.

39. Mr Powell therefore argues that the findings of a court applying the civil standard of proof are largely irrelevant to immigration proceedings in the same way that an acquittal in the criminal court is largely irrelevant in civil proceedings where the same allegation, which failed in the criminal court, is being considered. He reminds me that Family Court judges routinely find allegations to have been proved by reference to the lower civil standard of proof in cases where the alleged perpetrator has been acquitted in the Crown Court on the higher criminal standard of proof. He argues that incongruent outcomes can legitimately co-exist where there is a different standard of proof and that my findings in the Children Act proceedings do not provide a reason to revisit the outcome in the immigration proceedings. In support of this submission he made reference to the decision of the Court of Appeal in *Re T (Children)* [2020] EWCA Civ 1344 and in particular to the dicta of Baker LJ at [37]:

> "In my judgment, neither the fact that a jury has reached a verdict on criminal charges that is inconsistent with earlier findings in care proceedings nor the simple fact (if it be true) that the evidence heard by the jury was different from, or more comprehensive than, that adduced before the judge in the family proceedings is sufficient by itself to justify the conclusion that the findings in the family proceedings were wrong so as to require an appellate court to overturn the findings. It may, however, be sufficient to justify a reopening of all or part of the fact-finding hearing. I shall return to this point of the end of this judgment."

40. Mr Powell also referred me to a number of other cases in which the different processes of the First Tier Tribunal and the Family Court were emphasised, including the decisions of the Court of Appeal in *Re H (A Child)(International Abduction: Asylum and Welfare)* [2016] EWCA Civ 988 (in particular the comments of Black LJ at [52]) and in *Secretary of State for the Home Department v Suffolk County Council* [2020] EWCA Civ 731 (in particular the comments of Ryder LJ at [43]).

(2) Relevance

41. The second limb of Mr Powell's argument builds upon the first. He argues that if the court accepts the proposition that two different courts applying different standards of proof can legitimately reach different conclusions, it calls into question the relevance of any disclosure. In support of this position he relies upon the earlier decision of the Court of Appeal in the present case (*Re H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001) in relation to the disclosure of documents from the immigration proceedings into the Children Act proceedings. Mr Powell made reference to passages from the judgments of Baker LJ (at [53] and [54]) and Peter Jackson LJ at [70] which identified that in determining such an application the court would be required to conduct a balancing exercise having regard to competing rights, in particular the Art.6 rights of the party seeking disclosure to a fair trial and the Art.8 privacy and confidentiality rights of the other party and any person whose rights might in the circumstances of the case require protection.

42. Mr Powell also calls into question the Father's motives for seeking disclosure of the fact-finding judgment to the Secretary of State. He raises complaint about the Father's persistence in seeking the disclosure of the fact-finding judgment and asserts that in reality the application is an attempt on the Father's part to attack the Mother and H's status in the UK.

(3) *Res judicata*

43. Mr Powell's third argument is that the Mother's asylum claim has been determined and that the time for any appeal has expired. As such he argues there is no purpose in permitting disclosure, He took me to dicta from the Court of Appeal in *R (Abidoye) v Secretary of State for the Home Department* [2020] EWCA Civ 1425 reiterating that although the doctrine of *res judicata* does not apply with full rigour in immigration proceedings, an earlier decision will be treated as final and binding on the parties to it unless there is some legal justification for departing from it, and that (per Andrews LJ at [46]):

> "… it is not open to the Secretary of State or the individual to raise fresh points that could and should have been raised before the original Tribunal, or on appeal in the proceedings that gave rise to the first decision, in order to justify such a departure. There must be fresh evidence which meets the *Ladd v Marshall* test … or a material change in circumstances. If those conditions are not met, any attempt by either party

to relitigate the same issues may be treated as an abuse of process, and any fresh decision taken by the Secretary of State which is inconsistent with the earlier decision will be susceptible to judicial review."

(4) Welfare

44. Mr Powell directed me to considerations of H's welfare and referred me to aspects of the reports from the Guardian which suggest that H has been affected by the stresses that the current proceedings have placed upon the Mother. Whilst he accepts that if the Secretary of State were to seek to remove H and his Mother's status as refugees there would be a number of legal hurdles to be surmounted before H and the Mother could be removed from the UK, Mr Powell nonetheless urges me not to introduce yet more uncertainty into their lives.

45. Mr Powell also reminds me that although I rejected parts of the Mother's evidence, and in particular her allegation that the Father had sexually abused H, I accepted substantive parts of her evidence. In particular I had found (at para [38] of the fact-finding judgment):

> "the general picture that she presented of a marriage characterised by constant arguments and by the threat, and use, of violence by the Father to be credible and consistent with the evidence of her siblings and the limited contemporaneous documents."

He also reminds me of my conclusion (at para [52]):

> "Having regard to the totality of the evidence I am satisfied that on the balance of probabilities the Father's physical violence towards the Mother was not confined to the specific instances which form the remainder of the allegations made against the Father and that throughout the course of the marriage the Mother was subjected to abuse and physical violence from the Father."

46. On this basis Mr Powell argues that my findings in relation to domestic abuse were not inconsistent with the case that the Mother presented to the First Tier Tribunal and that from a welfare perspective the application does not assist me in determining what appropriate orders should be made in H's best interests.

47. I should finally mention, that following oral argument in this case, Mr Powell e-mailed me to draw my attention to the decision of Roberts J in *VR v YD* [2021] EWHC (Fam). Although that case also involved issues of disclosure, it considered the question of the disclosure of documents from immigration proceedings <u>into</u> family proceedings. It did not address the somewhat different question that I have to consider; namely the disclosure of information <u>out of</u> family proceedings to a public body, and I do not consider that it takes the issues that I have to address any further.

**The Children's Guardian**

48. On behalf of H's Children's Guardian Mr Edwards is formally neutral. He tells me that the Guardian and the CAFCASS legal team recognise that as a non-departmental public body under the sponsorship of the Ministry of Justice, they cannot realistically stand in the way of disclosure from one arm of the state to another, absent a compelling welfare reason or other factor (eg national security). However, from a welfare perspective the Guardian does not actively support disclosure. She considers that H will be harmed if the Secretary of State revokes his refugee status or his status in this country is otherwise destabilised and recognises that is at least a possible outcome of disclosure. She makes the point that H was not responsible for the Mother's dishonesty, but he may be the one to suffer the consequences of her actions. Having regard to the factors identified by Swinton Thomas LJ in *Re C*, Mr Edwards draws my attention to the following matters:

(1) Welfare

49. The Guardian's principal concern is that H will suffer harm if his status here is revoked. He has a settled life in this country and has been here for nearly six years. He is established here and does not want to return to Q. The Guardian's report indicates that H has worried, and continues to worry, about the Father wanting to send him and the Mother back to Q.

50. Mr Edwards accepts that disclosure of my fact-finding judgment does not automatically mean that H's refugee status would occur or that he would necessarily be at risk of being removed from the UK. He recognises that even if the Secretary of State were to take steps in that regard, there would be likely to be a lengthy legal process before any final decision was reached. Mr Edwards' greater concern is that disclosure of my fact-finding judgment would, in the short to medium term, introduce uncertainty into H's life and potentially subject him to further legal proceedings surrounding his status in this jurisdiction.

51. Whilst recognising that the principle of non-refoulment means that it is not possible for H to visit Q whilst he has refugee status in this country, the Guardian questions whether the possibility of future visits to Q is worth the introduction of uncertainty into H's life that disclosure of my fact-finding judgment would bring.

(2) Confidentiality of children's cases / encouraging frankness

52. Mr Edwards accepts that these factors are unlikely to carry any significant weight in the exercise of my discretion in this case. Both the Secretary of State and the First Tier Tribunal are already aware of the substance of all of the allegations raised in the present case, including the allegation that the Father sexually abused H. The only matter that is currently confidential is my finding that the allegation of sexual abuse was fabricated, and Mr Edwards recognises that in those circumstances it would be difficult for the Mother to rely on this aspect of the *Re C* factors to oppose disclosure.

(3) The public administration of justice

53. Mr Edwards does not accept the Father's argument that this is a situation where the rule of law is engaged, and argues that it is not automatic that two arms of the State should necessarily have the same information. However, he accepts that the different standards of proof before the First Tier Tribunal and in the family courts does not of itself provide a reason not to disclose my fact-finding judgment to the Secretary of State.

**DISCUSSION**

54. I have carefully considered all of the arguments put to me by counsel on behalf of their respective clients and I am grateful to them for their submissions both oral and written. I recognise that the issue of disclosure of my fact-finding judgment to the Secretary of State is an exercise of discretion which I must undertake by reference to the factors identified by Swinton-Thomas LJ in *Re C a Minor (Care Proceedings Disclosure) sub nom Re EC (Disclosure of Material).*

55. I start my analysis of the various factors that are engaged here with a recognition of the difference in the task that lay before the Secretary of State and the First Tier Tribunal in the immigration proceedings and that which I undertook in my fact-finding judgment. In the immigration proceedings the Secretary of State and the Tribunal were considering whether the Mother had proved that she was entitled to international protection as a refugee, by reference to the applicable standard of proof; that is to say "a reasonable degree of likelihood". The First Tier Tribunal were satisfied from the evidence that was presented to it that the Mother had discharged this burden. As I have indicated above, the Mother relied upon a number of different matters in support of her claim in the immigration proceedings of which the allegation of sexual assault against H was but one. It is not possible to say from the First Tier Tribunal's decision precisely what role each of the matters identified by the Mother played in its decision, although the Tribunal concluded (at paragraph [18] of its decision) that it found the Mother to be "articulate, detailed, consistent and credible", so that it appears it accepted the Mother's accounts in respect of all the incidents that she relied upon.

56. The task that I undertook in my fact-finding decision was different and undertaken by reference to additional evidence that was not available to either the Secretary of State or to the First Tier Tribunal. The Father, of course, played no role in the immigration proceedings but provided written and oral evidence in the Children Act proceedings. Unlike me, the First Tier Tribunal did not hear evidence from other family members. My decision was, of course, assessed by reference to the civil standard of proof; that is to say the balance of probabilities.

57. Given the different factual matrix that applied to the two sets of proceedings and the different standards of proof that were applied, I fully recognise that it is possible for different outcomes to co-exist. As Mr Powell argued, it is perfectly possible for the family court to find an allegation of abuse proved by reference to the civil standard of

proof, in circumstances where the application of the higher criminal standard of proof has led to an acquittal.

58. However, I consider that Mr Powell's argument that the possibility of different outcomes means that my conclusions are not relevant to the immigration proceedings overlooks an important feature of my fact-finding judgment. In the example that he gave, an acquittal in a criminal court does not necessarily mean that an incident did not occur; rather it indicates that the prosecution have failed to prove guilt by reference to the higher criminal standard of proof. Thus a criminal acquittal is not inconsistent with a finding of civil liability. However, here my conclusion in my fact-finding judgment was not just that the Mother had failed to establish the burden of proof in relation to the allegation of sexual abuse to the civil standard. The Father had made a cross-allegation that the Mother had fabricated the allegation of sexual abuse, and I was therefore also called upon to determine this cross-allegation, which I found to be proved. That is to say, I was satisfied by the Father, on the balance of probabilities, that the Mother had fabricated the allegation of sexual abuse.

59. When looked at in those terms, I consider that there is relevance to the disclosure of my fact-finding judgment to the Secretary of State. This is not simply a case where the difference in outcomes between the two sets of proceedings can be explained by reference to the difference in the applicable standards of proof. Applying the lower test, the First Tier Tribunal appears to have been satisfied that there is a reasonable degree of likelihood that the incident of sexual abuse alleged by the Mother occurred. Applying the higher test, I have been satisfied on the balance of probabilities that the abuse did not happen and the Mother's account of that incident was fabricated. I do not see that those two outcomes can be regarded as consistent with each other, although they may be explicable by the difference in the evidence that was received by the Tribunal and by me.

60. That is not to say that my fact-finding judgment is wholly at odds with the conclusions of the Secretary of State and the First Tier Tribunal. As Mr Powell argued, I broadly accepted the account given by the Mother of the domestic abuse and violence that she sustained from the Father and although I did not find the Mother's allegations of rape and sexual assault to have been proved by reference to the civil standard, I made clear that this was not to be regarded as a finding that those allegations were necessarily untrue (unlike the allegation of sexual abuse). Moreover, I was not called upon to consider, in the context of the family proceedings, the Father's alleged links with police and prison officials in Q, a factor which had plainly played a part in the First Tier Tribunal's conclusions.

61. I do not know the precise role the allegation that the Mother had witnessed the Father sexually abusing H abuse played in the determination of the First Tier Tribunal that the Mother had proved that she was entitled to international protection as a refugee. However, given its gravity it must have played a material part in the Tribunal's decision. Moreover, the Tribunal expressly concluded that the Mother was a credible witness in all

respects, and my conclusion that parts of the Mother's evidence were untrue is plainly at odds with that. In those circumstances I am satisfied that that my fact-finding judgment and, specifically the findings that I have made regarding the Mother's credibility and the allegation of sexual abuse, are relevant matters which, were I to permit disclosure, the Secretary of State would be required to consider. I cannot therefore accept Mr Powell's argument that my fact-finding judgment is not relevant to the Mother's and H's immigration status in this jurisdiction.

62. Turning then to the specific factors that were identified by Swinton Thomas LJ in *Re C* as being relevant to the decision to permit disclosure, I consider that there are three that carry particular weight in this case, namely:

(1) The welfare and interests of H;

(2) The public interests in the administration of justice; and

(3) The desirability of co-operation between various agencies concerned with the welfare of children.

I do not consider that the other factors that have been identified by the parties carry much weight in this particular case. I do not see that the welfare of children generally will be affected by a decision that I am making based on the specific facts of the individual case before me. Nor is this a case where a decision on my part to disclose my fact-finding judgment is likely to impact upon the general importance of encouraging frankness in children's case. Indeed, disclosure is sought by the Father because I have concluded that, in relation to the allegation of sexual abuse, the Mother has not been frank with this court. As to confidentiality, Mr Edwards correctly observes that this is not a case where the maintenance of confidentiality in children's cases is of its usual importance – the Secretary of State is already aware of the material details of the issues before the court. The main issue of which the Secretary of State is currently unaware is my finding that the Mother's allegation of sexual abuse was fabricated. I agree with Mr Edwards that it would be wrong to permit the Mother to rely upon this aspect of *Re C* to oppose disclosure.

63. I turn then to consider the three factors which do in my view carry weight in this case.

(1) The welfare and interests of H

64. I have given close consideration to H's welfare and interests. In particular I have considered the evidence from the Guardian in her report of 20 September 2021 and her concerns regarding the impact that the Children Act proceedings had had upon him. I note that around the time of the fact-finding hearing before me and for some time thereafter H appears to have been very worried that his Father was seeking to return the whole family to Q, but that more recently he has not conveyed the same level of anxiety. I note also the Guardian's comment that he may not have been as shielded from the issues within these proceedings as might be desirable, although I recognise the closeness of the bond between H and his Mother and the fact that restrictions imposed as a result of the coronavirus pandemic may have prevented external activities that might otherwise have acted as distraction or diversion for H from the issues posed by these proceedings.

65. The Guardian notes that throughout her meetings with H, his concern that the Father may force him to return to Q has been a consistent theme. This is an issue which goes wider than the question of whether my fact-finding judgment should be disclosed to the Secretary of State. H clearly has conflicting feelings in respect of his Father although he has consistently indicated a wish for a relationship with him. It is of the utmost importance that the resumption of contact between H and the Father is taken at a pace with which H is comfortable and which provides meaningful opportunity for the relationship between them to begin to be re-established and familiarity fostered. It is for that reason that I will review the contact arrangements later this year.

66. I recognise that a decision on my part to disclose my fact-finding judgment may give rise to a period of uncertainty regarding the status of H and his Mother within this jurisdiction, and this may lead to further worry or concern on H's part. That said:

(1) Disclosure of my judgment to the Secretary of State does not of itself mean H will be returned to Q, or even that such a step is likely or imminent. As all counsel recognised in their submissions, even if the Secretary of State took steps to revoke the grants of asylum to H and his Mother, there are a significant number of legal hurdles that would stand in the way of their being removed from the UK.

(2) H's present status as a refugee affects the steps that this court can take in terms of making orders for contact with his Father. As matters stand the court cannot make an order for him to have contact with the Father and his wider family (both maternal and paternal) in Q, a state that is part of H's identity and heritage. The resumption of the relationship between H and the Father is still at an early stage and there is no immediate prospect of such an order being made, but I recognise that unless H's immigration status is revisited such an order is impossible. Given the conclusions that I have reached in my fact-finding judgment I consider that there is force in Mr Devereux's arguments that it is in H's interests for decisions regarding his asylum status in this jurisdiction to be made on an accurate and informed basis.

(3) Having regard to the Guardian's report, it seems to me that there is also a risk that H will worry about the prospect of him being returned to Q, whether or not I permit the disclosure of my fact-finding judgment to the Secretary of State.

67. Thus the welfare considerations do not all point in one direction. Whilst I recognise that a decision on my part to permit disclosure is likely to have some adverse affect on H by increasing or prolonging his concerns about ongoing legal proceedings, there are clearly steps that can be taken by both parents to provide him with reassurance and shield him from the issues raised in ongoing legal proceedings. Taking all these welfare considerations into account, I do not consider that the overall impact on H's welfare of disclosure is sufficiently serious that this factor should be determinative of my decision.

(2) <u>The public interests in the administration of justice and the desirability of co-operation between various agencies concerned with the welfare of children</u>

68. I address these two factors together as they seem to me to raise broadly the same issues, which is that there is a public interest in a court engaged in family proceedings communicating with other public bodies and agencies. I have concluded that in this case these factors outweigh the potential welfare concerns that I have identified and have determined that I should permit disclosure to the Secretary of State.

69. In reaching this conclusion I have particular regard to the passages from the judgments of Singer J in *Re B (Abduction: False Immigration Information)* [2000] 2 FLR 835 and of Hayden J in *F v M (Joint Council for the Welfare of Immigrants Intervening)* [2017] EWHC 949 Fam; [2018] Fam 1 to which I was referred by Mr Devereux. Both judges were clear as to the importance of ensuring that significant and material misrepresentations in immigration proceedings are brought to the attention of the relevant authorities. I agree, particularly in circumstances where, as happened here, there has already been disclosure of documents from the immigration proceedings into the family proceedings. I, of course, recognise that the ultimate decision as to whether disclosure should be made in any particular case is a fact-sensitive one, and accept that there may be cases where other factors such as welfare concerns will compel the court to withhold disclosure. However, the family courts are part of a broader justice system and I consider that there is great importance in this court facilitating the proper administration of justice before other courts and tribunals and co-operating with other public bodies concerned with the protection of children. In my view the court should be wary of permitting the confidentiality which attaches to family proceedings to be used to conceal material and adverse findings about a party or their evidence from another public body that has a direct and legitimate interest in those findings.

70. It is clear that there is a substantial overlap between the issues raised in the immigration proceedings and those which I have had to consider in the Children Act proceedings. The connection between the two sets of proceedings is emphasised by the fact that the Secretary of State has previously been required by this court to make disclosure from the immigration proceedings into the Children Act proceedings. As I have explained above, the Mother's allegation that she witnessed the Father sexually abusing H was plainly a material consideration which was taken into account by the Secretary of State and the First Tier Tribunal in relation to the claims of both the Mother and H for asylum and in my view there is a compelling argument that my conclusion that this allegation was fabricated by the Mother is a matter which should now be disclosed to the Secretary of State.

**CONCLUSION**

71. Taking all these factors into account, I have therefore concluded that disclosure should be made to the Secretary of State of the following documents:

(1) My fact-finding judgment dated 29 January 2021;

(2) My order of 19 May 2021 which records the Father's position that that he fully supports [H] living in his mother's primary care in the United Kingdom; he seeks a full and proper relationship with [H], including spending time with [H] in both the United Kingdom and in [Q];

(3) My order made following the hearing on 30 September 2021 which includes a "lives with" order (made with the consent of all parties) that H should live with the Mother; and

(4) This judgment.

72. Such disclosure will provide the Secretary of State with some context to my fact-finding judgment and will ensure that she is fully aware of the Father's position that he fully supports H living in the Mother's primary care in the UK and that he has consented to a "lives with" order under section 8 of the Children Act 1989. It will also ensure that the Secretary of State is aware of the totality of my findings in relation to the Mother's evidence, including the fact that I accepted her evidence that the marriage was characterised by domestic violence. No party has sought to persuade me to disclose any additional documents from these proceedings to the Secretary of State and I do not consider that it is necessary at to do so. For the avoidance of doubt my order will not permit disclosure to third parties beyond Secretary of State and her officials. Should any party wish for wider disclosure to be permitted (for example disclosure into further legal proceedings regarding the status of H or the Mother in this jurisdiction) a further application will need to be made.

73. That is my judgment.