England and Wales High Court (Family Division) Decisions

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Neutral Citation Number: [2017] EWHC 949 (Fam)
Case No: FD15P00103

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
26/04/2017

B e f o r e :

MR JUSTICE HAYDEN

Between:

F	**Applicant**
- and -	
M	**1st Respondent**
- and -	
A	**2nd Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT JOINT COUNSEL FOR THE WELFARE OF IMMIGRANTS	**Interested Party**

Ms D Fottrell QC, Mr T Wilson & Ms M Brewer (instructed by Goodman Ray Solicitors) for the Applicant

Mr H Setright QC & Mr B Jubb (instructed by Maya Solicitors) for the 1st Respondent
Mr D Williams QC & Ms J Renton (instructed by Freeman Solicitors) for the 2nd Respondent
Mr Norton QC & Mr A Payne (instructed by GLD) for the Secretary of State for the Home Department
Ms Kathryn Cronin and Ms Julia Gasparro (instructed by JCWI) for the Interested Party

Hearing dates: 29th, 30th & 31st March 2017

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Hayden :

1. This matter comes before me pursuant to a direction of the Court of Appeal for rehearing, following the successful appeal in Re H (A Child) [2016] EWCA Civ 988. At this stage I am addressing some preliminary legal issues identified by Black LJ in her judgment. The background history has been distilled to a number of uncontroversial key facts.

Background

2. The Father (F) was born in Pakistan on 14th April 1976. He is a Pakistan national. The mother (M) was born in Pakistan on 18 June 1977. She is also a Pakistan national. M and F married on 15 August 2002.

3. On 4 April 2006, A was born in Lahore, Pakistan. A's twin sadly died 3 hours after he was delivered by caesarean section. A lived with F and M in Pakistan until May 2012 when he moved with M to Saudi Arabia, F having already relocated to Riyadh, Saudi Arabia in October 2011 for the purposes of his employment.

4. On 19 August 2014, A arrived in this jurisdiction with M for a visit, which had been arranged with the consent of F. A return flight to Saudi Arabia had been booked for the M and A departing on 11 September 2014. M did not return to Pakistan as had been agreed between the parents. On 6 September 2014, F came to this jurisdiction and there was an argument between M and F. F was arrested but released without charge and returned to Saudi Arabia, alone, on 11 September 2014. M and A have remained in this jurisdiction since that date.

5. On 15 September 2014 M sought asylum in the UK. On 11 October 2014 F issued proceedings for divorce in Pakistan but they have lapsed now, due to passage of time. On 9 December 2014 A's visa to reside in Saudi Arabia expired. In December 2014, A commenced his schooling in this jurisdiction. On 6 February 2015 M and A's visitor visa for the UK expired.

6. On 10 March 2015, proceedings commenced in the High Court, on a without notice basis, seeking the summary return of A to Pakistan. A was made a Ward of Court. On 30 March 2015 M was served with the court documents. An inter partes hearing on 14 April 2015 and again on 15 May 2015 before Russell J who gave case management directions (*inter alia*) directing that a CAFCASS report be prepared. On 24 June 2015 A had a meeting with a Cafcass officer, Mr McGavin.

Application for Asylum

7. On 26 June 2015, A applied for asylum in the United Kingdom to the Secretary of State for the Home Department ("SSHD"). On 8 July 2015, the final hearing took place in respect of F's application for what was said to be the 'summary return' of A to Pakistan. During the afternoon of that hearing, F and M entered into a Consent Order which provided for A's return to Pakistan by 5 August 2015. Both F and M gave undertakings to the court. M's included an undertaking to withdraw her asylum application and that of A.

8. In the event M did not withdraw either asylum application, and A did not travel to Pakistan. On 6 August 2015, F applied to enforce the order dated 8 July 2015 on a without notice application. On 12 August 2015 the case was listed (inter partes) and M applied to set aside the order dated 8 July 2015, claiming that she had not validly consented to it. On 23 September 2015 the Home Office informed M's solicitors that the SSHD was not agreeable to disclose the details of M's asylum application (it having been sought by F) as she had made allegations against the F in her asylum claim.

9. On 27 October 2015, M and A were granted, separately, 'refugee status' in the United Kingdom, by the Secretary of State for the Home Department. This has been generally referred to by the parties as 'grant of asylum'. On 28 October 2015, Mr McGavin of Cafcass attempted to supervise a contact between F and A. That contact was unsuccessful as A refused to see F.

10. The terms of the order dated, 29 October 2015, invited Mr McGavin to consider whether A should be separately represented in the proceedings. Though the order does not record it, counsel before me have agreed that this measure was thought necessary in light of the terms of the order for A's return to Pakistan; the applications before the court to set aside that order; **the grant of asylum to the child in his own right** (my emphasis) and the lack of contact between the child and the father.

11. On 17 November 2015, again pursuant to the order dated 29 October 2015, Mr McGavin wrote to the Court stating that he could see no way in which the case could be satisfactorily resolved without the Court hearing evidence and making findings in relation to the serious allegations made against F. Further, Mr McGavin stated that the Cafcass High Court Team were in a position to appoint a Guardian for A, once a fact finding hearing had taken place.

12. On 2 February 2016, at a directions hearing, Her Honour Judge Jakens (sitting as a Deputy High Court Judge) refused M's application for A to be joined to the proceedings. On 26 February 2016, His Honour Judge Bromilow (also sitting as a Deputy High Court Judge) dismissed M's application to set aside the order dated 8 July 2015 and granted F's cross application to enforce the order. As a consequence, HHJ Bromilow went on to order A's return to Pakistan forthwith and by no later than 23.59 hrs on 5 April 2016. Mr McGavin was directed to meet with A to inform him of the decision. M applied to HHJ Bromilow for permission to appeal and also for a stay, which applications were refused and thereafter M applied to the Court of Appeal for the same relief.

13. On 10 March 2016, Mr McGavin emailed the parties' solicitors stating that he had spoken to A about HHJ Bromilow's decision. Mr McGavin noted that A continued to object to the decision the judge had made.

The Appeal

14. On 22 March 2016, McFarlane LJ granted M permission to appeal and a stay. On 20 June 2016, A met with Ms Laura Coyle of Freemans Solicitors. On 30 June 2016, A applied to become a party to the proceedings and for permission to appeal. On 6 July 2016, Black LJ granted A's applications. On 13 July 2016 – 14 July 2016, the Court of Appeal (Moore-Bick, Longmore and Black LJJ's) heard the appeals of M and A, and a cross application by F for permission to appeal.

15. On 11 October 2016, the Court of Appeal handed down its judgment. M's and A's appeals were granted, and F was refused permission. The consequence of the Court of Appeal's judgment was that the orders of Her Honour Judge Finnerty, dated 8 July 2015 and the Order of HHJ Bromilow, dated 26 February 2016 were set aside and the proceedings were remitted to a High Court Judge for fresh consideration, in particular for consideration of the interplay between the wardship and immigration jurisdictions in light of the fact that M and A had both been granted asylum by SSHD.

The Re-hearing

16. On 2 November 2016, the first directions hearing took place in the High Court before Cobb J. Various case management directions were given to facilitate two hearings: a preliminary legal issues hearing, and a final hearing. The SSHD was invited to intervene in the proceedings, and further disclosure was requested from the SSHD in respect of M's and A's asylum claims. The questions for the court to focus on in respect of the preliminary legal issues hearing were also made clear and attached to the order.

The Cafcass High Court Team was ordered to ensure that Mr McGavin was not the author of any further Cafcass report if so directed (a report not being ordered at this stage.) Ms Coyle was appointed as A's Guardian in the proceedings.

17. On 19 January 2017, a further case management hearing took place. The Secretary of State, on her application, was granted Interested Party status. The issues for determination at the preliminary hearing were expanded, and further case management directions were given.

18. In her judgment Black LJ made the following observations which formed the framework to this hearing:

> *"39. The starting point for a consideration of the implications of A's refugee status will have to be, in my view, that at the very least it is unlikely to be appropriate for the family court to order A's return to Pakistan without first concluding that his situation did not, in fact, justify the protection afforded by the Secretary of State. It needs to be recognised that the position may go further in that, if some of the submissions made to us are correct, it might not even be permissible for the family court to order A's return unless and until his refugee status is revoked. The questions that will need to be addressed include at least the following:*
>
> *i) Is A's refugee status an absolute bar to the family court ordering his return to Pakistan?*
>
> *ii) If so, by what process can the father challenge the refugee status, given that he denies the allegations of violence by the mother and A upon which their asylum claims were based? By virtue of paragraphs 338A and 339AB of the Immigration Rules, a grant of refugee status shall be revoked where the Secretary of State is satisfied that the person's misrepresentation was decisive for the grant. The question arises as to how the determination is made that there has been a misrepresentation. Normally this would be a matter for the Secretary of State alone, but where the family court needs the issue resolved in order to decide what is in a child's best interests, can the family court determine it itself? Is it necessary for the Secretary of State to be joined in the proceedings, in those circumstances, not least with the intent that the family court's determination should be binding upon her too? Is it necessary for the grant of refugee status to be formally revoked by the Secretary of State prior to a return order being made or is some lesser process sufficient?*
>
> *iii) If the family court determines whether there has been a misrepresentation, on what basis does it do so? Is the usual process of making findings of fact on the balance of probabilities appropriate or is it necessary to take the sort of approach taken by the Secretary of State to the determination of asylum claims?*
>
> *iv) If A's asylum status is not an absolute bar, how should it be taken into consideration in the family proceedings? Once again, the question arises as to how the court should resolve the factual debate between the parties.*
>
> *v) Does it make any difference that, strictly speaking, A probably has humanitarian protection rather than protection as a refugee?"*

19. Earlier in her judgment Black LJ makes the following comment:

> *"I recognise that it may be thought unhelpful to return the case to a Family Division judge without providing comprehensive guidance as to how the question of A's refugee status should be approached. However, I think it would be wrong to offer any definitive views about this at this stage. It is a very difficult question and the court will require as much help as it can possibly get, not only from the family law angle but also in relation to immigration and asylum law and practice."*

20. I am pleased to say that I have been afforded precisely the kind of assistance that Black LJ had contemplated. The Secretary of State instructed leading counsel, specialising in family law, Mr

Andrew Norton QC, and very experienced immigration counsel, Mr Alan Payne. They produced a carefully analysed and impressively researched written argument which has been of great help not only to me but to all the parties in the case. On the 21st March 2017 I also granted permission for the **Joint Counsel for the Welfare of Immigrants** (JCWI) to intervene to make representations. JCWI is an independent National harity established in 1967. It provides direct legal advice in the sphere of UK immigration policies and undertakes research, policy and campaigning work, including on the impact on children of immigration laws. Amongst its wider work I note that JCWI participated, on behalf of the Office of the Children's Commissioner, in a co-authored report entitled '**The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements (2015)**'. Ms Kathryn Cronin and Ms Julia Gasparro, acting on behalf of JCWI, have provided an erudite analysis of the status of the Refugee Convention.

21. Such was the range of the argument advanced on behalf of the SSHD that is was necessary for her, through counsel, to apply for extension to the time limits set by this Court. Whilst those applications were properly made and for understandable reasons, it meant that the other parties had only a few days to consider their response, as I was not prepared to contemplate further delay for the child. SSHD considered that '*this case raises important issues related to the interpretation and application of asylum law in the context of family proceedings'*. By the time this hearing commenced a very broad level of agreement had been reached between the parties. Given the range of interests present and represented in this courtroom the agreement itself carries authority.

22. The first question identified by the Court of Appeal is **whether A's refugee status is an absolute bar to the family court ordering his return to Pakistan?** It follows that if the answer to this question is 'yes' most of the remaining questions either fall away entirely or diminish in significance.

23. The starting point in analysing the central question is the **EU Council Directive 2005/85/ EC**. (The Procedures Directive 'PD'), which provides for 'minimum standards on procedures in Member States for granting and withdrawing refugee status'. Article 4 (1) of which, provides that '*Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive…*'.

24. Article 7 (1) sets out the scope of the inquiry and procedure that is involved:

> *1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.*
>
> *2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:*
>
> *(a) applications are examined and decisions are taken individually, objectively and impartially;*
>
> *(b) precise and up-to-date information is obtained from various sources, such as the*
>
> *United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;*
>
> *(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.*
>
> *3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task. [Article 8] 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. [Article 22]

25. The PD also provides for the revocation of refugee status which plainly falls to be considered here and thus requires to be stated:

62. In terms of withdrawing or revoking refugee status the PD provides: -

Member States shall ensure that an examination to withdraw the refugee status of a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status. [Article 37]

1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit, in a personal interview in accordance with Article 10(1)(b) and Articles 12, 13 and 14 or in a written statement, reasons as to why his/her refugee status should not be withdrawn. [Article 38]

In addition, Member States shall ensure that within the framework of such a procedure:

(c) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(d) where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin. [Article 38]

26. Article 41 must also be emphasised, for reasons expanded below. This obliges a Members State to

"ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

27. In the UK, in compliance with this framework of requirements Parliament has, through the immigration rules (HC395), appointed the Secretary for State for the Home Department as the designated **'determining authority'**. As such, it is the SSHD who has sole responsibility for investigating and determining claims for international protection. Paragraph 334 of the **Immigration Rules** (HC395) confers the status of 'refugee' on a child. For the sake of completeness, the Immigration Rules are made pursuant to the **Immigration Act 1971** (the '1971 Act'). Accordingly and given that these powers are rooted within this statutory framework, the SSHD submits, and I agree, that the grant of asylum is not made pursuant to Royal Prerogative but reflects an exercise of statutory authority. No party has sought, at this hearing, to argue to the contrary. This discrete question has, to

my mind, now been comprehensively resolved by the Supreme Court: **Munir v SSHD [2012] UK SC 32**:

> *"26. In my view, the power to make immigration rules under the 1971 Act derives from the Act itself and is not an exercise of the prerogative. As its long title indicates, the purpose of the 1971 Act was to replace earlier laws with a single code of legislation on immigration control. Parliament was alive to the existence of the prerogative power in relation to enemy aliens and expressly preserved it by section 33(5). But prima facie, subject to the preservation of that power, the Act was intended to define the power to control immigration and say how it was to be exercised.*
>
> *27. It is true that there is no provision in the 1971 Act which in terms confers on the Secretary of State the power or imposes on her the duty to make immigration rules. But for the reasons that follow, in my view it is implicit in the language of the Act that she is given such a power and made subject to such a duty under the statute." Per Lord Dyson (with whom Lord Hope, Lord Walker Clarke and Lord Wilson Agreed)"*

The 1951 Geneva Convention relating to the status of refugees (the *Refugee Convention*) and the right not to be refouled.

28. Again, it is necessary here to consider the relevant framework of the 'Refugee Convention'.

> 46. Article 1 of the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol ('the Convention') is entitled "Definition of the term 'Refugee'". Article 1A provides that the term 'refugee' shall apply to "any person who":
>
> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> ...
>
> 47. This definition is provided "for the purposes of the present Convention" and provides the basis for any subsequent entitlement to the substantive rights provided by the Convention (set out in Articles 3 to 34). The Convention does not, however, provide for (or require Contracting States to provide for) any particular (immigration) status to be granted to those who fulfil the definition of "refugee" in Article 1A.

29. However, within the ambit of the issues that fall for consideration here the following substantive rights are relevant:

> (1) Article 32:
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

(2) Article 33:

(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

… who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

30. It is very clear now that the 'Refugee Convention' is to be interpreted in accordance with the Vienna Convention (see e.g. *Memorandum 2001* at para 2). There is no need for me to set this out here as it has been expressly recognised, see, e.g., **R (ST) v Secretary of State for the Home Department [2012] 2 AC 135 at [para 30]; R v Asfaw [2008] 1 AC 1061 at [para125])**.

31. Article 31(1) of the Vienna Convention requires a decision maker to interpret a treaty:

> *"in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".*

32. Article 31(2) recognises the Preamble as part of the context for the purposes of the interpretation of a treaty. The Preamble to the Convention states that the object of the Convention is to endeavour "*to assure refugees the widest possible exercise of [their] fundamental rights and freedom*". The Convention is to have a purposive construction consistent with its humanitarian aims (see, e.g., **R v Asfaw (supra) at para 11; HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596 at para14; RT (Zimbabwe) v Secretary of State for the Home Department [2013] 1 AC 152)**.

33. I agree with Mr Payne's analysis, it follows from the above that the governmental, administrative, judicial bodies of Member States are required to adopt an approach to those seeking or granted asylum that furthers the objectives of the Convention, to do otherwise would frustrate its primary purpose, see further **EN(Serbia v Secretary of State for the Home Department [2011] 1 AC 596 at [para 58]**: The Convention also affects the lawfulness of administrative practices and procedures, as Lord Steyn put it:

> *"It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention*".

34. Mr Payne properly highlights the fact that the Refugee Convention is an unincorporated international treaty; see **R v Asfaw** Lord Hope at [para 69], Lord Carswell at [para 118] and Lord Bingham at [para 28]): -

> 28…The appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in R v Secretary of State for the Home Department, Ex p Sivakumaran [1988] AC 958, 990g ; Lord Steyn in R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees Intervening) [2005] 2 AC 1, paras 40-42; section 2 of the Asylum and Immigration Appeals Act 1993; and rule 328 of Statement of Changes in Immigration Rules (1994) (HC 395). It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to anenactment in terms unambiguously inconsistent with such an obligation. [29]

35. Nonetheless, by a very forceful side wind, the Refugee Convention gains effect by s.2 of the **Asylum and Immigration Appeals Act 1993**, entitled 'Primacy of Convention'. This provides that:

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

36. Along with the PD, **Council Directive 2004/83/EC** (the Qualification Directive 'QD') also falls to be considered. Though 'refugee' bears the same definition in the QD to that in the Refugee Convention, it requires Member States to grant those whose circumstances are considered, to meet the relevant criteria for refugee status (Article 13).

37. The QD is entitled: *"minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted".*

38. The QD expressly provides, in Preamble 12, that 'the best interests of the child' should be a primary consideration of Member States when implementing this Directive. It recognises, in conformity with the Convention, that: *the recognition of refugee status is a declaratory act. [Preamble, [para 14];*

> *"refugee"*
>
> *"means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply; [Article 2(c)]"*

39. Like the Convention, the QD also facilitates protection against refoulement. (the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution). Thus:

> *1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.*
>
> *2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:*
>
> *(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or*
>
> *(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.*
>
> *3. Member States may revoke, end or refuse to renew or to grant the residence [Article 21]*

40. In contrast to the Convention, the QD, subject to certain conditions and/or limitations also requires:

> *(1) ... the grant of "refugee status" to those recognised as refugees by a Member State:*
>
> *"refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee; [Article 2(d)]*
>
> *(3) Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III. [Article 13]*
>
> *As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3). [Article 24(1)]*

(2) Provides for subsidiary protection for those who are at risk of serious harm but do not qualify as a refugee:

(e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country Article 2];

(f) "subsidiary protection status" means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection; [Article 2].

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V. [Article 18]

As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require. [Article 24(2)]

(3) Requires Member States to revoke refugee and/or subsidiary protection status in certain circumstances in certain defined circumstances: -

[Refugee Status]

Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) ...

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.[Article 4(3)]

[Subsidiary Protection Status]

3. Member States shall revoke, end or refuse to renew the subsidiary

protection status of a third country national or a stateless person, if:

(a) ..

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article. [Article 19]

(4) Sets the procedures governing any decision to revoke the grants of refugee

status

> *1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:*
>
> *a. To be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and*
>
> *b. To be given the opportunity to submit, in a personal interview in accordance with Article 10(1)(b) and Articles 12, 13 and 14 or in a written statement, reasons as to why his/her refugee status should not be withdrawn.*
>
> *In addition, Member States shall ensure that within the framework of such a procedure:*
>
> *c. the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and*
>
> *d. where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.*

41. Cumulatively, there emerges from this raft of interconnected material a clear answer to the central question identified by the Court of Appeal: the determination of the refugee status of any adult or child falls entirely within 'an area entrusted by Parliament to a particular public authority'. In this case the public authority is the SSHD.

42. The ramifications of such a conclusion were analysed by Lord Scarman in ***R W (A Minor) (Wardship: Jurisdiction: Jurisdiction)*** **[1985] AC 791** at para 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 public 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."*

43. In **S and S and Others** [2008] EWHC 2288 Munby J (as he then was) identified and emphasised a very clear jurisdictional line:

> *"it is simply outside the lawful exercise of any power of any judge in the Family Division to make an order directed to the Secretary of State requiring the release from administrative detention of the dependent of a failed asylum seeker, just as it would be wholly outside my powers were I to purport to make an order requiring a ward of court to be discharged from a young offender institution because I differed from the view that the magistrates who, upon conviction, had sent the child to such a place……Those are all matters within the exclusive statutory powers of the relevant officials".*

44. Accordingly, it seems clear that the grant of refugee status to a child by the SSHD is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction. Ms Fottrell QC, on behalf of F, has been reluctant to yield to this unambivalent statement of principle, at least expressed in such stark terms. She contends that the options for the child within the family court are not neutralised by the supremacy of the SSHD's authority. By this she means that there are a range

of alternatives which might encourage or indeed require the SSHD to reconsider her decision in the light of findings made in the Family Court on the basis of evidence to which she has not had access. This however, whilst a valid point, is not the same one. Determination of refugee status itself and therefore its consequences is the SSHD's sole responsibility.

45. Ms Fottrell's arguments were anticipated by the second question posed by Black LJ i.e. by what process the father can challenge the refugee status given that he denies the allegations of violence by the mother and upon which the asylum claims of both mother and child were based. Here it is important to emphasise the SSHD is actively obliged, pursuant to the Immigration Rules, to revoke the grant of asylum where she is satisfied that the evidence establishes that:

> *"the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of refugee status" (paragraph 339AB of the Immigration Rules).*

46. In their written submissions, Messrs Norton and Payne recognise that, in addition to the requirements set out by the Rules, the SSHD must ensure that her decisions and the procedures that underpin them comply with the tenets of Administrative Law. These principles have evolved considerably over the past two decades and cannot easily be condensed. It suffices to say that for the SSHD's position to be lawful, it must be both 'reasonable' and 'rational'. Thus it will not permit her, for example, to give manifestly inappropriate weight to any particular factor. It will not permit inconsistent, arbitrary or uncertain conclusions. This is reflected in the submission on the Secretary of State's behalf:

> *54. It is therefore accepted that SSHD has a public law obligation to consider material relevant to the discharge of her obligation to revoke the grant of asylum. This is reflected in the Asylum Policy Instruction "Revocation of refugee status" (the 'Revocation Guidance") which provides that "careful consideration must be given to revoking refuge status" where, amongst other matters, "evidence emerges that status was obtained by misrepresentation" (paragraph 1.2).*
>
> *55. In the context of any such decision the SSHD: - (i) bears the burden of establishing that the requirements of paragraph 339AB are met, and (ii) is required under section of the Borders, Citizenship and Immigration Act 2009 to take into account as a primary consideration the best interests of the Child.*
>
> *56. Accordingly, if evidence emerges during the course of these Family proceedings that is relevant to whether the grant of asylum to the Child should be revoked this material will be considered by the SSHD.*
>
> *57. The SSHD accepts that it would in principle be open to the Father to judicially review a failure by the Secretary of State to revoke the grants of asylum on public law grounds.*

47. To this I would add that, in addition to the above, a misdirection in fact or law may form the basis of judicial review: see **Secretary of State for Education and Science v Tameside MBC [1977] AC 1014**; **Hollis v Secretary of State for the Environment (1984) 47 P and C.R. 351**. Where facts in issue fall within a category prescribed by statute there may arise a question of mixed law and fact, since it entails a determination of the legal ambit of that category. This said, an application for judicial review based on mistaken fact and or law is always likely to face significant hurdles. Ms Fottrell submits that an application for judicial review may be 'largely illusory'. Mr Norton and Mr Payne respond to the father's contention in this way:

> *"(1) The decision to consider material provided in the course of Family proceedings does not directly inform the actor of persecution of the fact the Child is a refugee nor that his refugee status is under consideration. Such an approach is not therefore inconsistent with either Article 38 of the PD or paragraph 339IA of the Immigration Rules [F72 and 73].*
>
> *(2) Similarly, the provision of material by the Father does not result in his being "directly informed" that a consideration is being given to revoking the Child's refugee status [76].*

(3) Further and in any event, these issues do not arise where the Father is aware of the grant of asylum.

(4) There is no circularity arising from the fact that the SSHD decides whether any evidence of misrepresentation justifies the revocation of asylum. In particular the SSHD is uniquely well placed to determine the impact any misrepresentation had on her decision making [74].

(5) The fact that they are no defined rules governing the provisions of information to the SSHD, whether a review should be instigated, and whether the Father should be informed that consideration is being given to revoking the Child's refugee status and the outcome of the review provides no basis for concluding that judicial review is not an effective remedy. In any event, the short answer is that since the SSHD's accepts that she is under a public law duty to consider material relevant to the question of revocation, it would be open to the Father in principle to challenge a failure to review such material on public law grounds.

(6) The Father participates in this process by way of the evidence that he has given in the Family proceedings and the findings made by the Family Court. In any event, the lack of participation does not render ineffective the judicial process - in particular since it would be open to the Court to hear evidence from the Father if this was considered to be relevant.

(7) The potential adverse impact of the Father not being able to travel to the UK is the same for both Family proceedings and judicial review proceedings."

48. Properly deconstructed, these submissions are, in my assessment, primarily directed to the question of disclosure of documentation by the SSHD. It is not necessary for me further to burden this judgment with the detailed history of the disclosure which took place in this case. Suffice it to say that, following a number of politely phrased requests, prefacing orders made by Hogg J, disclosure was forthcoming. That is not, however, the route the SSHD proposes should be followed in future. I suspect that the response in this case, now asserted by Mr Norton to have been erroneous, came about in consequence of the Department's lawyers conflating requests for information in relation to immigration, visa and passport applications, in family proceedings with requests relating to the grant of asylum. The two are very different. In the case of the former, request is made by standardised form, EX660. This process follows guidance from the President of the Family Division in October 2014: ***Communicating with the Home Office in Family Proceedings*** (see FPR PD 12 F, Annex 1). This was expanded upon in **Re M and N (Parallel Family and Immigration Proceedings) [2008] 2 FLR 2030** and again reiterated in **RE C (A Child) [2013] EWCA Civ 431:**

"i) Practitioners acting for the parent in the family proceedings have an ongoing duty to remain au courant with what is going on elsewhere even if the other matter is being handled by other professionals.

ii) The parents, as part of their ongoing obligation to be frank and open with the court, are under a duty to instruct those advising them in any other relevant matter to keep their family solicitors informed of what is going on. And it is the duty of those advising them in the other matter, having received such authority, to keep the family solicitors informed accordingly.

iii) Practitioners involved in family proceedings have a duty to take adequate steps before each hearing to find out, from the solicitors or other professional advisers acting for their client in any other relevant matter, what has been going on, where the other matters have got to and, in cases where some formal decision is anticipated, when that decision is likely to be given.

iv) With a view to minimising the room for uncertainty or misunderstanding, it is preferable to obtain copies of the correspondence and other documents on the other solicitors' files rather than attempting to find out what is going on by means of questions

and answers in correspondence which may, through lack of understanding, miss the point or be misunderstood.

v) If the practitioners acting for the parent in the family proceedings are finding it difficult to obtain the relevant information from the solicitors or other professional advisers acting for their client in the other matter, then prompt consideration needs to be given – and at the earliest possible stage – to approaching the court with a view to inviting the court either to make a peremptory order that the other advisers deliver a complete copy of their file to the solicitors acting in the family proceedings or to make an order pursuant to the Protocol. Such applications should not be left to the next directions or other hearing which has already been fixed if waiting until then may generate inappropriate delay.

i) Where the outcome in the family proceedings is dependent upon or likely to be affected by the decision of some third party, consideration should be given – at the earliest possible stage in the proceedings – as to whether and if so how that third party decision maker should be brought into some appropriate form of direct engagement with the family proceedings."

49. The objective underpinning this guidance is to enable the Family Court to take decisions relating to children, in timescales which keep their needs in sharp focus and avoid delay. Passport and visa applications relating to children will often need to be resolved before the Court can make decisions in their best interest. An application for Asylum however, has an entirely different complexion to it. It will invariably involve material of a highly distressing and personal nature. Asylum seekers are informed, precisely because of these often exquisitely sensitive issues, that the information they provide will be treated as confidential and will only be disclosed where there is a requirement in law to do so. As Mr Norton emphasised, this is made plain to those seeking asylum in very clear terms at the start of the asylum process.

50. This emphasis on confidentiality is fretted throughout the investigative process. In order to maintain confidentiality, examinations are always conducted in private in circumstances where, as Mr Norton puts it 'the individual has a reasonable expectation that their privacy would be protected'. He submits

"'The legal basis for the need to protect information regarding a person's claim for asylum and any subsequent grant of refugee status (or refusal of the same), is that a duty of confidence arises at common law.'"

51. This approach finds support in the obligations imposed by Articles 22 and 41 PD, specifically, Article 41 obliges the Member States to:

"ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

52. Further, to summarise the submission on this point, it is contended on behalf of the SSHD that it is axiomatic that information pertaining to any asylum claim is, in the light of its sensitive nature, rarely in the public domain. In their written document Mr Norton and Mr Payne make the following, and in my judgement, compelling submission:

"Confidentiality is a vital element for the working of the asylum system and the proper discharge by the UK of its obligations under the Refugee Convention, QD and ECHR. The need for those seeking asylum to have confidence that the information they provide will not be made public means that there is a compelling public interest in ensuring that this confidentially is protected. This applies a fortiori to those granted refugee status (where the risk of harm has been established). For these reasons the SSHD considers that such disclosure should not take place absent exceptional circumstances and a Court order."

Procedural Obligations

53. Ms Fottrell submits, and I agree, that F and A's rights Article 8 ECHR are engaged in these proceedings and in any administrative process which has the effect of curtailing their relationships with each other. She refers me to **Monory v Romania and Hungary** (Application no. 71099/01, 5 April 2005) at [70]:

> *"...the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8. "*

54. Moreover, Ms Fottrell contends that it is also clear from European jurisprudence that Article 8 imposes on States a positive procedural obligation to maintain a fair, efficient and effective mechanism for determining the issue of return in the context of abducted children brought from other jurisdictions, see, for example: **Maumousseau and Washington v France** (Application no. 39388/05, 6 December 2007); **Neulinger and Shuruk v Switzerland** (Application no. 41615/07, 6 July 2010) and **Karrer v Romania** (Application no. 16965/10, 21 February 2012).

55. In their written submissions Ms Fottrell and Mr Wilson highlight the ECHR's observations in: **Maumousseau and Washington**, where the Court stated at [83]:

> *"... while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. As to the State's obligation to take positive measures, Article 8 includes the right of a parent – in this case the father – to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action…' "*

56. In the context of applications under the 1980 Hague Convention, Ms Fottrell points out that the Court has also emphasised, in a number of cases, the positive obligation to undertake an *'in-depth examination'*. In **Neulinger and Shuruk**, the Court stated as follows, at [139]:

> *"'To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.' "*

57. In **Blaga v Romania** (Application no. 54443/10, 1 July 2014), the Court stated as follows, at [70]:

> *"In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable objection to the child's return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing or accepting such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see Maumousseau and Washington, cited above, § 73), is necessary. "*

58. By way of conclusion it is submitted that there is a further positive obligation on the State to give due consideration to allegations raised within the abduction context. In **Karrer**, the Court found a breach of Article 8 on the basis that *'the analysis conducted by the domestic authorities in order to determine the child's best interests was not sufficiently thorough'* [48]. Further, the court found that the left-behind parent had been unable properly to respond to contested allegations. At [50] and [53] respectively, the Court stated:

> *"In this respect, the Court reiterates that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see, among other authorities, Airey v. Ireland, 9 October 1979, § 24, Series A no. 32). As regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.*
>
> *'When examining the overall decision-making process the Court cannot disregard the fact that the file before the domestic courts contained controversial pieces of evidence. The Court finds that giving the first applicant the opportunity to present his case either directly or through written submissions was of paramount importance for ensuring the fairness of the decision-making process."*

59. All this leads Ms Fottrell and Mr Wilson to conclude thus:

> *"While the Supreme Court has determined that, in the context of Hague Convention proceedings, the Convention jurisprudence does not require an abandonment of the summary approach to determining applications in the abduction context (**Re E (Children) (Abduction: Custody Appeal**) [2012] 1 AC 144), it remains a fundamental principle of Convention jurisprudence that Article 8 imposes an obligation on the State to ensure that a 'left-behind' parent is able to participate effectively and present welfare arguments. "*

60. Whilst it is undoubtedly correct that both F and A's Article 8 rights are engaged here and that procedural fairness is an indivisible facet of these rights, it is equally important to recognise that the duty of confidence to the claimant, in common law, also falls within the embrace of Article 8 (See Campbell v MNG Ltd [2004] UKHL 22; [2004] 2AC 457). More widely, this reasonable expectation of privacy is intrinsic to the operation both of the asylum system generally and the proper discharge by the UK of its obligations under the Refugee Convention, QD and ECHR. Mr Norton and Mr Payne address this necessary analysis of the competing rights and interests in play in these terms:

> *"Accordingly, when considering whether to order disclosure the Court will need to consider whether disclosure would be compatible with the refugee's ECHR rights, and in particular their Article 3 and 8 rights. In addition, in considering proportionality under Article 8 the Court will need to attach particular weight to the wider powerful public interest in protecting the confidentiality of the asylum process. This is particularly so where the applicant for disclosure is the alleged persecutor. Against these considerations the Court will need to weigh, in the case of an application made by a family member, any adverse Article 6 and/or 8 impact of disclosure not being provided to the person making the application. The SSHD's position is that only where an exceptional case is established by an applicant will disclosure be necessary."*

61. Whilst I accept and endorse much of this, I am not prepared to agree with the submission that 'only where an exceptional case is established by an applicant, will disclosure be necessary'. It may be that the balancing of the competing rights may lead to disclosure in only a very limited number of cases but effectively to create a presumption that disclosure should be 'exceptional' is corrosive of the integrity of the balancing exercise itself.

62. It also requires to be stated that the SSHD will frequently be better placed than the Court to conduct the balancing exercise when identifying whether or to what extent disclosure should take place.

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 SSHD. I will, in due course, deliver a judgment, which will be released to the SSHD. 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.

64. Finally, it is submitted on A's behalf and supported by M's team that the ambit of the forthcoming hearing ought, in the light of the available evidence, particularly relating to A's own forcefully expressed wishes and feelings and the extensive time that he has already spent in the UK, to be confined to the issue of contact rather than summary return. Ms Fottrell has neither conceded this point nor actively resisted it. I am bound to say that I consider that contact is the realistic issue in this case and ought properly to be identified as such. However, this important question will still involve consideration of whether false representations have been made to the SSHD in respect of both asylum claims and I do not propose to circumscribe F's case in any way that might inhibit the argument on this point.
