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## **UK ? F v M and A (a child) and Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants (Interested Party), Case No: FD15P00103, 26/04/2017**

**Country of Decision:**

United Kingdom

**Country of Applicant:**

Pakistan

**Date of Decision:**

26-04-2017

**Citation:**

F v M and A (a child) [2017] EWHC 949 (Fam)

**Court Name:**

High Court of Justice, Family Division

**Keywords:**

Actor of persecution or serious harm

Best interest of the child

Child Specific Considerations

Family member

Refugee Status

Relevant Facts

Return

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**Relevant Legislative Provisions:**International Law > [1951 Refugee Convention](#) [1] > [Art 1](#) [2]International Law > [1951 Refugee Convention](#) [1] > [Art 1A](#) [2]International Law > [1951 Refugee Convention](#) [1] > [Art 32](#) [3]International Law > [1951 Refugee Convention](#) [1] > [Art 33](#) [4]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 3](#) [6]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [7] > [Art 4](#) [8]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#)

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European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [7] > [Art 14](#) [14]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Recital 12](#) [16]

European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [7] > [Art 22](#)

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 8](#) [17]

European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [7] > [Art 37](#) [18]

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European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [7] > [Art 41](#)

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Art 2](#) [19]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Art 4](#) [20]

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European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Art 17](#) [25]

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European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Art 21](#) [27]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [15] > [Art 24](#) [28]

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**Headnote:**

Following the careful examination of International, European and domestic law, the Court concluded that the grant of refugee status supersedes any order made by a Family Court (regarding the return of the child to Pakistan), because it is the Secretary of State for the Home Department that is the entrusted public authority to deal with asylum matters. However, were

the Family Court to discover new facts, the relevant public authority would be responsible, in principle, under the tenets of UK Administrative Law to review their decision.

### **Facts:**

The Father (F) and Mother (M), both Pakistan nationals, were married on 15 August 2002. A, their child, was born in Lahore Pakistan on 4 April 2006. In early 2012, the family relocated to Saudi Arabia for the purposes of F's employment. On 19 August 2014, A and M travelled legally to the United Kingdom for a visit, with F's consent, but did not return with the booked flight and have remained in the United Kingdom since then.

On 15 September 2014, M filed for asylum in this jurisdiction; in her application, she made allegations against F's violent behaviour. On December 2014, A began his schooling in the UK. On 10 March 2015, proceedings commenced for the summary return of A to Pakistan, and he was made Ward of Court. On 26 June 2015, A sought asylum in this jurisdiction to the Secretary of State for the Home Department. On 8 July 2015, the 'summary return' of A to Pakistan was ordered in response to F's application, and M gave undertakings to withdraw her asylum application and ensure that A be returned by 5 August 2015. None of the undertakings were carried through, and 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*. The following day, A was unwilling to see F in a CAFCASS supervised contact.

On 2 February 2016, his Honour Judge Bromilow granted the enforcement of the 8 July 2015 order for A's return to Pakistan. Following A's continued objection to the decision of the judge, on 11 October 2016 *M and A's appeals were granted, F was refused permission* and the July 2015 order was set aside with the purpose of remitting the case to the High Court for *fresh consideration*. Case management directions ensued, A was appointed with a separate Guardian, and on *19 January 2017, a further case management hearing took place*, where the Secretary of State was granted Interested Party status.

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### **Decision & Reasoning:**

The first question considered by Mr Justice Hayden was *whether A's refugee status is an absolute bar to the family court ordering his return to Pakistan?* The starting point in his analysis was the examination of EU Council Directive 2005/85/EC that sets out the necessary conditions within Member States regarding the *granting and withdrawing* of refugee status. According to article 4(1), a Member State has to determine a particular authority which would be solely responsible for the examination of asylum proceedings. That authority is obliged to impartially and objectively assess each individual application (article 7(1)). Furthermore, according to article 37, were the applying party to misrepresent themselves, the determining authority would have the power to re-examine their application and possibly revoke the refugee status. In compliance with this Directive, the UK Immigration Rules (HC395- made pursuant to the Immigration Act 1971) have designated the Secretary of State for the Home Department as the 'determining authority'. The determination to confer refugee status is not a Royal Prerogative, but rather a statutory power (Munir v SSHD [2012] UK SC 32).

Next, the Court examined the 1951 Geneva Convention (the Refugee Convention). This Convention defines the term 'refugee' (article 1A) and explains their status, rights and freedoms. The Court determined that when interpreting the Refugee Convention according to article 31 of the Vienna Convention, the interpretation should have a *purposive construction consistent with its humanitarian aims*. This entails that a Member State should not adopt any administrative or judicial

procedure or practice that would eventually be contrary to the purposes of the Refugee Convention (EN (Serbia) v SSHD [2011] 1 AC 596 at 58).

The Court continued with the examination of Council Directive 2004/83/EC, which similarly to the Refugee Convention, protects against refoulement and sets out minimum standards for persons needing international protection. In relation to the asylum case of a child, Preamble 12 of this Directive explicitly provides that the best interests of the child constitute a primary consideration when determining their case. This Directive also provides for the revocation of refugee status, should the applying party misrepresent or omit important facts (article 4(3)).

Following the examination of the aforementioned legal instruments, MR Justice Hayden quoted Lord Scarman in R W (A Minor) (Wardship: Jurisdiction) [1985] AC 791 at 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?’*. Considering that A (the child) has already been conferred refugee status by the Secretary of State for the Home Department (which is the designated public authority to determine asylum matters), the Court reached the *clear* conclusion 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.*

The second matter considered by Mr Justice Hayden was *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.* According to the tenets of UK Administrative Law, a public authority’s position must be lawful, ‘reasonable’ and ‘rational’. If an asylum seeker has misrepresented facts in their application and that has led to the granting of that asylum, then the Secretary of State for the Home Department can re-examine their case, and possibly revoke the refugee status. Therefore, the Court held that *a misdirection in fact* (that M possibly misrepresented or exaggerated F’s violent nature) *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), and as such F could challenge the refugee status on *public law grounds.*

Furthermore, since this case is considered to fall within the context of abduction, the Court followed the reasoning in Karrer v Romania (Application no. 16965/10, 21 February 2012); respecting the principle of the best interests of the child and Article 8 of the European Convention on Human Rights, the ‘left-behind parent’ has to be able to properly *respond to contested allegations* (in this situation, M’s allegations of F’s violent behaviour).

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### **Outcome:**

Judgment Approved

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### **Subsequent Proceedings :**

A fact-finding hearing before MR Justice Hayden that would address M’s allegations against F, and F’s allegations of M’s misrepresentations in the asylum claim.

### **Observations/Comments:**

As stated by the Secretary of State for the Home Department, *this case raises important issues related to the interpretation and application of asylum law in the context of family proceedings* (para 21). The Court was in the challenging position to examine the interplay between the decision made by a designated public authority with the statutory power to do so (both under EU and

domestic law incorporating the EU Directives), and the judicial authority of the High Court to order the summary return of the 'abducted' child to F.

The fact-finding hearing, published on 19/05/2017 and cited **A (A Minor: Fact Finding; Unrepresented Party) [2017] EWHC 1195 (Fam)** took place in the High Court of Justice Family Division before Mr Justice Hayden. The applicant father appeared in person via video link. The father was given the opportunity to contest the allegations and question the mother. Overall the Court found him to be an emotionally distant, educated, eloquent man who loves his child. However, the Court found that when questioned regarding M's allegations of his violent behaviour (degrading acts such as frequent punching and slapping of M, of which the child had on occasion been a witness, and often locking the child in the washroom when 'misbehaving?'), he could not provide alternative explanations and restricted his answers to a simple denial. F's questioning of M did not purport to contest her allegations, but rather to undermine her credibility. The Court believed this tactic to have failed, particularly since M could recall certain details of past events, which only enhanced her credibility. In the end, Mr Justice Hayden finds himself deeply disturbed that *a Judge can still not prevent a victim being cross examined by an alleged perpetrator* (para 60), characterizing this as *a stain on the reputation of our Family Justice System*. He comments: *[n]o victim of abuse should ever again be required to be cross examined by their abuser in any Court, let alone in a Family Court where protection of children and the vulnerable is central to its ethos* (para 63).

This case summary was written by Nafsika Vasileiadou, LLM student at Queen Mary University, London.

#### Attachment(s):



[F v M & Anor \[2017\] EWHC 949 \(Fam\) \(26 April 2017\).pdf](#)[29]

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#### Other sources cited:

October 2014 President of the Family Division Guidance: *Communicating with the Home Office in Family Proceedings*

#### National / Other Legislative Provisions:

[Vienna Convention](#) [30]

[Article 31\(1\) & \(2\)](#) [31]

[1980 Hague Convention](#) [32]

[UK - Immigration Rules - Para 334](#) [33]

[UK - Immigration Act 1971](#) [34]

[Borders](#) [35]

[Citizenship and Immigration Act 2009](#) [36]

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#### Links:

[1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>

[2] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#1>

[3] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#32>

[4] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#33>

[5] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

- [6] [https://www.asylumlawdatabase.eu/node/195#toc\\_12](https://www.asylumlawdatabase.eu/node/195#toc_12)
- [7] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive>
- [8] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 4 APD>
- [9] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%207>
- [10] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 8>
- [11] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 10>
- [12] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2012>
- [13] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2013>
- [14] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 14>
- [15] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>
- [16] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Rec%2012>
- [17] [https://www.asylumlawdatabase.eu/node/195#toc\\_46](https://www.asylumlawdatabase.eu/node/195#toc_46)
- [18] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%2037>
- [19] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%202%20QD>
- [20] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 4 QD>
- [21] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 12 QD>
- [22] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 13 QD>
- [23] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2014%20QD>
- [24] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 15 QD>
- [25] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 17 QD>
- [26] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2018%20QD>
- [27] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#QD%20Art%2021>
- [28] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#QD%20Art%2024>
- [29] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/F%20v%20M%20%26%20Anor%20%5B201>
- [30] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/vienna-convention>
- [31] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/article-311-2>
- [32] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/1980-hague-convention>
- [33] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/uk-immigration-rules-para-334>
- [34] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/uk-immigration-act-1971>
- [35] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/borders>
- [36] <https://www.asylumlawdatabase.eu/en/taxonomy/term/8155>