

IN THE FAMILY COURT

Royal Courts of Justice  
Strand, London, WC2A 2LL

03/03/2015

Before:

**THE HONOURABLE MR JUSTICE KEEHAN**

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Between:

**HU**

**Applicant**

**- and -**

**SU**

**Respondent**

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**Catherine Piskolti (instructed by Orion Solicitors) for the Applicant father  
Markanza Cudby (instructed by Barrett and Thomson) for the Respondent mother  
Hearing dates: 10 11 and 19 February 2015**

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**HTML VERSION OF JUDGMENT**

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THE HONOURABLE MR JUSTICE KEEHAN

**Mr Justice Keehan:**

**Introduction**

1. I am concerned with four children:
  - a) SaU dob 28.7.00 (14)
  - b) ShU dob 7.11.02 (12)
  - c) FU dob 25.5.04 (10)
  - d) YU dob 9.10.10 (4)
  
2. The three older children have, since 11 September 2014, lived with their mother, SU (35). YU has lived with his father, HU (42) in the family home.

3. The parties have had an acrimonious relationship over the last few years. There were previous proceedings when the parties separated in 2011 but they were settled when the parties effected a reconciliation in 2012. Their marital difficulties have led to the involvement of the children's department of the London Borough of Hounslow and the repeated involvement of the police.
4. Since the parents finally separated on 11 September 2014. YU has had regular contact at a contact centre with his mother and siblings. The three older children, however, have said they do not wish to have contact with the father.
5. The mother has made divers allegations of violence by the father towards her and towards the children. The father alleges the mother has assaulted YU.
6. Accordingly on 15 December 2014 I listed the matter for a fact finding hearing and, if possible, a final welfare hearing. As the fact finding progressed, in the circumstances described below, it has only proved possible to conclude that aspect of the matter.

### **Law**

7. The burden of proving a finding of fact rests on that party who makes the allegation.
8. The standard of proof is the simple balance of probabilities: *Re B (A Child)* [2013] UKSC 33.
9. When considering the evidence I bear in mind a modified Lucas direction namely where I am satisfied that a witness has lied in his or her evidence I should only take account of the same if I am satisfied there was no reasonable explanation for that lie.

### **Background**

10. The parties, who are both of Afghani origin, married in June 1999. Each contends the marriage was turbulent. In 2011 the mother alleged the father had been violent to her. He was arrested and released on bail with a condition that he not reside at the former matrimonial home. Three months later the police notified the father that they were taking no further action in respect of the mother's complaint.
11. When the father attempted to return to the family home the mother denied him entry. He commenced proceedings in the county court for an occupation order and a non molestation order against the mother. He also applied for residence orders in respect of the children.
12. After some months, however, the parties agreed to effect a reconciliation and on 26 March 2012 the private law proceedings were concluded with the consent of both parties.
13. On 6 August 2014 the mother made a complaint to the police that the father had sexually assaulted her and blackmailed her on 24 July 2014. On 7 August 2014 the mother made a further complaint to the police that the father had sexually assaulted her a number of times between March 2013 and March 2014. The father was arrested, interviewed and bailed with a condition that he must not reside at the family home.

On 10 September the parties were notified by the police that no further action would be taken against the father and that his bail would be cancelled the following day.

14. It is the mother's case that it was shortly before these events that the mother discovered that the father had taken a second wife. The emotional and psychological impact of this on the mother cannot be overstated.
15. On 11 September the father attended the family home in the company of a police officer. There was no one present. The father entered the property and changed the locks; the property was rented and the tenancy was in his name.
16. The mother returned. The father refused to let the mother into the house. An argument ensued. YU was present. Both called the police who attended. The mother was advised she would have to secure alternative accommodation. In the police records, which the mother disputes, it noted that the parties reached an agreement that the children would remain living at home with the father until the mother had secured an alternative property.
17. In the event YU remained with the father and the mother collected the older three children from school and took them to the home of a friend. They remained living there for a few days until the mother obtained a property from the local council. I note the mother alleges she had been served with a notice to quit by the landlord of the family home which expired on 21.9.14. In preparation for the pending move the mother had started packing the children's clothes and told them they would have to move to a new home.
18. On or shortly after 11 September the mother accepts she told the 3 older children that their father had thrown them out of their home and had told the mother that she and the children could sleep on the streets. This was not the first time, nor sadly the last, when the mother was wholly negative, in what she told the older children about the father.

### **Preparation for the Fact Finding Hearing**

19. On 15 December 2014 I gave directions in preparation for this fact finding hearing. The mother's solicitors were to take the lead in obtaining disclosure from the police relating to incidents between the parties in 2014. Thereupon and in any event by 4pm on 10.1.15 the mother was to file and serve a concise schedule of findings sought and a statement in support. The father was to file and serve a schedule of findings sought by him against the mother, a response to the findings sought by the mother against him and a statement in support by 4pm on 24.1.15. Thereafter the parties were to file and serve a composite schedule of findings sought by 4pm on 3.2.15.
20. The solicitors for the father sent an email to my clerk on 30.1.15 seeking an urgent directions hearing. They raised a number of concerns:
  - i) by a letter dated 29.1.15 they were notified by the mother's solicitors that her legal aid certificate had not been extended to cover any further hearings after the hearing on 15.12.14 until 13.1.15;

ii) accordingly an application had not been made to the police for disclosure, as per the order of 15.12.14 until 14.1.15;

iii) the mother's solicitors contended that they were unable to file and serve a schedule of findings sought and/or a statement until they had received disclosure from the police; and

iv) no application had been made by the mother's solicitors to the court for a variation of the directions given on 15.12.14 and/or for an extension of time in which to comply.

21. In the premises I listed the matter for an urgent directions hearing on 4.2.15. I directed that the Commissioner of the Metropolitan Police make disclosure of relevant identified documents by 12 noon on 5.2.15 with liberty to apply to vary or discharge the order. The time for the mother to serve the father with the police disclosure, a schedule of findings sought and a statement was extended to 12 noon on 6.2.15. The time for the father to file and serve a response to the same, a schedule of findings sought and a statement was extended to 4pm on 9.2.15.
22. The mother's statement exhibited 175 pages of police disclosure.
23. At the hearing on 4.2.15 I was not given a satisfactory explanation as to why the mother's solicitor had not brought the delay in seeking police disclosure to the attention of the court and/or why no application had been made to extend time for compliance with my directions. Accordingly, I indicated I would consider the costs implications of the urgent directions on 4 February at the conclusion of the fact finding hearing (see from paragraph 47 below).

### **Evidence**

24. I have read the relevant statements, reports and other documents. I heard oral evidence from Ms Odze of the High Court CAFCASS team, the contact supervisor who supervised contact on 15 January 2015, the mother and the father.
25. I had requested Ms Odze to undertake a limited piece of work with the children to ascertain their wishes and feelings. She saw YU with the father but despite the father's best efforts, YU would not engage with her.
26. SaU, ShU and FU each said their father had hit them. They had nothing positive to say about him and were clear that they did not want to see him. All three of them spoke of how much they missed YU and that they wanted to see more of him.
27. Ms Odze was of the view that the mother must have discussed the marital difficulties with the three older children. They were all upset that the father had married a second wife and that he had not told them about it. She told me the children had become embroiled in the parental hostility which would be increasingly harmful if it continued. She recommended that the parents and the children engage in family therapy.

28. The mother initially used a Farsi interpreter to give her evidence. As matters progressed she increasingly gave her answers in English, especially when she became animated and emotional.
29. In the early part of her cross examination she said, "why did he hide the second marriage from me? This is a big point. He spoilt the lives of our 4 kids. He should have talked to me. He used my body – he used me like an animal. This is the main point. Why not divorce me first?" The fact that the father had married a second wife and then continued to have sexual relations with her is a very substantial source of the mother's strongly expressed negative feelings about the father.
30. I am satisfied that these very strong emotions are the driver of her allegations against the father and her resistance to the father having any contact with the older three children.
31. A significant number of allegations or assertions made by the mother were not contained in either of her two statements. After enquiries it was discovered that there were only two matters, of relatively minor significance, on which the mother had given instructions to her solicitors but which had not been included in her statements.
32. The mother gave evidence over the course of two days. She was, I regret to find, a most unsatisfactory and unreliable witness. She either lied about significant events and allegations or greatly exaggerated or embellished what had in fact happened.
33. I so find for the following principal reasons:
- a) the mother alleged the father assaulted SaU on two occasions in late 2013. On the first occasion she said the father beat SaU on the head and then locked her in a cupboard or storage room. In evidence, however, the mother said the father slapped SaU so many times in the face and she was crying so much that she could not talk. The mother could not explain why this later account of the event was not in either of her statements;
  - b) the older 3 children spoke to Ms Odze about an event when the father locked SaU in a cupboard. The father denies he did so. There may have been an event when the father had cause to discipline SaU – perhaps inappropriately – but given the degree to which the mother, by her own admission, has involved the older three children in the parental dispute, I am of the view I should be very cautious in placing any weight on comments made by the children to the CAFCASS Officer or other professionals.;
  - c) on a another occasion it is alleged the father pulled SaU's hair and slapped her. It is agreed there was an incident between SaU and the father which caused SaU to call the police. Given the alacrity with which the parents have involved the police in their marital disputes, I am less surprised than might otherwise be the case that SaU followed the course so frequently taken by her parents. In evidence the mother confirmed that the father had pulled SaU's hair and beaten her. This account of events does not accord with the police log of the incident, namely:  

"Father was spoken to separately who stated that he had found messages on his daughter's phone which he didn't approve of and the

messages were between this daughter and some unknown person. When questioned and told that he was going to ring the number the subject began crying and wanted the phone back, as the father paid the bill he kept the bill she was clipped softly around the ear and sent to her bedroom.

The subject and mother were also spoken too and confirmed that this was what happened, and now the subject is upset because she is no longer allowed the phone.

Subject was safe and well and had no visible injuries and was spending the day in her room. I've no concerns over the subject as she was punished according by her father."

The mother denied she had confirmed the father's account to the police. This is another occasion when the mother has disputed a police recording of events. I am satisfied that the police log is accurate and that the mother is once again lying in her evidence to the court;

d) The mother sought to suggest in evidence that there were subsequent incidents, post September 2013, involving the father and the children. She could not explain why there is no reference to any such events in either her statements or her schedule of findings sought. The excuse that she 'ran out of time' with her solicitor will not do. The mother is lying;

e) The mother's evidence about when she found out the father had married a second wife and her account of the events of 24 July 2014 are confusing and contradictory. At one stage in her evidence she asserted she found out about the second marriage on 23 July 2014. Some minutes later she said it was a few weeks before 24 July;

f) on 6 August the mother went to the police to report that her husband had been harassing her. She told that on 24 July he had started hugging and kissing her. When she refused his advances she alleged he threatened her that unless she did as he wished he would show photographs and recordings of her on his mobile telephone to he children. (I note the police later seized the father's mobile phones and forensically examined the contents. No inappropriate or other photographs or recordings of the mother were found).

g) The following day she returned to the police and made further allegations that the father had engaged in sexual activities with her without her consent, including having sexual intercourse with her when she was asleep. In her evidence she alleged, that the father had been violent to her on 24 July. Further when pressed why she had not reported his violence to the police there was a very very long pause; no answer was given. Eventually the mother asserted she had explained everything to the police and had been present at the police station for 5 or 6 hours. I do not accept that explanation. It is far more likely, in my judgment, that if the mother had made allegations of violence they would have recorded the same. They did not because no such allegations were made. They are, I find, of recent invention by the mother in a misguided attempt to bolster her case against the father. Once more she is lying and is exaggerating events;

h) the mother knew she and the children would have to leave the family home after the landlord served a notice to quit. She had started packing up the family

belongings. All of this occurred at a time when, as a result of her complaint to the police on 6 August, the father was on bail with a condition that he must not reside at or visit the family home. On 11 September, the day after his police bail had been cancelled he returned to the family home. It was immediately apparent that the mother had caused considerable damage to the property and furnishings. The father changed the locks. The mother returned. There was an argument and both called the police who attended. The mother was advised that because the tenancy was in the father's name, she would need to secure alternative accommodation. It is recorded in the police log that the parents reached an agreement that the children would remain living with the father until the mother was able to obtain her own property. The father agrees with this account. The mother denies there was any such agreement. I am satisfied there was such an agreement but that the mother almost immediately reneged on the same and went and collected the three older children from school. She took them to a friend's home. YU had remained in the care of his father. I find the mother's actions that afternoon to be inappropriate and not in the best interests of the children. Further she greatly compounded matters by telling the three older children that their father had thrown them out of their home and that he had told the mother that she and the children could sleep on the streets. That was not only untrue but was cruel to the children.

34. The father was a much more measured witness. He was far less emotional and animated than the mother. He however lacked insight into how his actions had adversely affected the children.
35. The father did not tell the children about his second marriage; he should have done. He handled the disciplining of SaU inappropriately; clipping her around the ear during a confrontation about her use of her mobile telephone was inadvisable and wrong. His decision to change the locks in the family home on 11 September whilst he may have wished to avoid further false allegations from the mother was done without taking account of the best wishes of the children. I accept the mother reneged on an agreement that in the short term all of the children should reside with him in the family home, but the father could and should have handled matters with a more child focused approach.
36. There was an incident on 15 January 2015 when, at the end of contact between YU and his mother and siblings, YU was distressed and crying. The contact supervisor told me that YU rushed up to his father, snuggled into him and hugged him. When, however, the supervisor told the father that YU was upset because he did not wish to leave his mother and siblings, the father became angry and repeatedly pushed YU away from him. The father denies this. He accepts YU was very upset and hugging him but that he held YU from him so he could see her face and hear his answers to the father's questions about what was wrong with him.
37. The contact supervisor was clear that she had not witnessed such an episode before and that invariably the father and YU are very warm and physically affectionate to each other. On balance, I favour the account of the contact supervisor. I find that in a rare and uncharacteristic loss of temper the father pushed YU from him when he was annoyed that the child had not wanted to leave his mother and siblings.

38. The father said he noticed an injury to YU's eye after the events of 11 September. He says YU told him his mother had caused it. YU has given different accounts to others including that his brother had caused the same. YU is just 4 years of age and he has been caught up in the emotional atmosphere of his parent's marital difficulties. For all her highly strung and emotional outpourings I do not have any sense that this mother would physically harm any of her children. In any event there is in my judgment wholly inadequate evidence to find the mother caused the same.
39. The mother eventually accepted that she had been physically aggressive to the father in June 2014 when YU and FU were present which resulted in damage to the father's wristwatch.

### **Conclusion**

40. In the premises I decline to make any of the findings sought by the mother. I accept there were two incidents in late 2013 when the father disciplined SaU but the mother has greatly exaggerated her account of events.
41. I find the father behaved inappropriately towards YU on 15.1.15 but that the same was an isolated incident; the significance of this event should not be overstated.
42. I find the mother assaulted the father in June 2014 I find that she has caused the children – especially the three older children – emotional harm by reason of her wholly inappropriate and negative comments and outbursts against the father. The father had an enjoyable holiday with the three older children in Barcelona in August 2014. By late September they refused and still refuse to see him. In my judgment their change of view of the father is primarily driven by the views of the mother, however, the father has not ameliorated the position by some of his actions prior to the marital breakdown.
43. It is vital and in the welfare best interests of the children that they are able to enjoy a loving and beneficial relationship with both of their parents. YU has regular contact with his mother and siblings which is mutually very enjoyable.
44. The mother and the older children greatly miss YU and would wish him to return to the care of the mother. I do not consider that to be in YU's welfare interests at present. All the evidence suggests he is thriving in his father's care. It may be appropriate to reunite all of the children in the care of one parent but that is a decision for another day.
45. My immediate concern is to restore the relationship between the three older children and the father. None of the mother's allegations, even if proved, would justify a cessation of direct contact with the father. Ms Odze recommended family therapy to repair relationships and to restore contact between the father and the older children. I am told the well respected child and adolescent psychiatrist, Dr Asen, is available to undertake that work with this family. It is essential that it commences as soon as ever possible. At the conclusion of that therapy I will determine what child arrangement orders will best meet the needs of each of these four children.

## Wasted Costs Order

46. At the conclusion of the evidence at the fact finding hearing I heard submissions on the issue of whether I should make a wasted costs order against the mother's solicitors in respect of the directions hearing on 4 February. Mr. Newton QC was instructed on behalf of the mother's solicitors.
47. Over the last 12 months or so a number of reported judgments have emphasised the importance and the need for parties and practitioners to comply with court orders and, if required, to seek an extension of time before the time for compliance has expired. Most notable was the judgment of the President in *Re W(A Child) (Adoption order: Leave to Oppose)* [2013] EWCA Civ 1177, [2014] 1 FLR 1266 where he said at paragraphs 51 and 53:

"51. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with *to the letter and on time*. Too often they are not. They are not preferences, requests or mere indications; they are orders: see *Re W (A Child)* [2013] EWCA Civ 1227, para 74."

"53. Let me spell it out. An order that something is to be done by 4 pm on Friday, is an order to do that thing by 4 pm on Friday, not by 4.21 pm on Friday let alone by 3.01 pm the following Monday or sometime later the following week. A person who finds himself unable to comply timeously with his obligations under an order should apply for an extension of time *before the time for compliance has expired*. It is simply not acceptable to put forward as an explanation for non-compliance with an order the burden of other work. If the time allowed for compliance with an order turns out to be inadequate the remedy is either to apply to the court for an extension of time or to pass the task to someone else who has available the time in which to do it."

See also *A Local Authority v DG* [2014] EWHC 63 (Fam), *Re A (A Child)* [2014] EWHC 604 (Fam) and *Re W (Children)* [2014] EWFC 22.

48. It must now be clear and plain to any competent family practitioners that:
- i) court orders must be obeyed;
  - ii) a timetable or deadline set by the court cannot be amended by agreement between the parties; it must be sanctioned by the court; and
  - iii) any application to extend the time for compliance must be made before the time for compliance has expired.

49. Mr Newton QC referred me to the provisions of CPR r 46.8 and to the three stage tests set out by the Court of Appeal in the case of *Ridehalgh v Horsefield* [1994] Ch 205 namely:

"a) Had the legal representative of whom complain was made acted improperly, unreasonably or negligently?"

- b) If so, did such conduct cause the applicant to incur unnecessary costs?
- c) If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?"

50. He referred me to a chronology of relevant events. On 16.12.14 the mother's solicitors sought a further extension to the mother's public funding certificate. It was not granted until 13.1.15 and as a result of the delay in granting the same a letter of complaint was sent to the Legal Aid Agency.

51. On 7.1.15 they sent a letter to the father's solicitors setting out that an extension of public funding was still awaited and requesting a one week extension for the filing of the mother's statement (orders to be filed and served by 10.1.15). Crucially this letter did not set out that police disclosure had not yet been formally sought and no communication was sent to the court.

52. On 16.1.15 the mother's solicitors wrote to the father's solicitors and to the court notifying them that the mother's public funding certificate had been extended, police disclosure had been requested and that the mother's statement and schedule of findings would be filed and served after police disclosure had been received.

53. I have a number of observations:

i) the letter to the court was not noted to be for the attention of me or my clerk and it was incorrectly addressed. I did not receive it;

ii) the solicitors had decided that the statement and schedule would be filed after police disclosure had been received. No such linkage or sequential process was made or set out in the order of 15.12.14; and

iii) no application was made for an extension of time to file the police disclosure and/or the mother's statement and schedule.

54. A further letter is sent to the father's solicitors and the court dated 23.1.15. Once again the letter is incorrectly addressed and was not received by the court. Furthermore it merely apologised for the further delay in obtaining police disclosure and nothing else.

55. On 29.1.15 yet another letter is sent to the father's solicitor but not to the court) setting out that the mother would not be able to complete her statement or a schedule until police disclosure had been received. No time for receipt of the police disclosure was given, however, on the same day the mother's solicitors chased the Metropolitan police in respect of the disclosure sought.

56. By an email sent on 30.1.15 to the court, the father's solicitors sought an urgent directions hearing. On the same day the mother's solicitors sent a letter to the court and to the father's solicitors. It once more asserted that the mother could not file a statement or a schedule without sight of the police disclosure. The letter did not:

i) set out what steps had been taken to secure disclosure from the police;

ii) it did not set out any date or likely timeframe by which disclosure would be made by the police;

iii) seek an extension of time in which to file the police disclosure and/or the mother's statement and schedule; and

iv) a revision of the timetable set by the court on 15.12.14.

57. At the directions hearing on 4.2.15 I directed the Commissioner of the Metropolitan Police to provide the disclosure sought by noon the following day. The mother was to file and serve her statement and schedule by 6.2.15 and the father his statement and schedule by 9.2.15. Those orders were complied with and it was possible for the fact finding hearing to proceed but at considerable cost to the father, who is privately funded, of legal fees incurred by attendance at the urgent directions hearing.

58. Mr Newton QC recognises the faults of his instructing solicitors. He characterises them as errors and oversights for which his solicitors profusely apologise, but which he submits did not pass the high hurdle of egregious conduct which merits being condemned by the making of a wasted costs order. He rightly reminds me of the considerable professional embarrassment which can result from the making of such an order.

59. In my judgment however the serial failures of the mother's solicitors were elementary. The failure to seek the leave of the court to extend the time for compliance with the directions order of 15.12.14 is to be characterised as incompetence, the result of which could have been the adjournment of this fact finding hearing. Their actions, as set out above, are redolent of past poor practices which should no longer feature in private or public law family proceedings.

60. I am satisfied that the conduct of the mother's solicitors is so serious and so inexcusable that I find that they acted improperly and unreasonably. Further the conduct caused the father to incur unnecessary costs. Finally in all of the circumstances I consider it just to order the mother's solicitors to compensate the father for the whole of the costs he incurred by reason of the directions hearing on 4.2.15.

61. I shall make a wasted costs order against the mother's solicitors. The father's costs of the February directions hearing will be subject to a detailed assessment.