This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court

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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 406 (Fam)

No. PR16P00137

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 10 January 2019

Before:

MR JUSTICE KEEHAN

(**In Private**)

B E T W E E N :

Parent A — Applicant
- and -
(1) Parent B
(2) Parent C
(3) Child D
(4) Child E
(5) Child F
Local Authority A — Respondents

MR S. MANNERING appeared on behalf of the Applicant.

MR S. COE appeared on behalf of the First Respondent.

MR B. JUBB appeared on behalf of the Children's Guardian for the Second to Fourth Respondents.

THE FIFTH RESPONDENT appeared in Person.

MS BAMBHRA appeared on behalf of Local Authority A

J U D G M E N T

MR JUSTICE KEEHAN:

INTRODUCTION

1 In these proceedings, I am concerned with three children: Child D, who is five years of age; Child E, who is three years of age; and Child F who is six months of age. The mother of all three children is Parent B, the first respondent to these proceedings. The father of Child D is Parent A. He is the applicant. The father of Child E is said by the mother to be one Mr X. He is not a party to these proceedings, has played no role in them, and no role in the child's life. The father of Child F is Parent C the fifth respondent to these proceedings.

2 Local Authority A's children's services department were involved with the mother and the children during the time she lived in the area of this local authority. By consent it was joined as a party to these proceedings in order to pursue an application for costs against the expert instructed in these proceedings, Dr. Kaur-Kelly.

3 In these proceedings, the father seeks a spend time with order in respect of his son Child D. That application was opposed by the mother who asserted that she had been the victim of domestic abuse at the hands of the father and the paternal family and that she was at risk of honour-based violence for reasons that I shall set out in a moment. This matter was therefore set down for a fact-finding hearing to determine what findings, if any, the court could make in respect of the allegations made by the mother in a schedule dated 5 December 2017. This hearing commenced in early December of last year but it had to be adjourned because very sadly and unfortunately Child D was taken seriously ill and was admitted to hospital. The hearing resumed part heard on Tuesday of this week, 8 January. For reasons which I will explain later in the judgment, before the completion of the mother's evidence, I with the consent of all the parties released her from her affirmation and invited her counsel Mr Coe to take her instructions as to what case she was putting against the father Parent A.

After some time for Mr Coe to take instructions, I was told that the mother no longer pursued any findings against the father albeit she maintained they were true.

4 The background to this matter can be set out fairly briefly. On 8 April 2011, the mother and father married in Pakistan. On 15 May, the father returned to England. The mother joined him in England on 18 May 2012. In August 2013, Child D was born. Subsequently, the father applied on behalf of the mother for an extension of her permission to remain in this country. In February 2015, the mother, the father, and Child D travelled to Pakistan for a holiday. Whilst there, the mother had sexual intercourse with a man said to be Mr X, in circumstances which I shall set out in a moment, as a result of which the mother conceived Child E. In April 2015, the mother, the father, and Child D returned from Pakistan to the United Kingdom.

5 In August, the mother and father attended hospital for the mother to have her first scan. It became clear from that scan and the dates of expected delivery, and therefore the date of conception, that the father knew he could not be the biological father of the child. The mother remained living in the family home with the father and Child D and other members of the paternal family until 21 October 2015 when she left, unbeknown to the father, taking Child D with her. She went to stay with a friend. After some three weeks, she had to leave. In November, after she had left her friend's accommodation, she contacted the police and made allegations of domestic abuse against the father as a result of which she was placed in a refuge in Derby. The refuge referred the case to the Derby local authority.

6 In December 2015, the mother gave birth to Child E. In 2016, the mother registered Child E's birth in Derby naming the applicant Parent A as the father. Subsequent DNA testing demonstrated that the father was not the father of this child. In February 2016, the father issued this application to spend time with his son. From the time that she left the family home in Blackburn and in light of the mother's allegations against the father , she has lived

at secret locations which were unknown to the father and, indeed, to maintain her anonymity and particularly the location where she lived, she gave evidence in this court by video link.

7 These proceedings were originally heard by HHJ Bellamy sitting in the Family Court at Derby. On 8 December 2017, he gave permission for an expert in honour-based violence, Dr Kaur-Kelly, to be instructed. She was to file her report by 5 February 2018. A fact-finding hearing was listed for 16 April 2018. On 26 January last year, that hearing was vacated and relisted to take place on 23 and 24 July. On 2 February 2018, at the request of Dr Kaur-Kelly, the date for the filing of her report was extended to 30 March 2018. On 16 April, there was a hearing at which a composite hearing was listed in July for three days. Dr Kaur-Kelly had not filed her report. The date for the filing of the report was extended to 21 May 2018. Questions were asked of Dr Kaur-Kelly upon production of her report on 8 June and Dr Kaur-Kelly replied on 20 June. Her response to these questions is set out in a report dated 2 July 2018. On 23 July, Dr Kaur-Kelly gave evidence before HHJ Bellamy in the course of the first composite hearing.

8 On 26 July, for reasons that I need not deal with at this stage, the case was reallocated to me. On 2 August, I ordered that Dr Kaur-Kelly file an addendum report by 28 September 2018 and I listed a composite hearing, both fact-finding and welfare, to commence on 4 December of last year. On 28 August 2018, I refused an application for a further extension of time for Dr Kaur-Kelly to file her addendum report. I ordered that if no report was filed by 28 September, Dr Kaur-Kelly was to attend before me on 2 October 2018. No report was filed.

9 On 2 October 2018, Dr Kaur-Kelly attended before me. She explained that because of other professional commitments and bouts of ill-health, she had been unable to comply with the date for filing of the report. With her agreement, the date of the filing of the addendum report was extended to 15 October. The sole purpose of the hearing on 2 October was for

the court to hear Dr Kaur-Kelly's explanation as to why she had failed to file her report by the required date. All the parties attended that hearing and, of course, incurred costs in doing so.

10 On 10 October, there was a further hearing before me because two days after the previous hearing, Dr Kaur-Kelly had notified the guardian's solicitors that she was once again ill and would be unable to report. The provision for her to file an addendum report was discharged. At the hearing on 2 October, I asked Dr Kaur-Kelly was there any reason why she should not pay the costs of that hearing. After some hesitation, she told me there were no reasons why she should not pay the costs.

11 At the commencement of the first part of this fact-finding hearing on 4 December, Dr Kaur-Kelly was due to attend court to give evidence in relation to her first report. She was, it was said, ill and could not attend. Costs schedules from each party were sent to her and she was given permission to file written submissions. On 6 December, written submissions from Dr Kaur-Kelly were received and contrary to the position that she had adopted on 2 October, she sought to persuade me not to make an order for costs against her and also sought to persuade me that I should not name her in a public judgment.

THE LAW

12 The burden of proving the facts sought in the *Scott* schedule rest solely with the mother. The standard of proof is the balance of probabilities (*Re B* [2008] UKHL 35).

13 In respect of welfare decisions, I bear in mind that the welfare best interests of all three children are my paramount consideration under s.1(1) Children Act 1989 and in deciding what orders to make in respect of each of them, I have regard to the welfare checklist set out in s.1(3) of the 1989 Act. At all times, I had regard to the Article 6 and Article 8 rights of the children and the parents but bear in mind where there is a tension between the Article 8

rights of the child on the one hand and of the parent on the other, the rights of the child prevail (*Yousef v Netherlands* [2003] 1 FLR 210).

14 When considering the evidence, particularly the evidence of the mother, I give myself a revised *Lucas* direction; namely, I should only take account of any lies found to have been told if there is no good reason or other established reason for the person to have lied. I also take into account the decision of the Court of Appeal in *Re H-C* [2016] EWCA Civ 136 where McFarlane LJ, as he then was, said at paragraph 100:

> "One highly important aspect of the *Lucas* decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the 'lie' is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in *Lucas*, where the relevant conditions are satisfied the lie is 'capable of amounting to a corroboration'. In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of *R v Middleton* [2001] Crim.L.R. 251 where it was said:
>
> > 'In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt'."

15 I entirely accept that the mere fact of a lie being told is does not prove the primary case against the party or the witness should they have been found to have lied to the court. I also bear in mind there is no obligation on the party to prove the truth of an alternative case (*Re*

X (Children) (No. 3) [2013] EWHC 3652 (Fam) and *Re Y (Children) (No. 3)* [2016] EWHC 503 (Fam)).

THE EVIDENCE OF THE MOTHER

16 I regret to conclude that the mother was a most unsatisfactory witness and, as I shall set out in a moment, I find that she lied serially either in the accounts that she gave to others, namely the police and the local authority, and/or she lied in her evidence to this court. She had made the most serious allegations against the father. In the course of her evidence, it became abundantly clear that there was no truth whatsoever in her allegations.

17 I turn to the *Scott* schedule. The first allegation made by the mother was that her marriage to the father was a forced marriage. She asserted that her parents told her that she was marrying the father, she had not previously met him, and she felt she was forced to agree to marry him. There are a number of points to make in relation to this allegation. First, the assertion is that it was the mother's parents who forced her. There is no evidence presented to me that the father was complicit in any force or pressure put on the mother. Second, in the mother's own evidence, she said she had not considered her marriage to be a forced marriage until after the birth of Child D. Third, when she did contact the police and make allegations of domestic abuse against the father in December 2015, she made no reference whatsoever to her marriage having been forced. In her evidence, she could give no explanation for that omission. Moreover, in the divorce petition that was issued on her behalf, there is no assertion that the marriage was forced. Once again, the mother could not explain that omission. She then variously sought to say in evidence that she had not read in detail the divorce petition, or it had not been translated to her, and her last version of her answer was she had not read it at all. I am satisfied that the mother was lying. I do not find that this was a forced marriage.

18 The second allegation is that during the course of the marriage, the mother was treated like a prisoner in the family home with doors and windows always locked, and she says that she was only allowed to leave the house if she was accompanied by the father or by her mother-in-law. That is denied by the father. The mother maintained this allegation during the course of her evidence. She was then asked to explain why it was that in a conversation or interview with the police, she asserted that when she went out, she was quizzed by the father and family members as to where she was going and who she was going to meet. When asked why she had said this, she then said that she was only ever allowed to go out with the father. I am satisfied that that is a lie and it is a lie because the only reason why the family would, as she said, quiz her about where she was going or who she was going to meet would be on the basis that she was going out alone. If she was going out in the company of the father, neither he nor any paternal family members would have any reason for asking her about where she was going or whom she was meeting.

19 It is then asserted in paragraph 3 of the schedule that the mother was prevented from having regular contact with her family and when she did, she had to do so on speakerphone. I am not satisfied that that allegation is true in light of the other conclusions that I reach about this mother's credibility.

20 Fourth, it is alleged that the applicant and his family threatened to have the respondent deported to Pakistan and that they would keep the child with them if she ended the relationship with the applicant. It became abundantly clear in the mother's own evidence, that the person who had made the so-called threat, if any threat was made at all, was the paternal grandmother and not the father. I am satisfied that in the *Scott* schedule and in her statements, where she makes this allegation against the father, she is lying and it is false. It may be the maternal grandmother made that comment in relation to the impending birth of Child E and his paternity. This sets the context for this comment if it was made.

21 The fifth allegation is that upon receiving the results of the paternity test in relation to Child E, the applicant told his family and the community that he was not the child's father. I see nothing wrong with that if it be true. The applicant and/or his mother told the respondent's family that she had engaged in an extramarital affair and that the applicant was not the child's father. This is also true. This, it was asserted, has resulted in the respondent's family making threats to kill her. It became clear in evidence that what, in fact, had happened was that once the results of the DNA test were known by the maternal family, in the course of a telephone call, the mother's brother made a threat to kill her if she came to Pakistan. He lives in Pakistan and the mother tells me he cannot come to this country. There is no evidence that he has made a subsequent threat to kill her nor that he has made any attempt to come to this country or to encourage others living in this country to execute that threat.

22 The sixth allegation is that the applicant and his family have made threats to kill the respondent. Allied to that is the seventh and final allegation that the applicant and his family believe the respondent has dishonoured them and brought shame to their family. As a result of this, it is said, she is at risk of honour-based violence from the applicant and his family. When the mother gave evidence, on repeated occasions she asserted that it was only her brother who had made any threat to kill her. She confirmed that the father nor any member of the paternal family had made any threat to her still less a threat to kill her. In making those assertions and allegations in paragraphs 6 and 7 of the *Scott* schedule, I am satisfied that the mother was lying and the allegations are entirely false.

23 The mother was, at all times, too ready to make false allegations against the father and his family. She could not explain why it was that after the date of the scan in August, she remained living with the father for two months during that time when the father knew he was not the father of Child E. The mother does not suggest at any time that the father or members of his family threatened her in any way. What the mother complained of, based in

the first part of her evidence and in the second part of this resumed part heard hearing, was that the father gave her the cold-shoulder and that he was not warm towards her, he did not speak to her, or respond to her attempts to be affectionate. Given that the father had just discovered that his wife must have engaged in an extramarital affair to have become pregnant with Child E, it is hardly surprising that he did cold-shoulder, as it is put, the mother but I am quite satisfied he did not make any threat.

24 She left in October 2015, I am satisfied and find, of her own volition because she realised that by her actions the marriage was doomed. She did not do so because she was or considered herself to be at any risk of any harm from the father or from his family. The circumstances in which Child E was conceived are stark.

25 When on the family holiday in Pakistan, the mother made contact with a man, now said to be Mr X. She said in evidence she had never met him before but had seen him in public. It emerged that she had told the authorities that she had telephoned him to arrange to meet him. When asked why it was that she made telephone contact with a complete stranger, she said that she wanted somebody to talk to and to speak to her. She arranged to meet Mr X at her grandmother's home. She had sexual intercourse with Mr X in the maternal grandmother's home at a time when her maternal grandmother was in the house and so was the maternal aunt. Child D was also in the same room with her and Mr X, although the mother asserts that he was asleep. The mother admitted and recognised in evidence that if her family had caught her or discovered that she had had this illicit relationship with Mr X, they would have killed her. That may well be the case but any threat to the mother arises solely from the maternal family, in particular from her brother.

26 In the circumstances that I have described, I am entirely satisfied that the mother made a false case and false allegations against the father. There is no truth whatsoever in any of the allegations that the mother has made. The father does not pose any adverse risk of harm to

the mother: still less is she at risk of honour-based violence from him. His approach to her actions has been measured. It follows that, in my judgment, there is absolutely no reason why the father and S should not, as soon as ever possible, have the opportunity to resume their relationship. It is, in my judgment, appalling that this little boy and this father have not seen each other for some three and a half years solely because of the malicious conduct, as I find it to be, of the mother.

27 I turn now to consider the evidence of the mother and Parent C in relation to their relationship. On 30 April 2018, the mother was interviewed by the then guardian. She told the then guardian that her partner, Parent C, had moved in to live with her in September or October 2017 and that they planned to get married. In her evidence, both written and oral to this court, the mother asserted that she had met Parent C via Facebook in December 2017, that he had moved in to live with her in January 2018, that they married in February 2018, and she became pregnant with Child F, by Parent C, in March 2018.

28 Parent C, in his evidence, gave a somewhat different version. He also produced the marriage certificate of the Islamic marriage that they underwent. Parent C said that he began to make contact with the mother via Facebook in September or October 2017. Then he asserted, he had fleetingly met the mother sometime late in 2017 at a railway station, and that his first proper direct contact was in early January. He accepted that on their first direct meeting on 3 January 2018, they went through the Islamic marriage ceremony. They were present in this jurisdiction, the imam who is said to have undertaken this ceremony was in Pakistan, and the marriage was conducted over the telephone.

29 It further emerged in the course of Parent C's evidence that he arrived in the United Kingdom sometime in 2012 on a student visa. This visa expired in 2015. He was and remains an illegal overstayer. Contrary to the immigration laws, he was employed. He was arrested by the immigration authorities on 14 December 2017 and held in a detention centre.

Initially, Parent C sought to assert that he could not recall for how long he was in the detention centre. Eventually, he told me he was there for some two weeks. So he was released some time on or after 28 December. He then met the mother and as I have described, at that first meeting they got married. Parent C told me, when I asked, that it was he who had first raised the question of marriage.

30 The mother was in the process of seeking leave to remain. In August of last year, she was granted leave to remain for a period of five years. Parent C told me that in order to obtain his release from the detention centre, he made an application for asylum. Immediately after the marriage to the mother and knowing that she was pregnant with their child, he made an application for a visa, I assume a spousal visa. This application has yet to be determined.

31 HHJ Bellamy had earlier in these proceedings made an order that the mother was not to disclose the details and the circumstances of Child E's birth or other features of this case with Parent C. I removed that embargo at the conclusion of proceedings in early December last year. Parent C was made a party to these proceedings at that hearing and he was therefore provided with a bundle of documents. The mother asserted that she had told Parent C that Parent A was not Child E's father and he had asked no other questions. The mother asserted, and Parent C agreed, that he knew that the mother asserted she was the victim of honour-based violence, but the mother continually asserted and maintained that Parent C had asked her not a single question about those allegations.

32 I find that to be an incredible state of affairs and it adds weight to the conclusion that this marriage and this relationship was entered into solely for the purposes of Parent C making an application for a visa relying upon his relationship with the mother and relying upon the birth of their daughter. What consequence that has for the future care of the children remains to be considered. So too does the issue, in light of that finding, of what the court should do. I will return to that issue at a subsequent hearing when Parent C has the

opportunity either of being represented and/or along with the mother making submissions to the court.

DR KAUR-KELLY

33 Dr Kaur-Kelly was instructed as an expert. She failed serially to comply with court orders either to file her first report on time and/or to file an addendum. I am satisfied and find that the costs borne by the parties on 2 October and 10 October were required solely because of Dr Kaur-Kelly's serial failures to comply with court orders as set out in paragraphs 7-11 above.

34 In considering an application for costs against Dr Kaur-Kelly, I have regard to section 51(1) and section 51(3) of the Senior Courts Act 1981 whereby the court is given a discretion and has full power to determine against whom a costs order may be made and the extent of it. I also have regard to the provisions of Rule 28.1 of the Family Procedure Rules and Rules 44.4 and 46.2 of the Civil Procedure Rules.

35 I take into account the decision of the Court of Appeal in *Symphony Group Plc v Hodgson* [1994] QB 179 and the observations of Balcolmbe LJ in relation to the circumstances when a court may make a costs order against a non-party.

36 I also have regard to the decision of *Phillips v Symes* (No. 2) [2005] 1 WLR 2043 where it was held that expert witnesses were not in the interim being held liable to wasted costs order.

37 I have taken into account the decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors (No. 2) (New Zealand)* [2004] UKPC 39 where Lord Brown summarised the principles governing the discretion that:

> "Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense."

38 Finally, I have had regard to the decision of the *Secretary of State v Aurum Marketing Limited* [2000] EWCA Civ 224.

39 In her written submissions, Dr Kaur-Kelly gave explicit details of the medical condition which she asserts that she suffers from. I do not propose, having regard to her right to privacy, to mention those in this judgment. She does, unfortunately, suffer from an adverse health condition which causes her difficulties from time to time and which flares up from time to time. That is most regrettable. However, as a professional witness and accepting forensic work, Dr Kaur-Kelly knows and knew only too well of her duty to the court and of the importance of filing reports on time. If her health was such that she could not be sure that she would be able to comply with court orders, she should frankly not have accepted instructions to be a forensic expert witness.

40 I am satisfied, as Dr Kaur-Kelly accepted at the hearing on 2 October, that there are no good reasons why I should not make an order for costs against her. I consider her to have acted inappropriately and to have serially failed to comply with orders of this court. Accordingly, I will order her to pay the costs incurred by all of the other parties in respect of the hearing on 2 October 2018 and 10 October 2018. Those costs will be either agreed or they will be subject of a detailed assessment.

41 I find there are no cogent reasons why I should not name Dr. Kaur-Kelly in this judgment.

CONCLUSION

42 All the allegations made against the father by the mother are dismissed. None of them are true. This mother has wrongly and maliciously sought to exclude the father from Child D's life. There is no reason why the child and the father should not now have the opportunity to re-establish their warm and loving relationship and that the father has and plays an important and full role in Child D's life which will be to the inestimable benefit of Child D. It is to be regretted deeply that the mother's actions have resulted in Child D and the father not having any contact whatsoever for three and a half years, I will determine the means by which the reestablishment of that relationship is to be achieved after hearing further submissions.

CERTIFICATE

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