Neutral Citation Number: [2021] EWHC 3133 (Fam)

Case No: ZE17P01593

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2021

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between :

F	**Applicant**
- and -	
M	**Respondent**

- -
- -

Mr Sam Momtaz QC and Miss Annabel Barrons (instructed by **Dawson Cornwall**) for the **Applicant**
Miss Maggie Jones (instructed by **Duncan Lewis**) for the **Respondent**

Hearing dates: 17th November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

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.

The Honourable Mr Justice Hayden :

1. In January 2021, I handed down a judgment following a ten-day fact-finding hearing. The case involved allegations of conduct and behaviour by the father (F) in this case, in two separate relationships, which I found to be coercive and controlling. That judgment is reported as **F v M [2021] EWFC 4 (Fam)**. What requires to be emphasised is that F's behaviour was strikingly similar in both relationships, notwithstanding that the two women involved were of different ages and living in very dissimilar circumstances. The application before me today concerns the children of F and M (the mother, as reported in the earlier judgment).

2. F seeks a Child Arrangements Order to spend time with the children; and a Specific Issue Order to change the name of the younger child. M seeks a Specific Issue Order divesting F of parental responsibility; permission for disclosure of documents filed within the proceedings to the police and to the Home Office and disclosure of documents from F's immigration solicitor, identifying the case reference details of his failed application to remain in the United Kingdom. F has overstayed his leave to remain by some 7 years. I recall he told me in evidence how surprised he was that he was *"still here"*, as he put it.

3. The substantive findings in my judgment have been conveniently and helpfully summarised by Mr Momtaz QC and Ms Barrons who appear on behalf of F:

   i That the applicant father coercively controlled the respondent mother throughout the relationship by preventing her access to ante-natal care, isolating her from her family, friends and peers, controlling her money and food and deliberately curtailing her freedom, also amounting to emotional abuse.

   ii That the applicant father raped the respondent mother, probably on more than one occasion, during their marriage.

   iii That the applicant father's conduct during the relationship, resulted in Y being exposed to emotional harm.

   Specific findings in judgment

   iv the sinister, domineering and, frequently, tyrannising complexion of F's behaviour

   v F's behaviour strikes me as sadistic and it requires to be identified as such

   vi In his evidence I found F to be histrionic, self-pitying and manipulative

   vii I consider F to be a profoundly dangerous young man, dangerous to women who he identifies as vulnerable and dangerous to children. The risks he presents to women are not only to their emotional and physical well-being but also, in the light of my findings, to their sexual safety. It is clear that he has the capacity to cause much harm and distress to those who cross him more generally, particularly those within the sphere of the women he controls. It has been a disturbing case to hear.

viii It is an understatement in this case to say that F lacks credibility. He is at times a fantasist.

4. I agree with Mr Momtaz's characterisation of these findings as serious and far reaching. It should be noted that I made findings of a similar complexion in respect of F's subsequent partner.

5. The Cafcass Officer, Ms Kathleen Cull-Fitzpatrick has prepared a report for these proceedings dated, 11th October 2021. Though Ms Cull-Fitzpatrick was able to visit the children and the mother, her attempts to contact F were unsuccessful. She contacted him on the telephone number he had given her but that was not receiving calls. She sent F a number of emails to which she received no response and contacted F's solicitors to ensure that she had the correct address. They confirmed that she had.

6. The Cafcass officer made the following observations in her most recent report:

> *"As detailed earlier within this report, [F] has not engaged with me during the course of my assessment and therefore I have no direct knowledge of his views or opinions on the issues before the court. From the information within the court papers, it appears that he does not recognise that he has perpetrated domestic abuse. His behaviour is indicative of severe coercive controlling behaviour, including sexual, physical and emotional abuse. Without [F] having accepted or addressed his behaviour, I am of the view that he continues to present a high risk to the children and [M]."* (paragraph 29)

7. Later in her report, the Cafcass officer expresses her conclusions thus:

> *"I have considered [F's] capacity for change, from the information available to me I have formed the view that, it does not appear [F] recognises that he has perpetrated domestic abuse. Nor has he been able to demonstrate insight into the consequences of his behaviour or taken any responsibility for his actions. [F] has not demonstrated a willingness to change but rather he continues to challenge the findings made about him and preserve his needs in securing that the information against him within these proceedings is not disclosed to the police or immigration services."* (paragraph 35)

8. In a statement filed on the 9th April 2021, F makes the following assertions:

> "*I would like the Court to know that since reading the Judgement, I have been taking the time to work on myself. In particular, I have made enquiries with the Centre for Justice Innovation as to the 'Promoting Positive Relationship Programme' which is an integrated group work intervention programme developed for adult males who have demonstrated the potential to be abusive in intimate relationships. This programme focuses on providing cognitive and behavioural skills and tools to support and promote the use of positive behaviours within*

> *intimate relationships. I am in agreement to the terms of participation in this programme and am prepared to attend this course."*

9. F provides a summary outline of the proposed work:

> *The programme runs for 6 months over a maximum of 24 sessions, each 2 hours long. The initial 3 months occur on a one-to-one basis and the following 3 months take place in a group format. The sessions will take place once a week and are currently running on a virtual basis. The organisation hopes to resume in person sessions in due course and they have confirmed to me that there is currently availability on the programme."*

10. The essence of F's application is that he is effectively prohibited from engaging with the Cafcass officer or the Court more generally, because to do so might incriminate himself and potentially expose him to prosecution. Mr Momtaz articulates his client's position as follows:

> *"F makes this application in order to protect himself against self-incrimination. As set out in this document, the nature of these proceedings are such that F is in a position where he must choose whether to stay entirely silent in these proceedings to avoid incriminating himself or whether to engage with questions put to him about the extent to which he 'accepts' the findings that have been made against him. That applies both in respect of his own application for Child Arrangements Orders or in his defence of the Mother's application to 'remove' his parental responsibility."*

11. The argument is developed more broadly:

> *"For the reasons set out in this document, that position is neither 'fair', within the meaning of Article 6 ECHR and the Overriding Objective, nor is it in the best interests of the subject children within the meaning of s.1(3) Children Act 1989."*

12. This reasoning led Mr Momtaz to submit:

> *"F will say that the most appropriate means by which this court should redress that position is to rule that any statement or admission that he makes (if any) will not be disclosed to the police. By removing the prospect of F incriminating himself in that way, both parents will have the opportunity for full engagement within the court process, and the proceedings will operate most effectively in the best interests of the children."*

13. The thrust of this submission requires to be confronted directly. It is argued on behalf of F that the Court should make a prospective determination that nothing should be disclosed to the police in respect of any written statements made by the father in which he makes any admissions in respect of the findings. This is extended to include any admissions he may make in oral evidence.

14. I have not been told, at this stage, whether F is contemplating making any admissions. Certainly, nothing has been reduced to writing. Accordingly, I am being asked to make a decision concerning material which, at present, does not exist and in respect of which, axiomatically, I can make no evaluation. I am in an evidential vacuum, being asked to fetter my own discretion in respect of entirely unknown material. Rarely, this may be necessary, for example in cases involving national security, but generally and for obvious reasons it is undesirable.

15. On behalf of F Mr Momtaz highlights the principle of a litigant's privilege against self-incrimination i.e. that a person is not bound to answer any question if his answer would tend to expose him to any criminal charge. This finds expression in the Civil Evidence Act 1968 Sec 14(1):

> "(1)The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—
>
> (a)shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b)shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty."

16. The jurisprudence of the European Court of Human Rights establishes that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which suffuse the principle of fair procedure, protected by Article 6. The protection against self-incrimination is primarily concerned with respecting the will of an accused person to remain silent (see **Heaney and McGuiness v Ireland (2001) 34720/97**). All this is uncontentious.

17. Similarly, the advocates agree that the Court is entitled to draw adverse inferences from a party's silence in family proceedings, where the broader canvas of the evidence enables the court to do so (see **R v IRC and Another, ex p TC Coombs and Co. [1991] 2 AC**). Again, this is uncontroversial.

18. In proceedings under the Children Act 1989, Parts IV and V (Care and Supervision and the Protection of Children), the legislation affords parties protection from statements or admissions made within those proceedings becoming admissible in proceedings for an offence (other than perjury):

> "98 Self-incrimination.
> (1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from—
>
> (a) giving evidence on any matter; or

> (b) answering any question put to him in the course of his giving evidence, on the ground that doing so might incriminate him or his spouse of an offence.
>
> (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury."

19. Case law has established that protection from admissibility in evidence is not synonymous with the disclosure of such material to the police or other relevant bodies, to assist them in their investigation, most particularly where this concerns safeguarding or the welfare of children (see Re: **EC (Disclosure of Material) [1996] 2 FLR 725 CA)**. Accordingly, statements made to an expert witness may be disclosed: Re: **AB Care Proceedings: Disclosure of Medical Evidence to Police [2003] 1 FLR 579**; Position Statements, filed within proceedings; statements or admissions to the Children's Guardian (see **Oxfordshire County Council v P [1995] 2 ALL ER 225; Re M (Children) 2019 EWCA Civ 1364**.

20. In Re EC (supra), the Court emphasised that questions of admissibility of the disclosed documents were a matter for the Criminal Courts. For completeness, it is helpful to note that in Re EC, the Court identified the, non-exhaustive, factors to be considered when resolving an application to the court for disclosure to the police:

i. the welfare and the interest of the child concerned and of other children generally;
ii. the maintenance of confidentiality in children cases and the importance of encouraging frankness;
iii. the public interest in the administration of justice and the prosecution of serious crime;
iv. the gravity of the alleged offence and the relevance of the evidence to it;
v. the desirability of co-operation between the various agencies concerned with the welfare of children;
vi. in cases where s 98(2) applies, fairness to the person who has incriminated himself and any others affected by the incriminating statement;
vii. any other material disclosure which has already taken place.

21. As is clear, Section 98 of the Children Act 1989, does not apply to private law children proceedings (Part II) but is expressly confined to Part IV and Part V of the Act. For the avoidance of doubt, this was confirmed by Hedley J in **D v M [2003] 1 FLR 647**. Mr Momtaz does not analyse the reasons underpinning this distinction. Given that very serious findings, which can have a criminal complexion, may be made in both the public and private law arena, it is suggested that this may simply be an error. I am inclined to doubt that and will consider it below.

22. During submissions, Mr Momtaz and Ms Barrons refined the scope of the protection they are seeking. They now suggest that the court makes a prospective order preventing the disclosure out of these proceedings of:

> *"Any statement or admission made by the applicant father, at any stage of these proceedings, in relation to the findings made against*

> *him by the court in its judgment dated 15 January 2021 shall not be disclosed to the police or the Crown Prosecution Service"*

23. Mr Momtaz and Ms Barrons place considerable emphasis on the observations in D v M (supra) where, they submit, Hedley J identifies an elevated need for frankness in private law cases. Weight is placed on the following paragraphs in that judgment:

> *"[8] It must be the case in private law proceedings no less than in public law cases that the court should do all it can to encourage as well as require frankness from witnesses and, in particular, from parents. More so in private law cases than in those under Part IV is the court dependent for the accuracy of its information on the evidence of parents. These cases have far less external investigation as a rule and far more does the court have to find facts based on an evaluation of the evidence of parents. Frankness is therefore a rich evidential jewel in this jurisdiction."*

24. Though it is undoubtedly true that a far broader range of professionals is likely to be involved with families in public law cases, I do not consider that the need for frankness in that jurisdiction is any less significant. Nor do I believe that this is what Hedley J was really intending to say. In every sphere of decision taking, where the welfare and safety of children is concerned, honesty, frankness and candour with the court and the professionals is essential. These are immutable touchstones, they are the foundations of 'working together' which has been recognised, for over thirty years, as intrinsic to successful outcomes for children and families. It is rightly and elegantly identified by Hedley J as *"a rich evidential jewel."*

25. The weight to be afforded to frankness in private law proceedings might, Hedley J speculated, lead to it being afforded greater significance when a court was considering disclosing material to the police. He made the following observation:

> *"[9] I recognise, of course, that frankness cannot come at any cost and the court must also have regard to the gravity of the offence, in particular where that offence may put at risk these or other children, and the court cannot close its mind to public policy issues where grave crime is involved. The court must also have regard to the welfare of the children concerned. Indeed I recognise that in fact every issue set out in Re C (A Minor) (Care Proceedings: Disclosure) may well be relevant. However, it would be my view given both the need for parental honesty and the absence of s 98(2) protection, that the need for encouraging frankness might well be accorded greater weight in private law proceedings and that accordingly the court might be more disinclined to order disclosure."*

26. It may well be that the absence of the protection accorded by Section 98 (2), in private law proceedings, might lead to a judge placing greater emphasis upon frankness, when determining a disclosure application but it does not follow inevitably. Nor is Hedley J suggesting that it should. On the contrary, he expressly recognises that all the factors identified in the case law relating to disclosure require full consideration. As the Judge says, *"frankness cannot come at any cost"*. The identified passage also specifically identifies the need to have regard to the gravity of the offence. I note that Hedley J

considered that the sexual offence that he was considering fell *"at the lower end"* of the spectrum of gravity. Whether that is an accurate characterisation or not, the Court, unlike here, was concerned with an essentially victimless crime.

27. A transcript of my judgment has, belatedly, been forwarded to the police. The Court's approval for this is not required, see Practice Direction 12G. M's application is for wider disclosure of material. I anticipate that now the police have seen the judgment they may have their own views too. Ms Jones submits that the court should consider applications for disclosure of documents to the police at the conclusion of the welfare hearing. Mr Momtaz contends that leaves F in a *"very insecure and uncertain position"*. This is expressed in the Applicant's skeleton argument in these terms:

> *"He will have no idea what will or will not be disclosed; he will have no idea to what extent he is actually incriminating himself before he makes a statement. Anything he says could, on the face of it, be used against him as evidence in a criminal process or trial."*

28. It is developed thus:

> *"38. The stakes in this case are extremely high; higher than in many other cases, because the findings made by the court against F are so serious. The likely consequence of the court not grappling with this issue now, is that F will have no choice but to remain silent. That, it is submitted, is an unreasonable interference with his Article 6 Right to a fair trial.*
>
> *39. The further consequence is that these proceedings cannot operate in the best interests of the children. If one parent is left unable to fully engage because they cannot assess the extent to which they will be incriminating themselves that will, more likely than not, serve to limit or prevent any effective welfare analysis or therapeutic process, and mean that the children have a much higher risk of having no relationship with one of their parents."*

29. As Ms Jones correctly analyses, paragraph 38 is, in fact, a distortion of Hedley J's reasoning in D v M (supra). Here it would appear to be suggested that the gravity of the offence should militate against disclosure whereas Hedley J was positing the reverse position, which, if I may say so, is the more logical and attractive reasoning.

30. In their thorough and detailed skeleton argument Mr Momtaz and Ms Barrons discuss the scope and potential consequences of failing to afford F the "pre-emptive" protection he seeks. It is not necessary for me to burden this judgment with the detail of these submissions, save to record that the most striking consequence may be that M's application might succeed and F's parental responsibility be significantly curtailed or, were I to yield to M's argument, be extinguished.

31. Recognising that were I to grant the wholesale pre-emptive protection contended for (i.e. extended to any statement or admission F makes) I will be affording greater protection in private law cases than exists in public law, Mr Momtaz makes a second and alternative submission to the effect that I should afford F the identical protection set out in Section 98.

32. The Children Act 1989 is recognised, rightly in my view, to be one of the most progressive and carefully drafted pieces of legislation of the latter part of the 20th century. It was, as the now extensive case law reveals, drafted with ECHR compliance in mind. The Act has withstood the scrutiny of the ECHR regime notwithstanding that within its aegis exists a range of dramatically draconian orders granting, where appropriate, extensive powers to the state via the arm of Local Authorities.

33. Parliament granted the protection of Section 98 to public law care proceedings but not to private law cases. It must be deemed to have made this distinction deliberately and not, as Mr Momtaz tentatively suggests, inadvertently. It strikes me that there are sound reasons for the distinction in these two very different regimes.

34. In proceedings regulated by Part IV and V, the State enters family life. Where care orders and interim care orders are made the State becomes, in effect, the corporate parent. Children will usually be removed from their parents care and, in reality, primary decision taking concerning the welfare of the subject children will transfer to the Local Authority, across a wide range of issues. A Local Authority's ultimate plan, which will fall to be approved by the court, may involve the total deracination of children from their birth families. Adoption of the children may follow, which will serve effectively to expunge birth parents from the children's legal history and, in many circumstances, cause them to be permanently estranged from all their extended family and much of their own history. It is difficult to contemplate a more draconian regime even where it is pursued only when there are no other options for the children and where nothing else will do. Confronted, as it requires to be, in these stark terms, it is not difficult to see why the legislation strains to afford every opportunity to a parent to work openly and honestly with the process.

35. For this reason, Section 98 affords considerable protection against prosecution even though a parent may tentatively acknowledge or actually admit causing really serious harm to a child. Even in such circumstances however, the protection of Section 98 may not be ubiquitous and when it occurs to the judge, in care proceedings, that a party may be about to incriminate himself, the judge will issue a warning indicating that Section 98 should not be regarded as an impenetrable defensive shield.

36. By contrast, though the consequence of orders in private law may have far reaching effect on children and parents (e.g. orders inhibiting access to the court pursuant to Section 91 (14)) and though some of the orders available might also properly be characterised as draconian, they do not carry resonances of quite the same magnitude that I have highlighted above. Moreover, as I have already alluded to, for any order to be made in public law, the court will have to be satisfied that a child has sustained "significant harm, or is likely to sustain significant harm", attributable to the care given or likely to be given. Inevitably therefore, the court is always investigating direct harm to a child, in care proceedings be it physical, sexual or emotional. This is not the case in private law.

37. Accordingly, it seems to me, that Section 98 is confined to public law cases for good reason. It is also to be remembered that it exists not for the protection of the parent but to promote the best interests of the child, which remains the paramount consideration throughout. It promotes the central philosophy of the Children Act 1989 that wherever possible children should be cared for by their parents and within their families.

38. With respect to the arguments advanced, Parliament has confined the ambit of Section 98 in the way that has been discussed. This is there for judges to apply; it is not open to a judge to extend a provision beyond that which Parliament intended. That is outwith the judicial role. The relief sought by the father is, in my judgement not merely overly ambitious it requires a construction of the legislation which cannot be supported either within the framework of the Children Act 1989 or consistent with its central philosophy. For these reasons I decline to make the orders contended for on behalf of the Applicant.