Case No: FD03A00505

**Neutral Citation Number: [2004] EWHC 1283 (Fam)**
**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**PRINCIPAL REGISTRY**
**(In Private)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 May 2004

**Before** :

**THE HONOURABLE MR JUSTICE MUNBY**

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**In the matter of SL (a child)**

**And in the matter of the ADOPTION ACT 1976**

| **H** | **Applicant** |
|---|---|

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**Ms Naomi Angell** (of Osbornes) for the applicant H
**Mr Michael Sherwin** (of White & Sherwin) for the child SL

Hearing date : 24 May 2004

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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 Munby

This judgment was handed down in private but the judge hereby gives leave for it to be reported in the form in which it here appears.

## Mr Justice Munby :

1. This is an application by a single woman, Ms H, to adopt a little boy, SL. But for the technical point with which I must deal in due course it would be the plainest possible case for an adoption order. The local authority has produced a Schedule 2 report which is not merely supportive of Ms H's application but "strongly recommend[s]" that an adoption order be made. An experienced guardian is equally supportive, giving it as her "firm view" that adoption is in SL's best interests and having "no hesitation in recommending and lending my support to this adoption application".

2. Ms H is rightly described by the author of the Schedule 2 report as being "an exceptional woman" and by the guardian as "a truly exceptional person". It was a privilege, but also a very humbling experience, to be able to meet her.

3. SL was born on or about 25 June 1994. We do not know where or when he was born or who his parents were, because he was found on 4 June 1996, seemingly abandoned, on a football field in Hong Kong. One suspects that this was not unconnected with the fact that he is a child with multiple and profound difficulties. Efforts by the Hong Kong authorities to trace his parents were unsuccessful and on 18 July 1996 an order was made by the relevant court in Hong Kong appointing the Director of Social Welfare of Hong Kong ("the Director") as his legal guardian. In March 1997 he was placed in a residential home for children with special needs.

4. It was there that Ms H, an English expatriate working as a volunteer care assistant, first met him in June 1997. She became for much of the time his key worker and became very attached to him. Towards the end of 1998 she decided to adopt him. The guardian refers to her as having single-handedly fought to become SL's parent against all the odds and as having shown resilience and foresight in her aim of adopting him. I need not go into the details. Ms H has at all times worked in full and frank co-operation with all the relevant authorities both in Hong Kong and in this country. None of them opposes the making of an adoption order or seeks to take any part in the proceedings.

5. Eventually, on 10 October 2001, the High Court of the Hong Kong Special Administrative Region made an order that the Director be at liberty (a) to give consent to SL's adoption in the United Kingdom by Ms H, (b) to send SL to the United Kingdom and (c) to pass care and control of SL to Ms H for the purpose of adoption. SL had in fact already been placed with Ms H on 24 August 2001.

6. Ms H returned to London with SL on 25 October 2001 and gave notice in accordance with section 22(1) of the Adoption Act 1976 to the relevant local authority – it is a London borough council. On 9 December 2003 she issued an adoption application in the Principal Registry. The problem – if, indeed, there is a problem – arises because on 11 December 2003 Ms H and SL went to live in Scotland. It was for this reason

that on 15 March 2004 District Judge Bassett Cross directed that the application was to be heard by a judge of the Family Division. It came before me on 24 May 2004.

7. The applicant's re-location to Scotland, which is of course outside the jurisdiction of the English court, raises two questions:

   i) Does the English court have jurisdiction to make an adoption order?

   ii) Are the requirements of section 13 of the Adoption Act 1976 satisfied?

8. In my judgment the English court undoubtedly has jurisdiction to hear this application and to make an adoption order. SL was, within the meaning of section 62(2) of the Act, "in England or Wales when the application [was] made". The application was made on 9 December 2003, when SL and Ms H were both still living in London: they did not move to Scotland until 11 December 2003. Ms H "is" (and indeed has at all material times been) "domiciled in a part of the United Kingdom" within the meaning of section 15(2) of the Act. Scotland, being part of Great Britain, is a part of the United Kingdom: see Schedule 1 to the Interpretation Act 1978.

9. The more difficult question is whether the requirements of section 13 of the Act have been – indeed whether they are capable of being – complied with.

10. In the circumstances of this case the relevant provisions are sections 13(2) and (3)(b), which, so far as material, are in the following terms:

> "(2) … an adoption order shall not be made unless the child is at least 12 months old and at all times during the preceding 12 months had his home with the applicants or one of them.
>
> (3) An adoption order shall not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant … in the home environment have been afforded – …
>
> (b) … to the local authority within whose area the home is."

11. Section 13 has to be read together with section 22, the material provisions of which for present purposes are as follows:

> "(1) An adoption order shall not be made in respect of a child who was not placed with the applicant by an adoption agency unless the applicant has, at least 3 months before the date of the order, given notice to the local authority within whose area he has his home of his intention to apply for the adoption order.

> (1A) An application for such an adoption order shall not be made unless the person wishing to make the application has, within the period of two years preceding the making of the application, given notice as mentioned in subsection (1).
>
> (1B) In subsections (1) and (1A) the references to the area in which the applicant or person has his home are references to the area in which he has his home at the time of giving the notice.
>
> (2) On receipt of such a notice the local authority shall investigate the matter and submit to the court a report of their investigation."

It is to be noted that sub-sections (1A) and (1B) contain provisions that were not to be found in the predecessor legislation, the Children Act 1975.

12. The leading authority on the meaning of these provisions is the judgment of Sheldon J in *Re Y (Minors) (Adoption: Jurisdiction)* [1986] 1 FLR 152, a decision on the corresponding provisions of the legislation then in force, section 9 of the Children Act 1975. Having referred to the relevant provisions of the legislation (see now in particular sections 13, 22 and 72(1) of the 1976 Act) he concluded at p 156 that:

> "in my judgment, there can be no doubt that the local authority, for the purposes of these provisions, must be a local authority in England or Wales – a local authority over which Parliament has authority and the English courts have jurisdiction."

That is plainly right. So the "local authority" referred to in section 13(3)(b) must be a local authority in England or Wales, from which it follows that the "home" referred to in section 13(3)(b) must also be a "home" in England or Wales.

13. Sheldon J also had to consider what is meant for this purpose by a "home". There is no need for me to dwell on this part of his judgment. Suffice it to say that I agree entirely with his analysis. In the circumstances of the present case (and I need not go into the facts) the applicant's "home" – and therefore SL's "home" – was in London until 11 December 2003 and thereafter in Scotland.

14. The difficulty in the present case is immediately apparent. The applicant's "home" during the 12 months preceding the hearing on 24 May 2004 has not been in England: it was in England from 24 May 2003 until 11 December 2003 but since then it has been in Scotland. This gives rise to two questions:

    i) Does the "home" referred to in section 13(2) have to be the same as the "home" referred to in section 13(3)(b)?

ii) Granted that, for the reasons given by Sheldon J, the "home" referred to in section 13(3)(b) has to be in England or Wales, does the "home" referred to in section 13(2) likewise have to be in England or Wales?

It will be appreciated that if the answer to either of these questions is 'Yes' then the present application must necessarily fail.

15. Immediately following the passage in Sheldon J's judgment which I have already quoted there is a further passage which, taken at face value, suggests that the answer to each of these questions is indeed 'Yes'. What Sheldon J said was this (for ease of understanding I substitute the appropriate references to the 1976 Act for the original references to the 1975 Act):

> "That being so, it follows that even though an applicant … may be domiciled here, an adoption order cannot now be made unless:
>
> (a) when giving notice of his intention to adopt (which must be at least 3 months before the date of the order) he had a 'home' here in the area of the local authority to which, by s. [22(1)], such notice had to be given; and
>
> (b) at all times during the alternative periods … referred to in s. [13], he also provided a 'home' for the child in the area of the local authority required by that section to see all parties together in their 'home environment'."

16. It is important to appreciate that in *Re Y* the application failed at the first hurdle. Sheldon J found that the applicants had never had a "home" in England or Wales at any material time, so they were unable to meet the judge's requirement at (a). In that sense *Re Y* turned on what are now sections 22(1) and 13(3)(b) rather than on section 13(2). In the present case, in contrast, that requirement presents no difficulty. The applicant did have a home in London at the time she gave notice in accordance with section 22(1). On the facts, therefore, the present case is, as Ms Angell submits, quite different. In the present case the difficulty arises out of Sheldon J's observations at (b). Those observations were not strictly speaking necessary for his decision and can therefore properly be considered mere *obiter dicta*. But, of course, as Sir Robert Megarry once remarked, there are dicta and dicta, and I cannot ignore the fact that the passage I have just quoted appears to have been a precisely formulated statement of principle set out in a reserved judgment which had, it would seem, been carefully prepared for publication.

17. That said, I have to say, with all respect to Sheldon J, that I cannot accept his formulation at (b) as being in all respects an accurate statement of the law. In my judgment:

i) The applicant must have a "home" within the jurisdiction at the time she gives notice in accordance with section 22(1). That "home" will be the "home" for the purposes of section 13(3)(b).

ii) But the "home" referred to in section 13(2):

a) does not have to be the same as the "home" referred to in section 13(3)(b); and

b) does not have to be in England or Wales.

18. It follows, in my judgment, that there is no obstacle to my making the adoption order which Ms H seeks. I need not go into the facts in any detail, but I am entirely satisfied on the evidence that each of the conditions in sections 13(2) and 13(3)(b) has been met:

i) SL has had his "home" with Ms H ever since 24 August 2001: until 25 October 2001 that "home" was in Hong Kong, from then until 11 December 2003 it was in London, and since then it has been in Scotland. Each of these, in my judgment, qualifies during the relevant portion of the overall period from 24 August 2001 until 24 May 2004 (the date of the hearing when I made the adoption order) as a "home" for the purposes of section 13(2).

ii) The relevant local authority – the London borough council – has had more than sufficient opportunities to see SL in his "home environment" in London.

19. Two separate but related lines of reasoning lead me to these conclusions. The first is based on the language and structure of section 13:

i) The word "home" is not defined in the Act as referring only to a "home" which is in England or Wales. It is only the reference in section 13(3)(b) to the "local authority" which has the effect that the "home" referred to in section 13(3)(b) must be a "home" in England or Wales. There is nothing corresponding to this in section 13(2), which refers simply and without further qualification or elaboration to the applicant's "home".

ii) There is nothing in either the language or the structure of section 13 to indicate that the "home" referred to in section 13(2) has to be the same as the "home" – or "home environment" – referred to in section 13(3)(b). On the contrary, section 13(3)(b) identifies the "home environment" by reference to "the local authority within whose area the home is", and not, as it were, by reference back to the "home" referred to in section 13(2).

iii) The time period which qualifies the concept of "home" in section 13(2) is different from that which qualifies the concept of the "home environment" in section 13(3)(b). The "home" in section 13(2) is defined by reference to a fixed period – 12 months; the "home environment" in section 13(3)(b) is defined by reference to a less determinate period – the period during which "sufficient opportunities to see the child … have been afforded". There is no necessary connection between these two different periods.

20. This last point requires some elaboration. I can best make the point by reference to two passages in Sheldon J's judgment in *Re Y* which, as it seems to me, are crucial to his analysis of what is now section 13(3)(b). Both are to the same effect. They are to be found at pp 158 and 160:

> "The requirement that the applicant or applicants must have a 'home' within the jurisdiction for the period specified, however, does not also import an obligation that they or the child should be living or residing there at or for any particular time or length of time. Of course, the less time that any of them spend there, the more difficult is it likely to be to persuade the court that it is a 'home'; but the only statutory obligation in this connection would seem to be that they spend sufficient time there to enable the local authority concerned to see all parties together in their 'home environment' as provided by s. [13(3)(b)] and properly to investigate the circumstances as required by s. [22]. What that will involve in terms of residence will be a question to be decided in the light of the facts of each case.
>
> … in my opinion, the only extent to which the physical presence in this country of the applicant or applicants or the child is required by statute, from the date upon which notice of the adoption application is given to the local authority, is that it should be sufficient to enable the latter to see them all together in their home environment here and to prepare the report required by s. [22]."

I entirely agree. It is to be noted that Sheldon J went on at p 160 to reject in terms the contention of the local authority in that case that it was necessary for one applicant to have been in the country for at least three months, and the other for at least one month, if it was to be said that there had been "sufficient opportunities" within the meaning of what is now section 13(3)(b).

21. In my judgment there is nothing in either the language or the structure of section 13 to indicate that sections 13(2) and 13(3)(b) are anything other than two entirely separate and independent requirements. That being so, there is nothing anywhere in the legislation to indicate that the "home" referred to in section 13(2) has to be within the jurisdiction, let alone in any particular place.

22. The second line of reasoning is based upon a consideration of the purpose (or purposes) which section 13 is designed to achieve. As Mr Sherwin correctly pointed out, a purposive approach to section 13 leads readily to the identification of two separate statutory purposes which section 13 is designed to achieve, within the wider statutory objective of ensuring that an adoption order is only made if the adoption of the particular child by the particular applicant is in the best interests of the child:

    i) The first purpose is to test the strength of the applicant's commitment to the child, and whether the "match" between the child and the applicant is secure, those matters being assessed empirically by the need to demonstrate that the child's placement with the applicant in her "home" has survived at least 12 months.

    ii) The second purpose is to maximise the usefulness and reliability of the report submitted to the court by the local authority in accordance with section 22(2) by ensuring that the reporting authority has been afforded "sufficient opportunities to see the child with the applicant … in the home environment".

23. Each of these purposes can be achieved whether or not the "home" relied on as satisfying the section 13(2) requirement is the same as the "home" (or "home environment") relied on as satisfying the section 13(3)(b) requirement. That being so, I ask rhetorically, What further statutory purpose would be served by requiring the two "homes" to be the same? I can think of none. On the contrary, to read into the statute that further requirement would actually – as the facts of the present case so plainly illustrate – compel the court on occasions to deny an adoption even when the requirements of both sections 13(2) and 13(3)(b) have seemingly been met and even though, as in the present case, adoption is so very obviously in the best interests of the child. As *Re Y* shows, there will be occasions when the plain words of the statute prevent a judge doing that which is in the best interests of the child. So be it. But that is no reason for construing the 1976 Act narrowly, or reading words into it which are not there, if the consequence is to be the denial to a child of an adoption which is plainly in his best interests. This is legislation which requires to be given a sensible and purposive construction. As I remarked during the course of argument, it would be almost absurd to suggest that the requirements of section 13(2) are not met if the applicant relocates north of the border just a day or two before the final adoption hearing takes place – perhaps because a hearing originally fixed for an earlier date has had to be re-fixed to meet the court's convenience. And if that is so, it cannot make a difference that the applicant in fact re-located rather earlier.

24. I was therefore delighted to be able to make the adoption order which is so very obviously so very much in SL's interests. The author of the Schedule 2 report describes how, with the love and devotion Ms H has shown him, SL has become a secure, happy child who is now thriving. The guardian comments that Ms H has offered him a remarkable opportunity to achieve emotional security within a loving family. The Director consented to my making an adoption order (see section 16(1)(b)(i) of the 1976 Act) and I had no hesitation in dispensing with the agreement of the parents on the ground that they cannot be found (see section 16(2)(a)). Strenuous attempts by the Hong Kong authorities to trace them in 1996 were

unsuccessful – perhaps not surprisingly given the circumstances in which SL was found. It would be an exercise in complete futility even to attempt to resume the search now: cf *Re A (Adoption of a Russian Child)* [2000] 1 FLR 539 at pp 547-548.