



[2024] EWHC 306 (Fam)

Case No: FD20P00408

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**IN PRIVATE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

21 February 2024

**Before :**

**SIMON COLTON KC SITTING AS A DEPUTY HIGH COURT JUDGE**

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**Between :**

**ZS**

**Applicant**

**- and -**

**THE ESTATE OF NJ**

**Respondent**

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**Ms Alexandra Jankowska**, trainee solicitor, of IMD Solicitors, for the **Applicant**

**JK**, in person, as representative of the **Respondent**

Hearing date: 9 February 2024

Judgment circulated in draft: 12 February 2024

Revised judgment circulated in draft: 14 February 2024

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**Judgment**

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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

## **Mr Simon Colton KC:**

### **Introduction**

1. This is an application under section 55A of the Family Law Act 1986 (the ‘**1986 Act**’) for a declaration that NJ is the father of ZS.
2. NJ died in England in 2019. These proceedings began in February 2020, with ZS seeking a direction, pursuant to the inherent jurisdiction of the High Court, that blood samples of NJ held by an NHS Trust be released for DNA testing. That direction was given following a hearing on 21 July 2020.
3. The matter came before me on 9 February 2024, with ZS now seeking the making of a final declaration. However, I have decided that the evidence, presently before the court, does not suffice to persuade me that the application should be granted. For the reasons set out below, I have also decided, that ZS’s mother should be joined as a respondent to these proceedings, and that JK should represent the estate of NJ in these proceedings.

### **The background to the application**

4. NJ was born in the 1940s. He was a prominent opponent of the regime in his home country, from where he was expelled in the 1970s. He did not visit that country again until the early 1990s. According to ZS, at around this time NJ had a two year relationship with ZS’s mother, leading to the birth of ZS. However, when NJ found out about the pregnancy, he broke off the relationship with ZS’s mother, not wanting a family.
5. ZS states that her birth certificate records her father using a name which combines the first names of NJ with the surname of ZS’s mother. ZS says she met NJ four times, the first time being when she was 18 years old, in England where he was living.
6. NJ was still living in England when he died. He left no spouse nor other children (so far as is known). JK told me that he believes that NJ left one sibling, a sister, EM, who lived in Switzerland. EM has no living children, nor spouse, so far as JK is aware.
7. NJ died intestate. In 2020, letters of administration of his estate were granted to JK, as attorney for EM. As a result, at the hearing on 21 July 2020, JK was party to these proceedings in his capacity as personal representative of NJ’s estate.
8. DNA testing took place in November 2021. There was then a further delay and instructions to progress this application were given only in October 2023. By this time EM had died, and JK took the view that, in such circumstances, he could no longer act under the letters of administration on behalf of NJ’s estate. On 19 December 2023 ZS issued the present application seeking a final declaration.

### **The deficiencies in the evidence before the court**

9. The bundle for the hearing before me included a report from AlphaBiolabs, which concluded that there is a “*99.9% probability of paternity*”, based on a comparison of the DNA profiles of NJ and ZS. Such conclusion appeared amply to satisfy the burden on ZS of showing that NJ was her father. However, as I explained at the hearing, on a

more careful reading I am not satisfied that this report is sufficient to evidence ZS's case.

10. The report describes the testing process as follows: "*An independent sample collector obtained consent to collect and test buccal cell samples from the above named individuals for the purpose of DNA analysis. Samples, photographs and ID documents were then collected and returned to AlphaBiolabs.*" That description – of taking buccal cells, presumably via a cheek swab – cannot, on the facts presented to me, be an accurate description of the testing of NJ's DNA. NJ had died more than two years before the testing date, and the evidence I had was that DNA testing was to be, and was, carried out on a blood sample, not on buccal cells. It may be that this language is just a *pro forma* description – and that, in fact, AlphaBiolabs did indeed test NJ's DNA using a blood sample, and did indeed take proper steps to verify both the identity of the individual whose blood was being tested, and the individual whose cheek cells were being tested – but the description given by the AlphaBiolabs reports leaves me uncertain as to whose DNA was actually tested, and by what means.
11. Evidence of scientific testing is not necessarily required when a declaration of parentage is sought: *Boudewijn v Johnson* [2022] EWFC 142, [2023] 4 WLR 5 at [45]-[46] (Mostyn J). However, in the bundle of material provided to me, other evidence was oddly lacking. I was told of a two-year relationship between ZS's mother and NJ, but no evidence was adduced from ZS's mother, nor any explanation for its absence. I was told of the contents of ZS's birth certificate, but that document was not in the bundle. The evidence stated that "*All official documents relating to the respondent show his name as [NJ]*", but no examples of this were exhibited. I was also told that NJ's "*British passport named his place of birth*" as his home country but, again, this was not exhibited.
12. I also raised concerns with Ms Jankowska, the trainee solicitor appearing on behalf of ZS, that in answer to the question on the application form "*What effect would the granting of a declaration of parentage have upon the status of [ZS] as regards [her] nationality, citizenship or right to be in the United Kingdom*", the answer given was simply "*None*". I queried whether this was correct – since, for example, it might depend on whether NJ had acquired British citizenship before ZS's birth. Ms Jankowska frankly accepted that she did not know whether this question had in fact been investigated. This gives me cause for concern as to the efforts that had been made to verify the other assertions contained in the application documents.
13. The ordinary civil standard (i.e. the balance of probabilities) applies on an application of this sort: *Aylward-Davies v Chesterman* [2022] EWFC 4 (Mostyn J) at [55]. For the reasons I have set out above, I am not presently satisfied that this burden has been met. I shall, therefore, adjourn this application, with liberty to restore it (preferably, before me), as and when further evidence has been obtained.

### **The positions of ZS's mother and of the estate of NJ**

14. FPR 8.1 provides that, with certain exceptions which are immaterial in this case, applications to which FPR 8 applies must be made in accordance with the FPR 19 procedure.

15. Chapter V of FPR 8 relates to declarations, including declarations of parentage under section 55A of the 1986 Act.
16. FPR 8.20 sets out who the respondents to such proceedings are, which includes, in application for declarations of parentage, “*any person who is or is alleged to be the parent of the person whose parentage is in issue, except where that person is the applicant or is a child*”.
17. In the ordinary course, therefore, in an application of the present sort, both the putative father, and the mother, should be made respondents to the proceedings: see *Aylward-Davies v Chesterman* at [5]-[9]. However, while ZS’s mother is identified in the application as one of the ‘Other people in the case’, ZS’s mother has not been made a respondent, and, Ms Jankowska informed me, was not served with the application. In my judgment, this is a state of affairs which must be remedied before the application can continue.
18. As for NJ, where the putative father is deceased, a representative of their estate should be made respondent to the application. As described in paragraph 7. above, that is indeed what occurred. However, JK was correct to think that, following the death of EM, he could no longer represent the estate: the grant of letters of administration to JK was qualified by the words “*The lawful attorney of [EM] for their use and benefit limited until further representation be granted*”, and an attorney in such circumstances is debarred from acting further under his grant once he knows of the death of the donor – see Tristram and Coote’s Probate Practice (32<sup>nd</sup> ed, 2021) at ¶11.102; Williams, Mortimore & Sunnucks – Executors, Administrators and Probate (22<sup>nd</sup> ed, 2023) at ¶15-15.
19. In such circumstances, I could order the application to continue, with NJ’s estate still named as a respondent, but with no person representing that estate. By way of analogy, although not directly applicable to the present application, I note that such possibility is specifically provided for in civil claims by CPR 19.12(1)(a). Alternatively, I could simply waive the requirement that NJ’s estate remain as a respondent at all: compare *Aylward-Davies v Chesterman* at [18]-[19]. I am concerned, however, that there may yet be aspects to the substantive application under section 55A of the 1986 Act where submissions on behalf of NJ’s estate, or access to documents held by NJ’s estate, will be of benefit to the court, and so I am reluctant to allow a situation where NJ’s estate is either not a respondent, or a respondent in name only.
20. In this regard, I note section 116 of the Senior Courts Act 1981, which provides:

***“Power of court to pass over prior claims to a grant***

*(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.*

*(2) Any grant of administration under this section may be limited in any way the court thinks fit.”*

21. Decided cases on the meaning and application of section 116 were summarised by HHJ Paul Matthews (sitting as a Judge of the High Court) in *Otitoju v Onwordi* [2023] EWHC 2665 (Ch) at [20]-[22]. The position, in sum, appears to be that no gloss should be put on the language of the statute: the power under section 116 may be exercised where, by reason of any special circumstances, it appears to be necessary or expedient to appoint an administrator other than the person who would otherwise be entitled. The power is an entirely general one and may be used to appoint any person, including someone who would otherwise have no entitlement at all to appointment: *Gudavadze v Kay* [2012] EWHC 1683 (Ch) at [45]-[46] (Sales J).
22. In the present case, it is unclear whether there is anyone entitled to the grant of administration under rule 22(1) of the Non-Contentious Probate Rules. NJ appears to have left no spouse or civil partner; no child (save perhaps, which is the very question in this application, ZS); no parent; no siblings (except for his sister, who has now died); no nephews or nieces. I have no information as to whether NJ had, or has, any first cousins. JK did not know who (if anyone) was acting for the estate of EM (NJ's sister), which might be a matter of Swiss law, since that is where she was understood to be resident at the time of her death.
23. The original letters of administration recorded that the gross value of the estate of NJ in England and Wales amounted to £3,500, and the net value amounted to £0. JK's understanding was that NJ had no significant worldwide assets: he had had intellectual property rights which had been sold to satisfy liabilities of the estate, but that was all. In these circumstances, and given the limited purpose for which the estate is to be represented in these proceedings, I consider it disproportionate to require any advertisements, or any further investigations to be conducted, to establish who, if anyone, may be entitled to a grant. Rather, in circumstances where EM previously appointed JK as her attorney for the purpose of administering NJ's estate, I consider that the special circumstances of this case make it expedient to re-appoint JK as administrator, for the limited purpose of representing NJ's estate in these proceedings. JK has consented to such appointment. Since there has been a prior grant of administration, this will be of the *de bonis non* type (see, e.g., Williams, Mortimore & Sunnuks at ¶16-06; and *Perotti v Watson* [2004] EWCA Civ 269 at [5]). This grant will be limited, as I have indicated, to representing the estate in these proceedings.

## Transparency

24. The hearing before me was in private under FPR 27.10. However, in each of *Aylward-Davies v Chesterman* and *Boudewijn v Johnson* – reflecting a line of his decisions – Mostyn J held that the fact that the hearing of an application under section 55A of the 1986 Act is in private does not prevent full reporting of any resulting judgment. Rather, any application for a reporting restrictions order had to be considered on its own merit, weighing up the interests of open justice against any desire for privacy on the part of the parties to proceedings.
25. In *Aylward-Davies v Chesterman* (see at [30]), and again in *Boudewijn v Johnson* (see at [18]), no application for a reporting restrictions order was made. However, in the present case, after I invited the parties to consider whether they would oppose publication of my judgment, both JK and (through Ms Jankowska) ZS did seek such an order. My initial reaction was to refuse such order with reasons, but after I circulated

my judgment in draft the parties responded with further submissions which caused me to change my approach.

26. The parties submit, in summary, that I should have regard to the Article 8 rights of ZS, of JK, and of ZS's mother (who has, as yet, not had the opportunity to make her views known to the court). They contend that each of these individuals, in their own way, could be harmed by publication, including by being placed at risk of persecution by the country from which NJ originally came. The parties recognise that there are countervailing Article 10 rights of the media and public at large, but submits that this is a truly private matter, in which those rights should cede to the Article 8 rights of the individuals directly affected.
27. In my judgment, the submissions made by the parties raise a real question as to whether I should exercise my inherent jurisdiction to limit reporting of this judgment. The parties indicated that there may be further evidence forthcoming in support of their position in this regard. I shall consider that evidence, together with any submissions the media may wish to make, before I reach a final determination of this question. In the meantime, I shall direct that this judgment be published only on an anonymised basis.

### **Conclusion**

28. For these reasons, I conclude:
  - i) ZS's mother shall be added as a respondent to this application, and served with it. If permission is required to serve ZS's mother by some particular means, I will decide such question on the papers.
  - ii) I will direct that JK be appointed as administrator of NJ's estate for the limited purpose of representing the estate in these proceedings.
  - iii) The substantive application under section 55A of the 1986 Act shall be adjourned, with liberty to restore it (before me, if I am available) as and when further evidence has been obtained.
  - iv) The judgment will be published through the usual channels, with NJ, ZS, EM and JK referred to only by these initials.