



Case No: OX40/2023

Neutral citation: [2024] EWHC 3198 (Fam)

IN THE HIGH COURT OF JUSTICE
Family Division

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

In the matter of;

Re X
(Intercountry Adoption: Kafala: Noncompliance s.83 ACA 2002)

Between:

A

Applicant

-and-

B

A UK Adoption Agency

X, through his children's guardian

Respondents

-and-

Secretary of State for Education

Intervener

Miss Amanda Weston KC, Dr Kathryn Cronin and Miss Artis Kakonge (instructed by Hilka Hollmann of Dawson Cornwell LL) (counsel acting pro bono) on behalf of the Applicant

P was neither present nor represented

**Miss Kelly Wise (in house advocate) on behalf of the relevant UK Adoption Agency
Mr Andrew Leong (instructed by Michael Trueman of Trueman's Solicitors) on behalf of the child X through his Guardian, Natalie Allen**

Ms Sarah Hannett KC and Mr Alexander Laing (instructed by the Government Legal Department) on behalf of the intervener the Secretary of State for Education

Hearing dates: 17 and 18 October 2024
Handed down at 10 am on 10 December 2024

Judgment

This Judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

HHJ MORADIFAR:

Introduction

1. At the centre of these proceedings is a two-year-old boy whom I will identify as X. He was born in Morocco and is a Moroccan national. He was abandoned shortly after his birth. Neither of his parents can be traced. X lived in an orphanage before being placed in the care of the applicant who has since brought him to the UK and now applies to adopt him. The case raises principal issues about the interpretation and application of the domestic laws of England and Wales and its operation in the context of international law. More specifically, the issues in the case may be distilled to the following:
 - a. Was X brought to the UK for the purposes of adoption?
 - b. If so, can the court make an adoption order in the face of noncompliance with important requirements of the domestic laws?, and if so,
 - c. What are the permissible routes for doing so?

Background

2. The applicant was born in the UK and is a UK national. She was previously married but divorced in 2016. Following her divorce she decided to adopt a child from Morocco where she has previously spent some time in 2011. In 2017 she contacted the Intercountry Adoption Centre ('IAC') that is now known as Coram IAC. Following an assessment, the IAC approved her as prospective adopter for a child from Morocco and in 2019 she was granted a Certificate of Eligibility by the Department for Education. In 2020, the family court in Morocco granted her a *Kafala* for her first adopted child, Y, who was brought to the UK and subsequently adopted in April 2021 under the laws of England and Wales.
3. The applicant wished to adopt a second child from Morocco and contacted the IAC in the summer of 2021. By this time the process for adoption from Morocco had changed and after some exchanges with the relevant local authority and adoption agency, IAC approved the applicant as a prospective adopter in February 2022. X was born later in

the same year and relinquished in the same orphanage as Y when he was three days old. Pursuant to an application by the Public Prosecutor in Morocco, on 15 November 2022, the court of First instances in Meknes, Morocco declared X to be an ‘abandoned child’.

4. In early November of the same year X’s details were shared with the applicant who confirmed her wish to adopt him. The matching process was completed by IAC and the relevant adoption agency in December 2022 before the applicant and Y travelled to Morocco. She and Y met X for the first time on 20 December 2022.. Following a further court hearing, on 28 February 2023, the Moroccan courts granted a *kafala* in respect of X and after completing the necessary immigration procedures, X arrived in the UK on 6 May 2023. He has continued to live with the applicant and Y since this date.
5. On 28 September 2023 the applicant applied to courts in England to adopt X. Due to the issues in the case, the matter was allocated to the High Court of Justice and the IAC, Secretary of State for Home Department and the Department for Education were served with notice of the proceedings. Happily, the Secretary of State for Education has since intervened in these proceedings with the former two confirming that they did not seek to intervene. The Moroccan authorities have also been notified of the proceedings but have not sought to intervene in the same.

The legal framework

6. There are three main relevant legal systems that intersect and operate within these proceedings. These are the Kafala process under the Moroccan domestic law, the domestic laws of England and Wales and the international scheme. In this part, I will summarise the relevant operative parts of each of these before analysing their interaction in more detail in the later sections.

Moroccan Kafala process

7. The Moroccan Kafala is rooted in the Islamic doctrine and regulates the legal relationship and responsibilities of the person who is appointed as the guardian, the *kafil* and the child who is without parents and the subject of the kafala, referred to as the *makful*. The publication by N Yassaro et al, entitled *Filiation and Protection of Parentless children*, K.E. Hoffman (associate professor of Anthropology, director of Middle East and North African Studies and faculty member of the Legal Studies Programme at Northwestern University) provides a most helpful insight into the operation of the Kafala system in Morocco.
8. In summary, the Moroccan domestic laws make a clear distinction in the treatment, legal rights and obligations towards children that are born within the family and those that are not. The former have clear legally delineated rights that arise from their filiation. This is so, as the Moroccan Family Code applies to families and the concept of family is strictly based on filiation. The second category of children do not have any recognised filiation and this impacts on many of their rights including inheritance.

Importantly, the Code specifically provides that adoption has no legal effect in Morocco. In some Muslim countries adoption is expressly prohibited.

9. Moroccan Kafala is specifically addressed in the Kafala (guardianship) Law (2002) which provides that a kafala may only come to being by two distinct processes. The first is the grant of the Kafala by the family court, a *judicial Kafala*, and secondly a *notarial Kafala*. The former is by far the most commonly utilised route. The judicial Kafala is a contractual arrangement that is endorsed by the court following the completion of a set procedure. The formal procedural steps include efforts to find the child's biological parents, which when exhausted lead to the next stage, the declaration of the child as abandoned. The prospective kafil (guardian) will be the subject of an assessment. Once these formal procedures have been satisfied, the court will make a welfare decision as to whether to grant a Kafala. The Kafala is a contract between the kafil and the Royal Prosecutor for child welfare in the relevant province. Once the Kafala is contracted and endorsed by the court, the kafil cannot rescind from their obligations but it is possible for the court to terminate a Kafala in certain circumstances which include the biological mother's request to do so and to place the child in her care. The Kafala permits the child to travel with their guardian across other jurisdictions.

Domestic laws of England and Wales

10. The domestic legislative and regulatory framework is primarily set out in the Adoption and Children Act 2002 ('ACA 2002'), Adoption Agencies Regulations 2005 ('AAR 2005') and Part 14 of the Family Procedure Rules (2010) ('FPR 2010'). The ACA 2002 governs all adoptions within England and Wales including intercountry adoptions effected within England and Wales. An intercountry adoption is an adoption of child who is habitually resident in a different country to the prospective adopter. In this context the Act sets out the requirements of residence by the prospective adopter as follows:

"49 Applications for Adoption

(1)An application for an adoption order may be made by—

(a)a couple, or

(b)one person,

but only if it is made under section 50 or 51 and one of the following conditions is met.

(2)The first condition is that at least one of the couple (in the case of an application under section 50) or the applicant (in the case of an application under section 51) is domiciled in a part of the British Islands.

(3)The second condition is that both of the couple (in the case of an application under section 50) or the applicant (in the case of an application under section 51) have been habitually resident in a part of the British

Islands for a period of not less than one year ending with the date of the application.”

11. Importantly, chapter 6 of the ACA 2002 is entitled “*ADOPTIONS WITH A FOREIGN ELEMENT*” and in s. 83 sets out the restrictions on children being brought to England and Wales for the purposes of adoption in the following terms:

“83 Restriction on bringing children in

(1) This section applies where a person who is habitually resident in the British Islands (the “British resident”)—

(a) brings, or causes another to bring, a child who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption by the British resident, or

(b) at any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of twelve months ending with that time.

The references to adoption, or to a child adopted, by the British resident include a reference to adoption, or to a child adopted, by the British resident and another person.

(2) But this section does not apply if the child is intended to be adopted under a Convention adoption order.

(3) An external adoption means an adoption, other than a Convention adoption, of a child effected under the law of any country or territory outside the British Islands, whether or not the adoption is—

(a) an adoption within the meaning of Chapter 4, or

(b) a full adoption (within the meaning of section 88(3)).

(4) Regulations may require a person intending to bring, or to cause another to bring, a child into the United Kingdom in circumstances where this section applies—

(a) to apply to an adoption agency (including a Scottish or Northern Irish adoption agency) in the prescribed manner for an assessment of his suitability to adopt the child, and

(b) to give the agency any information it may require for the purpose of the assessment.

(5) Regulations may require prescribed conditions to be met in respect of a child brought into the United Kingdom in circumstances where this section applies.

(6) In relation to a child brought into the United Kingdom for adoption in circumstances where this section applies, regulations may—

(a) provide for any provision of Chapter 3 to apply with modifications or not to apply,

(b) if notice of intention to adopt has been given, impose functions in respect of the child on the local authority to which the notice was given.

(7) If a person brings, or causes another to bring, a child into the United Kingdom at any time in circumstances where this section applies, he is guilty of an offence if—

(a) he has not complied with any requirement imposed by virtue of subsection (4), or

(b) any condition required to be met by virtue of subsection (5) is not met,

before that time, or before any later time which may be prescribed.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding twelve months, or a fine, or both.

(9) In this section, “prescribed” means prescribed by regulations and “regulations” means regulations made by the Secretary of State, after consultation with the Assembly.”

Thus creating a clear distinction in the approach to Convention and non-Convention adoptions. The section also creates a criminal offence for noncompliance with s.83(4) and (5).

12. Adoption is defined by s. 66 of the ACA 2002 as:

“(1) ...

(c) an adoption effected under the law of a Convention country outside the British Islands, and certified in pursuance of Article 23(1) of the Convention (referred to in this Act as a “Convention adoption”),

(d) an overseas adoption, or

(e) an adoption recognised by the law of England and Wales and effected under the law of any other country;

and related expressions are to be interpreted accordingly.

...

(3)Any reference in an enactment to an adopted person within the meaning of this Chapter includes a reference to an adopted child within the meaning of Part 4 of the Adoption Act 1976 (c. 36).”

13. The definition of adoption in the Adoption Act 1976 as amended is set out in s. 38 of the said Act and includes an adoption:

“ ...

(cc)which is a Convention adoption;

(d)which is an overseas adoption; or

(e)which is an adoption recognised by the law of England and Wales and effected under the law of any other country ... “

Thus creating three categories of adoption in addition to the domestic adoption of children and adoptive parents who are habitually resident in England and Wales.

14. The requirements for assessments and the procedure for applications for adoptions in England are set out in AAR 2005. These provisions and those set out in Part 14 of the Family Procedure Rules (2010) and its associated Practice Directions set out the detail that is to be provided in the report to the court (‘Annex A report’). Importantly, the requisite information includes confirmation that the requirements of s. 83 have been complied with.
15. By s. 1(2) of the ACA 2002 in all decisions about adoption, the child’s welfare throughout his/her life must be the court’s paramount consideration and in the exercise of its jurisdiction to make an adoption order, among other factors, the court must have regard to the factors that are set out in s. 1(4) of the said Act.

International framework

16. The requirements of s. 83 are expressly disapplied to ‘convention adoptions’ by s.83(2). The Convention referred to is the Hague Convention on Protection of Children and Co-operation of Intercountry Adoption (1993) (the ‘1993 Convention’). Unlike Morocco, the UK is a party to the 1993 Convention that sets out the practice and procedure for intercountry adoption between its member states. However, its procedures are adopted by the Adoption (Intercountry Aspects) Act (1999) and the associated Regulations, the Adoptions with a Foreign Element Regulations (2005) (‘AFER 2005’). The requirements for an ‘overseas adoption’ or a ‘non-convention adoption’ are set out in F. Save for the specific provisions of AFER 2005 relating to a non-convention adoption, the general procedure under ACA 2002 for the preliminary steps to adoption (s. 42-45) and the making of the adoption orders (s. 46-51) are the same.
17. Both Morocco and the UK are parties to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (the ‘1996 Hague Convention’). Pursuant to Art. 23 of the 1996 Hague convention the Kafala order of the Moroccan courts is recognised in the United Kingdom.

Analysis

18. I am most grateful to all of the advocates for their helpful submissions. They have each taken a different approach to the issues in the case. Ms Hannett KC's and Mr Laing's submissions have helped to further crystallise the parties' respective positions and to narrow the issues. There is no dispute that X should remain living with the applicant and if permissible, the applicant should adopt X (save that the Secretary of State for Education took no position on the merits). This is a welfare issue that I will return to later in this judgment as I must first consider if there is a lawful route through which this may be achieved. Miss Weston KC, Dr Cronin and Miss Kakonge submit on behalf of the applicant that there are three permissible routes through which the court may make an adoption order in the present circumstances. These may be summarised as:
- a. the court's powers to make an adoption order are not hindered by any non-compliance with the domestic statutory and regulatory framework. Any breach of the terms of s.83 ACA 2002 do not fetter the court's powers to make an adoption order under s.46 of the said Act,
 - b. the court by adopting a purposive interpretation of the legislation can find that the regulatory requirements have been complied with in substance and can make an adoption order, and
 - c. the court is obliged to adopt an interpretive approach under s. 3 of the Human Rights Act (1998) and to 'read down' s.83 of ACA 2002 and to disapply the requirements of regulation 4 of AFER 2005.
19. The applicant no longer pursues an argument that the court has powers that are founded in common law principles to grant an adoption order. I entirely endorse this approach and for completeness observe that there are no such powers. As Ms Hannett KC and Mr Laing correctly submit on behalf of the Secretary of State for Education, there is a complete statutory and regulatory scheme dating back to the Adoption of Children Act (1926) that governs adoptions in England and Wales and the court has never had a power to make adoption orders outside these provisions. I will address the applicant's proposed permissible routes to adoption by reference to the issues that I have identified at the start of this judgment.

Application of s.83 ACA 2002 and AFER 2005

20. An adoption order significantly alters the individual's legal and social status throughout his/her life. This is an interference of the highest order with an individual's rights which is only permissible if it is in pursuance of a legitimate aim, necessary, proportionate and in accordance with the law. Therefore it is essential that appropriate safeguards are put in place so that all adoption orders are made on the correct premise. This presents particular challenges for adoption of children from other jurisdictions. The complexities of such arrangements have recently been the subject of discussion and recommendations by the President of the Family Division's Public Law Working Group (*Recommendations for best practice in respect of adoption*, November 2024).

21. The ACA 2002, s. 83 places important controls and restrictions on children being brought to England and Wales for adoption that do not fall within the 1993 Convention. The present proposed adoption is not an adoption under the 1993 Convention and the s. 83 restriction clearly engaged. In *Re A & B (Adoption: s.83 ACA 2002)* [2024] EWHC 2837 (Fam) which was published on 8 November 2024, Cobb J provides a most helpful analysis of the applicable law. The facts of the case are different to the present case. *Re A & B* concerned familial arrangements for two teenage girls who were the subject of guardianship orders in favour of their aunt that were made in the courts of Pakistan with no parent available to care for them. When addressing the primary issue, the learned judge found that the children had not been brought to the UK *'for the purposes of adoption'* and the terms of s.83 and AFER 2005 were not engaged.
22. In his judgment the learned judge then considered the circumstances where the provisions of s.83 apply and are not complied with. In summary, he observed that in exceptional cases, the court retains a power to make an adoption order despite noncompliance with AFER 2005 as to do otherwise would deny the child and the applicant's Article 8 ECHR rights and the court has power to disapply AFER 2005 as it would be likely to interfere with and be incompatible with the child's and the applicant's *"significant and established Article 8 rights"*.
23. These observations have served to further highlight the difference in approach between the parties to the facts of the present case. The applicant argues that her submissions fall squarely within the observations in *Re A & B* and not only has the court the power to disapply the AFER 2005, it is obliged to do so to protect the Article 8 rights of X and the applicant. The applicant points to the similarity in the guardianship order of Pakistani court and the Kafala order of the Moroccan district court and invites the court to find that the purpose for bringing X into the UK was to meet the applicant's ongoing obligations under the Kafala, thus falling outside the regulatory and statutory regime and s.83 of ACA 2002 is not engaged. In the main the guardian follows the same route by submitting that the court has the power to make an adoption order despite any non-compliance and that it may disapply the AFER 2005 if the court finds it is required to observe X's Article 8 rights.
24. The Secretary of State for Education very properly continues to make no submissions on the factual issue including whether s.83 is engaged and whether there has been a breach of its provisions. She invites the court to find that it was not necessary to disapply the AFER 2005 as the court is not precluded from making an adoption order where there has been non-compliance with the AFER 2005. She submits that the observations by Cobb J were obiter having decided that the circumstances of the applicant and children in *Re A & B* fell outside the ambit of the s.83 and AFER 2005. Furthermore, following the ordinary principles of statutory construction, the domestic statutory regime allows for an adoption order to be made despite non-compliance after the court has considered all of the factors and applied the appropriate weight to the same.

25. The detailed evidence that has been filed by the applicant has not been challenged. In her statements she sets out the background and her reasoning that led her to wish to adopt a child from Morocco. She provides a helpful and illuminating account about the circumstances in which she came to adopt Y and the circumstances leading to her decision to adopt a second child. Although the advice she received from IAC was incorrect, she faithfully took all the necessary steps towards adopting X. It is not necessary to rehearse the detail of her unchallenged evidence. The thread running through her evidence is her wish and plan to adopt both children. There is nothing in her evidence that points to her wishing for Y to have a different legal status to X. All of the evidence overwhelmingly demonstrates her ardent desire to offer both children a lifelong permanent family through adoption. She has been assessed as a prospective adoptive parent.
26. I am entirely satisfied that the purpose for which she brought X into the UK was to adopt him. Whilst the Moroccan Kafala creates the rights and obligation that the applicant must observe, the Kafala was granted as part of a larger plan by the applicant to bring X to the UK so that she could adopt him. To state otherwise would be to create an unsustainable and impermissible legal fiction designed to avoid the legislative controls and restrictions that Parliament has put in place. In my judgment the provisions of s. 83 of the ACA 2002 and AFER 2005 are engaged and the applicant, albeit unwittingly, has breached the terms of the aforesaid provisions.

Consequences of non-compliance

27. As I have recorded earlier, the ACA 2002 creates a criminal offence for non-compliance which is punishable by a term of imprisonment not exceeding six months and/ or a fine. This issue may be relevant to the welfare decision that the court is tasked with and each case must be decided on its own facts. In the context of the present case it is a factor that is weighed in the balance. The independent decision of the prosecuting authorities is not one that this court can be involved in. However, the consequences of any decision to prosecute may be relevant to the welfare decision of the court.
28. In my judgment the answer to the main issue of whether the court is permitted to grant an adoption order in the face of non-compliance first lies in the statutory construction and interpretation of the ACA 2002. The legislation is clearly and carefully drafted. It creates different consequences for non-compliance. For example, regulation 9 of AFER 2005 provides that:

“9.—(1) In a case where the requirements imposed by section 83(4) of the Act have been complied with and the conditions required by section 83(5) of the Act have been met, section 42 shall apply as if—

a) subsection (3) is omitted; and

(b) in subsection (5) the words from “three years” to “preceding” there were substituted “six months”.

(2) *In a case where the requirements imposed by section 83(4) of the Act have not been complied with or the conditions required by section 83(5) have not been met, section 42 shall apply as if—*

(a) subsection (3) is omitted; and

(b) in subsection (5) the words from “three years” to “preceding” there were substituted “twelve months”.

Thus, as it is submitted by Miss Wise, the ACA 2002 and AFER 2005 clearly identify the consequences of a breach of the terms which do not extend to prohibiting the court from making an adoption order.

29. Developing this argument further, Ms Hannett KC and Mr Laing rely on three authorities that lend further support. In *Re C (A Minor) (Adoption Illegality)* [1999] 2 WLR 202 Johnson J ‘speculated’ that Parliament’s intention for the breaches of the prohibitions in the Adoption Act 1976 could not lead the court to make a decision that is contrary to the child’s welfare. In *Re X* [2008] EWHC 1324 Fam Munby J (as he then was) observed that public policy was relevant to welfare and this included dishonesty and subterfuge, but where welfare and public policy point to different outcomes, welfare will prevail. Finally, in *Re Z (A child: Egyptian fostering: UK adoption) (Rev 1)* [2016] EWHC 2963 (Fam) Russell J found that the AFER 2005 do not provide a bar to the making of an adoption order. However, I note that the issues in this case were very different to those in the present case and the court did not hear detailed argument about the issues arising from the application of s.83 or AFER 2005. They further submit that the above approach is entirely consistent with *R v Soneji* [2005] UKHL 49 and *R (Majera) v. Secretary of State for the Home Department* [2021] UKSC 46 in which the court stated that the court must ask if Parliament intended that the act leading to non-compliance with prescribed provisions should be invalid.
30. I entirely endorse these arguments. In my judgment the silence of the legislation about the court’s powers to make an adoption order in the face of a breach or non-compliance, can only be purposeful and intentional. The legislation is carefully drafted so that on the one side of the scale it recognises the significance and the importance of compliance with s. 83 which is designed to safeguard and promote the welfare of the children that are brought to this jurisdiction for the purposes of adoption. This is balanced by the other side of the scale by not fettering the court’s exercise of its powers to make orders that promote and safeguard the subject child’s welfare throughout his life. To do otherwise can lead to perverse outcomes in some circumstances where the court would be forced to make decisions that are contrary to the child’s welfare which the ACA 2002 itself requires the court to regard as its paramount consideration. Indeed the thread that runs through the legislative framework is the protection of the child, his or her rights and the paramountcy of the child’s welfare interest throughout his or her life.
31. At the core of its foundation, the domestic legislative framework clearly recognises and heeds the individual’s rights to a private and family life that are trumped by the

paramountcy of the child's rights. This is entirely consistent with the European jurisprudence that is enshrined in the Human Rights Act 1998. Therefore, in my judgment, in this instance there is no requirement for the court to engage with the merits of disapplication of the secondary legislation or any 'read down' of the legislative framework. In making this observation, I fully recognise that in appropriate cases the court has the power to disapply secondary legislation so as to observe and give effect to the individual's protected fundamental rights, see *RR v Secretary of State for Works & Pensions* [2019] UKSC 52 referring to *Re G (adoption: Unmarried Couple)* [2019] AC 173 and *Re TY (Preliminaries to Interlocutory Adoption)* [2019] EWHC 2979 (Fam).

32. Furthermore, it is imperative to recognise the purpose and function of the crucial safeguards that the legislative framework provides for. These are designed to protect children from maltreatment or being inappropriately brought into this jurisdiction. Nothing that I have stated in this judgment should be regarded as a dilution of these very important restrictions and safeguards. Whilst non-compliance is not a bar to the court making an adoption order and is an important part of the welfare analysis, in such circumstances an order may only be made in the most exceptional circumstances that are demanded by the child's welfare interest throughout his or her life.

Welfare

33. X is two years old and much too young to form and express an informed view about his future. He has been living with the applicant and Y since the spring of 2023 and he is thriving in the care of the applicant. Neither of his parents are available to care for him. X is a happy, healthy child who is meeting all of his developmental milestones. In his short life he has experienced several changes that included being abandoned when he was three days old, living in an orphanage and finally being placed in the care of the applicant. The evidence of the applicant's capacity as a parent is overwhelmingly positive. Not only has she a proven record of her capacity by looking after Y, she has also demonstrated her unending commitment and skills to making X a part of her family for the remainder of their lives. She is entirely well placed to meet X's cultural needs and sense of identity. This is further buttressed by the support of the extended family who have also demonstrated their commitment to X.
34. Should the applicant adopt X, he will have an opportunity for a close and enduring relationship with Y. An adoption order will provide X with the most secure legal route through which he can become a lifelong member of his family. Whilst other orders may be considered, these are not in my view realistic options. There is no justification why X should have a different legal relationship to his family compared to Y. Indeed this is unnecessary and potentially harmful to him. There are no individuals in his biological family that can be traced and their views cannot be canvassed. In any event, the evidence is clear that any change to his living arrangements and family life would be unconscionable, unnecessary and highly damaging. Mr Leong, with characteristic clarity, makes strong and persuasive submissions on behalf of X that point to the overwhelming evidence in favour of the making of an adoption order. He further

submits that the extent and the nature of the breach is not such that should compromise X's welfare interest. He invites the court to weigh into the balance the applicant's entirely proper intentions and how she was misled by receiving the wrong advice from IAC.

35. In my judgment, X's welfare demands that the court makes an order for adoption in favour of the applicant. I am entirely satisfied that X's biological parents cannot be found. The Moroccan District Court has declared him to be an abandoned child. Therefore, I dispense with parental consent pursuant to s.52(1)(a) of the ACA 2002. I hope that any consequences flowing from the breach of the statutory requirements will not impact on X's welfare and future hopes. In my judgment X's circumstances make it an exceptional case that require the court to make an adoption order in the face of non-compliance with the terms of ACA 2002 and AFER 2005.

Conclusions

36. For reasons that I have set out earlier in this judgment, the operation of the domestic laws of England and Wales in the context of the international legal scheme may be summarised as follows :

- a. A Moroccan Kafala is founded in the Islamic doctrine as a contractual relationship between the guardian and the estate which is endorsed by the court (or notarised) creating legal obligation and responsibility by the guardian towards the subject child. Adoptions are not recognised under Moroccan law and expressly prohibited in some Islamic Countries. A kafala is not an adoption.
- b. A Moroccan Kafala order is recognised in the UK under the terms of Article 23 of the 1996 Convention.
- c. The Lord Chancellor is the Central Authority for England. It is a continuing role under The Parental Responsibility and Measures for the Protection of Children (International Obligations)(England and Wales and Northern Ireland) Regulations 2010 which continue to have effect. The Central Authority performs a number of functions under the terms of the 1996 Convention that are undertaken by the operational team known as the International Child Abduction and Contact Unit ('ICACU'). These functions do not include any oversight role under the 1996 Convention (see Chapter V of the 1996 Convention).
- d. An intercountry adoption is one where the child to be adopted is habitually resident in a different territory/state to the prospective adopter.
- e. All adoptions including intercountry adoptions in England and Wales are governed by the ACA 2002 and associated regulations.
- f. All intercountry adoptions where the two countries are parties to the 1993 Convention (Convention adoptions), must follow the set procedure

in the said Convention as implemented by the Adoption (Intercountry Aspects) Act 1999, the ACA 2002 and the AFER 2005.

- g. Where a child who is the subject of an intercountry adoption comes to the UK from a state that is not a member of the 1993 Convention (non-convention adoption), the movement of the child into the UK is subject to the restrictions of s.83 of the ACA 2002 and AFER 2005.
 - h. Regulation 4 of AFER 2005 provides further protection for subject children by requiring a Certificate of Eligibility to be issued by the Secretary of State before the child can enter the territory of the UK. In recognition of Morocco's objection to adoption a Certificate of Eligibility is not provided in respect of Moroccan children.
 - i. ACA 2002 s.83 is engaged if the child is brought to the UK *for the purposes of adoption*. This is a factual determination by the court that must be based on evidence.
 - j. ACA 2002 s.83 provide important safeguards for children and must be complied with. Non-compliance is a criminal offence and likely to lead to an adoption order being refused by the court.
 - k. However, non-compliance is not an absolute bar to the court making an adoption order and in exceptional cases the court may make an adoption order after weighing into the balance the fact and circumstances leading to non-compliance including the gravity and nature of such acts.
 - l. When making an adoption order, the court's paramount consideration is the child's welfare throughout his or her life and any decision must be made among other factors by reference to the factors that are set out in s.1(4) of the 2002 Act.
-