Neutral Citation Number: [2025] EWHC 103 (Fam)

Case No: BM67/2024

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN RE B (ADOPTION ASSESSMENT)

-

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2025

Before :

THE HONOURABLE MRS JUSTICE JUDD

- -

Re B

- -
- -

Hilka Hollmann of Dawson Cornwell for the **Applicants**
Nick Brown (instructed by **A Metropolitan Borough Council Legal Services**) for the **1st Respondent**
Artis Kakonge (instructed by **Star Legal**) for the **2nd Respondent**

Hearing dates: 11th December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 23rd January 2025 by circulation to the parties or their representatives by e-mail.

.....

MRS JUSTICE JUDD
This judgment was delivered in private.

Mrs Justice Judd :

1. This is an application for an adoption order with respect to a child, B, who is of primary school age. B was born in Sierra Leone, and was adopted there by the applicants in 2019 whilst they were living in the United Arab Emirates (the "UAE"). Sierra Leone is not a signatory to the 1993 Hague Convention, nor are adoption orders made there automatically recognised in England and Wales.

Background

2. The applicants are a married couple, one of whom is a British national. They lived here together for a short period in 2017/18. Apart from that one applicant has never lived in the UK and the other applicant last lived here over 30 years ago. They met when they were both living in the Far East and married shortly afterwards. The applicants moved to live in the UAE in 2018 and have remained there ever since.

3. Shortly after they moved to the UAE the applicants began to consider adopting a child from Sierra Leone Through contacts with other adopters locally (there are a significant number) they were put in touch with a UAE registered Clinical Psychologist who prepared a Home Study Report, and a lawyer in Sierra Leone who they instructed. Through their lawyer the applicants were then put in touch with the Director of an orphanage who showed them the profiles of several children.

4. One of the children at the orphanage was B, who had been taken there by family members following the death of B's grandmother who had looked after B since B's mother died in childbirth. The applicants arranged to travel to Sierra Leone to visit B and to make preliminary arrangements for an adoption. They spent time visiting B and had B to stay with them overnight. The solicitor guided them through the legal process. The applicants were taken to meet with the Children's Affairs Directorate at the Ministry of Social Welfare, Gender and Children's Affairs, and the adoption process was explained to them. A meeting was arranged with B's birth father and the birth mother's adult son. They then left the country whilst further arrangements were made. The adoption order was made a few weeks later. The applicants were intending to be present at the hearing but by the time they arrived in Freetown it had already happened. They then took B into their care and flew to the UAE with B a few days later. Those days were not easy ones as B had contracted malaria and had to spend some time in hospital before B was well enough to leave.

5. For the last five years B has lived with the applicants in the UAE where B has thrived. B is a much loved and cherished member of the family, is doing well at school, and has lots of friends. The applicants have kept in touch with B's older birth siblings in Sierra Leone, and plan to visit them there with B at some point in the near future.

6. The applicants also plan to come to live in England soon. The application for a British adoption order was made on 30th May 2024 following the giving of requisite notice. The application has been made so that B is able to enter the country as a British citizen and also to ensure that B's position as their child and child of the wider family is recognised in English law.

7. The applicants gave notice to the adoption agency within the area where the male applicant's parents live which is also the area where he had his last home in England.

The adoption agency prepared an Annex A report which is wholly positive. Once the proceedings were issued B was joined as a party and a Cafcass Guardian appointed. The court invited the Secretary of State for the Home Office and for the Department of Education to be served with the application and make representations should they wish to do so, but they have each declined. The High Commission of Sierra Leone was also informed of the application, but there has been no response.

8. The Guardian's report was filed in October 2024 and was also wholly positive, recommending that an adoption order should be made. B is thriving in the care of the applicants and regards them as their parents. B is well integrated into the family and happy.

9. On 11th October a further hearing was listed before Her Honour Judge Tucker. She expressed some concern as to whether local authority assessment for the Annexe A report was sufficient to meet the requirements of section 42(7)(b) Adoption and Children Act 2002, and required the local authority to file a further statement to deal with that specific issue. The case was then transferred to me.

Statutory framework

10. In coming to a decision relating to the adoption of a child, the paramount consideration must be the child's welfare, throughout his life. The court must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare. The court must have regard to all the matters set out in the adoption welfare checklist at s1(4) of the Adoption and Children Act 2002.

11. The Act sets out a number of statutory requirements that have to be met before an adoption order may be made. First, in the case of a couple, either both applicants must be habitually resident or one of them domiciled in the UK (s49(2) and (3)). They must be over the age of 21 (s50). The child must have lived with the applicants for three of the last five years (s42(5)) unless the court grants permission for the application to be made earlier. The applicants must have given notice to adopt to the prescribed local authority (s44(2) and (3)) not less than three months or more than two years before submitting the application.

12. Section 47(1) provides that an adoption order may not be made if the child has a parent or guardian unless the parent(s) or guardian consents or their consent is dispensed with.

13. I am satisfied that the requirements set out above in paragraphs 11 and 12 have been established on the facts before me. The applicants are over 21 and married. B has been living with them continuously for five years. Notice has been given to the local authority in the correct timescale. Despite the fact that the first applicant has lived out of the jurisdiction for so long, this is his domicile of origin and I am satisfied that has not changed. His family live here, his connection with this country has remained, and he intends to return.

14. There appeared to be some errors in the documentation from Sierra Leone, the reasons for which are not clear, although they have now been amended.

15. The mother's death certificate states that she died at the same date and time that B's current birth certificate records B as being born. The death was registered on 1st September 2023, after the date of the adoption itself. The applicants believe that the reason B's birth and B's mother's death were registered so long after the event is likely to have been the result of the Ebola epidemic. These matters leave some doubt as the accuracy of the systems in place for registering births and deaths in Sierra Leone.

16. Despite these issues concerning the documentation, I note that family members including the mother's older son (B's brother) have confirmed the details that have been given. . The birth father does not appear to have parental responsibility but there is a signed and witnessed document from him in the correct form giving his consent. He has also spoken to the Guardian to confirm his position.

17. There is, however, a further requirement. Pursuant to section 42(7) ACA 2002:

> "an adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant, or in the case of an application by a couple, both of them together in the home environment have been given
>
> (a) Where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,
>
> (b) In any other case, to the local authority within whose area the home is."

18. B was not placed with the applicants by an agency so it is s42(7)(b) which applies. This was an issue which concerned Judge Tucker, leading her to direct further evidence from the local authority as to how they conducted the assessment.

19. The social worker with the conduct of the case filed a statement dated 18th November 2024. She stated that one part of the assessment was conducted by video link with B and the applicants in their home in Dubai. There were several interviews conducted in this way amounting to about 9 hours in all. The social worker spoke to the applicants and B at length (separately and together) and had a virtual tour of their home.

20. The other part of the assessment was carried out over two days in this country. It took place at a hotel where the family were staying, and also included observing the family at lunch together in the nearest town. The social worker interviewed family members as well as the applicants, saw the family together, and spent some time alone with B.

21. In *Re SL* [2004] EWHC 1283, Munby J (as he then was) stated, following the earlier authority of *Re Y (Minors)(Adoption: Jurisdiction)* [1986] 1 FLR 152, that the home environment referred to in the predecessor to s42(7)(b) of the 2002 Act must be in England and Wales:

> "*..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 [s13(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*".

22. This position was confirmed by the Court of Appeal in *Re A (Adoption: Removal)* [2009] EWCA Civ 41; [2009] 2 FLR 597. Wall LJ stated that there was no requirement that the home specified in s42(7)(a) needed to be in the jurisdiction, unlike s42(7)(b) where it did. At paragraph 92 Moore-Bick LJ added that he considered the purpose of subsection (b) was to ensure that where no adoption agency was involved, a local authority takes responsibility for carrying out the necessary assessment before an adoption order is made.

23. *Re A* involved the intended placement of children who were in care in this country with relatives in the United States, and turned upon the construction of s84(4) of the 2002 Act which required the children to have had their home with the applicants at all times during the 10 weeks preceding the making of the application. The Court of Appeal concluded that it was not necessary for this to take place in this country. Applicants for orders under that section are by definition not seeking a domestic adoption order, but an order giving them parental responsibility prior to adoption abroad.

24. In the light of those authorities it is plain that the home referred to in s42(7)(b) must be in this country. Therefore, whilst the local authority have observed the family in the home environment in the UAE by video link and in person here in a hotel and the community, the statutory requirement is not strictly met.

25. On behalf of the applicants, Ms Hollmann, supported by Ms Kakonge, counsel for B's Guardian, submits that this court should take a sensible and purposive approach to the construction of the statute. It cannot have been intended that an application would fail if applicants are not assessed inside a home here. Ms Hollmann argues that both the statute and regulations anticipate a situation whereby applicants will not be living in the jurisdiction. The Act requires at least one applicant to be domiciled here or for both to be habitually resident. Further, Regulation 3 of The Local Authority (Adoption)(Miscellaneous Provisions) Regulations 2005 provides for a situation where non-agency applicants who no longer have their home in England (including where only one of them had a home in England) can serve notice upon a local authority, being the local authority for the area where the last home was situated. Those applicants and children must be assessed somehow. Indeed there are examples of cases where assessments take place in the family home of relatives, or even in a property rented for a short period for that very purpose.

26. In this case both the social worker and the Guardian consider that the assessment has been sufficient, that B is thriving in the care of the applicants and that it is very strongly in B's welfare interests that an adoption order should be made now. Ms. Hollmann queries what an extra period of assessment in this country, in a home environment which the applicants would have to provide, would actually bring in terms of the information available.

27. On behalf of the local authority Mr. Brown submits that whilst the local authority maintains that it is in the best interests of B to be adopted as proposed and that it

would welcome the court acceding to a purposive reading of s42(7)(b), there are some difficulties with this approach. Even purposive reading must have its limits, and there can be 'hard' and 'stubborn' facts which can prevent or delay outcomes that might be indicated by welfare *Re X (Adoption Application: Gateway Requirements)* [2013] EWHC 689 (Fam). Adoption has a 'peculiar finality' because it affects the most fundamental of human relationships.

28. All counsel invite me to consider the numerous authorities in relation to the making of both parental and adoption orders where judges have 'read down' legislation in a manner which is compatible with the convention rights of the individuals affected. Examples include judges making parental orders in cases where applications have been made long after the statutory time period of 6 months has elapsed, or where one of the applicants has died. Examples in adoption applications are *Re A (A Child: Adoption Time Limits s44(3)* [2020] EWHC 3296 (Fam), *X v M* [2022] EWHC 3296, *Re E (Adoption by One Person)* [2021] EWFC 45, *Re YP (Adoption of an 18 year old)* [2021] EWHC 3168, *Mr. and Mrs. C v D, E and T* [2023] EWFC 10 , *E v L, R and H* [2023] EWFC 214, *K v Maya and A County Council* [2023] EWHC 293, *Re TY (Preliminaries to Intercountry Adoption)* [2020] 1 FLR 793.

29. I have also been referred to the decision of Cobb J in *Re A and B (Adoption: Section 83 ACA 2002*) [2024] EWHC 2837 (Fam) where the primary question for the court was the meaning of the phrase "for the purpose of adoption" in section 83(1) of the Adoption and Children Act 2002. Cobb J decided that the applicant did not bring the children into the UK for the purposes of adoption (so that they were not in breach of s83) but he went on to consider what the situation would have been had they done so, and had been in breach of the Adoption with a Foreign Element (AFER) Regulations 2005. Cobb J said this at paragraphs 44 to 46:

> "*44..(i) The focus of the court's analysis should be upon the consequence of the non compliance as opposed to the imperative wording of the provision (Re X at [37]). 'The emphasis ought to be on the consequences of non compliance (per Lord Steyn in Regina v Sonneji and another [2005] UKHL 49[2006] 1 AC 340 at [23]'*
>
> *(ii) if there is a breach of a statutory procedural requirement the modern approach is to look at the underlying purpose of the requirement whether departure from it contravenes the letter of the statute and if so, whether it renders it a nullity. (Re X at 39/41)' a "purposive" interpretation should be adopted.*
>
> *(iii) the consequences of making or not making the order (or in this case of allowing the application to proceed) should be considered; this would be particularly pertinent if the consequences could be lifelong and irreversible (Re X at [54]).*
>
> *(iv) the Human Rights Act 1998 requires an interpretation which gives effect to the rights enshrined therein (Re X at [44]).*

(v) relevant to the exercise of discretion (in considering whether to adhere strictly to the letter of the statute or not) would be whether the parties had acted in good faith (Re A and B at [45], [52,[65].

(vi) consideration should be given to whether any party would suffer prejudice if the application is allowed to proceed (Re X [65] cited in KB and RJ at [38]).

45. Developing the point above as I said in Re TY at [32(ii)] it is essential to recognise and give effects to the rights of children and the Applicant for a family life under Article 8 of the ECHR buttressed in this and other cases by Article 3 of the UN Convention on the rights of the child. In Re TY at [32] I said this:

> *"any interference with those rights must be both proportionate and justified. For the court to thwart their wholly reasonable joint ambition for an adoption order in this country at this stage, an ambition which has been both long held and conscientiously pursued, would represent an unjustified and disproportionate interference with those rights"*

46. The conclusions I reached in Re TY in respect of the application of the HRA 1998 in this type of situation were reassuringly validated by the Supreme Court less than one week later by its judgement in RR and Secretary of State for Work and Pensions [2019] UKSC 52 specifically at [27], [28], [29], [30] and [32]. The Supreme Court held that it is not unconstitutional for a public authority court or tribunal to disapply a provision of subordinate legislation which would otherwise result in acting incompatibly with a Convention Right where this is necessary in order to comply with the Human Rights Act 1998. In delivering the judgement of the court in RR, Lady Hale referenced in Re P and others [2008] UK HL 38 sub nom In Re G (Adoption: Unmarried Couple) 2009 AC 173 in which she said at [116] that:-

> *"the courts are free simply to regard disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with convention rights. Indeed, in my view, this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with a convention right if it is free to do so"*

In her conclusions on the main appeal in RR she said this at [27]:

> *"there is nothing unconstitutional about a public authority court or tribunal disapplying a provision of subordinate*

> *legislation which would otherwise result in their acting incompatibly with the convention right where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear*".

Decision

30. Although the facts of this case are very different, in coming to a decision as to whether to make an order despite a departure from a statutory requirement, this is a very helpful distillation of the relevant case law in such circumstances.

31. The wording of s42(7) is that the local authority should have sufficient opportunities to see the applicant(s) with the child in the home environment in this country if it is a non-agency case. I suppose that one could argue that in some cases 'sufficient' opportunities could include none at all if there has been an assessment elsewhere, but I think the true intention of the Act must have been for the prospective adopter and child or children to have all been seen in person at home, even if the 'home' concerned was not the family's only or even main one. At the time the statute was brought into force it seems unlikely that anyone would have foreseen the widespread use of technology to enable assessments to be carried out virtually.

32. The Annex A report which is required to be produced by the local authority following its assessment must include a number of matters as set out in Practice Direction 14C FPR 2010. Some of this information could be ascertained without any meeting with the prospective adopters at all, as it includes a lot of factual rather than evaluative matters. Nonetheless, it does entail an assessment of the adopters' ability to bring up the child throughout his childhood, and seeks observations on the living standards of the household, particulars of the home and living conditions, and particulars of any home where the prospective adopter proposes to live with the child, if different. It also requires a description of how the proposed adopter relates to adults and children, and of their personality. In section D (e) there is a requirement for the report to specify whether there has been sufficient opportunity to see the family group and the child's interaction in the home environment, and at (f) an assessment of the child's integration with the family of the prospective adopter, and the likelihood of the child's full integration into the family and community.

33. In my view the fact that the family have only been seen in the home environment over a video link is a significant omission in the overall assessment. Whilst a virtual tour of the home, and interviews of the family conducted in the same way are very helpful, there is a qualitative difference between engaging via a screen and actual presence. I do not consider that the requirement in s42(7)(b) can be seen as merely procedural, nor do I find that an omission can be made good by a combination of seeing the family at home online and then in person in a hotel and/or out in the community. The fact that the social worker and Guardian consider this to be enough is very important, but it is not decisive. Adoption is a very important step for a child, and has lifelong consequences which relate not only to the day to day care of the child, but also to their long term sense of identity. Whilst it is overwhelmingly likely that an in person assessment in a home in this country will be positive, that does not mean it is not necessary.

34. There is no reason to think that the applicants have not acted in good faith in this case, although they will have known when they went through B's adoption in Sierra Leone that they would have to comply with the requirements for an adoption in this country should they wish to apply.

35. The consequences of a refusal by the court to make an adoption order at this particular point in time does not mean that an adoption order cannot be made at all. It should not be overly difficult for the applicants to obtain a home in this jurisdiction for a sufficient period of time for the assessment to be properly carried out here. What amounts to a sufficient period of time is something that the local authority will have to consider in the light of what happens in relation to domestic applicants and the work that has already taken place. There is no evidence that the applicants will be refused a visa for B to enter the country with them for a period of time which is sufficient, nor that B's position in the meantime will be so parlous that an adoption order needs to be made now. B has been living with them for several years without there being a UK adoption order. Whilst I appreciate that delay is not good for B, B has been living in this particular situation since 2019 and that is not about to change.

36. B and the applicants have a right to respect for their private and family lives pursuant to Article 8 of the European Convention of Human Rights. Nonetheless, the statutes and regulations surrounding adoption are there for a good reason, to ensure the safety and protection of children. There are strict regulations for the adoption of children who are brought into this country by those who are habitually resident here, and it is unlikely that Parliament intended that children who are adopted by applicants whose main home is elsewhere should be afforded less protection under the law. The State of Sierra Leone permits adoption of children by people who have no other connection with the country, and therefore it is important for prospective adopters to be properly approved here. If the applicants had been habitually resident in England and Wales they would have had to undergo an assessment before B being brought here, and to have obtained a Certificate of Eligibility. I am not able to say whether an assessment by a private, UAE accredited psychologist was any less rigorous as the sort of assessment that would have taken place here, but the process is different.

37. In all the circumstances I find that the requirements of s42(7)(b) of the 2002 Act have not been met, and I am not prepared to 'read down' the provisions so that an adoption order can nonetheless be made. The assessment will need to be carried out in accordance with the statute before the court can determine whether the order should be made, applying the paramountcy principle in s1 of the Act and the welfare checklist.

38. I appreciate that this decision will be distressing for the applicants. I also appreciate the effect of delay upon B, but do not find that this should carry overriding weight. B will continue to live with the applicants in their home in the UAE and it will be a matter for them to decide how next to proceed. I am content to adjourn this application for a number of months for them to make the necessary arrangements for an assessment in accordance with s42(7)(b), and to resume the hearing thereafter. In the alternative they may wish to seek permission to withdraw their application and apply again at a later stage when they have come to live here on a permanent basis.