Neutral Citation Number: [2016] EWHC 3085 (Fam)

Case Nos: FD16P00226 and ZC126/16

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the matter of N (A Child)

Between :

GS **Applicant**

- and -

(1) SS
(2) PM
(3) THE SECRETARY OF STATE FOR THE HOME DEPARMENT
(4) N (through her solicitor as litigation friend)

Respondents

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- -

Ms Kathryn Cronin (instructed by Goodman Ray) for the applicant
Mr Paul Greatorex (instructed by the Government Legal Department) for the third respondent
Ms Deirdre Fottrell QC and Ms Gemma Kelly (instructed by Philcox Gray) for the fourth respondent
The first and second respondents were neither present nor represented

Hearing dates: 12-13 October 2016

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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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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
This judgment was handed down in open court on 1 December 2016

Sir James Munby, President of the Family Division :

1. I have before me two applications by GS, who I will refer to as the applicant. She was born in Bangalore in India in 1956. It is common ground that her domicile of origin was India. So far as is material for present purposes, she has a brother, PVV, and a sister, PM. Both applications relate to N. She was born in India on 4 December 1998, and will accordingly reach her eighteenth birthday in just a few days' time. She is the biological child of the applicant's sister, PM, and her (the sister's) husband, SS.

The background

2. In 1999, when she was about eight months old, N was informally adopted by the applicant and her husband, S. They had married in 1997; he was killed in a car accident in 2009. The applicant describes in her witness statement what happened:

> "N was born in December 1998 and in August 1999, when she was about 8 months old; S and I travelled back to India to visit my family for two months. It was during this visit that my sister gave N into our care. I already knew that my sister was struggling with having another child. The pregnancy was unplanned and she was not happy to be pregnant. The difficulties with her husband were escalating and she spoke to me about not being able to care for another baby. I tried to help her and I would give her money when I could but her husband was never going to change.
>
> During our visit my sister came to visit me at my brother's house. She brought N with her. She was crying about her situation and clearly in trouble. Again, I tried to reassure her that were there for her and for the baby. My sister then handed N to me, and she said to me "this is your child". From that moment, I have treated N as my own. I told my sister then that we would take all responsibility for her and when she was placed in my hand that day she became our daughter. We were both very emotional, knowing what an important decision this was for both of us. I felt overwhelming joy and great sadness for my sister. I know that my sister was also sad but relieved to be spared a responsibility she could not undertake. From that point onwards N has been our daughter. I have supported N. S and I had joint responsibility for her ever since this date until his death, when I have taken over sole responsibility for her. She has been brought up knowing me as her mother and S as her father. I have provided everything emotionally and materially for her. Everyone understands, including N, that we are her parents.
>
> We took N into our care that day. As we were both working in Saudi Arabia at the time, we arranged with my brother and his wife for N to live with them and their son who was just 6 months older than N."

3. Her brother, PVV, says much the same in his witness statement:

> "[The applicant] and her husband S arrived from overseas for their holidays in time to attend [a family] baptism. After the baptism, PM shared her worries with [the applicant]. We were altogether in our home and PM said that she could not care for N and wanted to give her to [the applicant] and S for adoption. It was very emotional for all of us. Girl children often miss out in India and PM said that she wanted N to have an education and not to have to struggle for her education, food, home, security and everything. We would all have helped PM to keep and support N. She was clear that she made this decision and wanted [the applicant] and S to be N's parents. As they had recently lost a baby they were surprised at the event but very pleased and overjoyed at their child."

4. The adoption was formalised at a customary ceremony on 27 October 2011, followed by the execution by the applicant and her sister and brother-in-law on 29 October 2011, before the registrar of the local registry office at Bellary in the State of Karnataka, of a Deed of Adoption.

5. In her witness statement the applicant gives this description of the ceremony on 27 October 2011:

> "We had a customary ceremony at the house on 27 October 2011 at which the Priest from our local church attended. At this ceremony friends and family members and the Priest were there to witness the formal giving of N to me. My sister and her husband, my brother and his wife, and my cousin's brother (now deceased) all attended the ceremony at our home. Afterwards we had a meal at the home to celebrate. The Priest stayed for the meal and my sister hugged me and told me that N is my legal daughter and she needed to concentrate on her son who was going the same bad way as her husband. She looked happy. My daughter was with me all the time; she kept asking me whether she could now travel with me so that we could live together. I told her that she could not come now, but that we would be together later. My sister had to go back to her home in the village and she left that night with her husband."

6. Her brother says this in his witness statement:

> "The lawyer advised that she could make an adoption through our pastor. On his advice we invited our church pastor, church committee members and N's birth parents to our home and we remade the adoption through prayers and PM and SS again giving N to [the applicant]. Then [the applicant] filed an application to the sub registrar office at the Court asking for the registration of adoption."

7. The applicant continues by describing what happened two days later:

"On 29 October 2011 N and I attended the local registry office to have the adoption formalised. My lawyer also attended the registration. My sister and her husband travelled back for the registration of the adoption and my brother and his wife and my cousin's brother also attended.

The registration was conducted like a court hearing might be in England. We were taken into a room and my lawyer started off by speaking to the registrar to explain why we were there. The registrar confirmed whether my sister and her husband consented to the adoption and to make sure that they understood the effect of the adoption – that they were no longer her parents, that all their rights as parents were removed and that I was now N's sole parent. He spoke to them to ensure that they were happy to give N in adoption to me. My sister and brother in law both answered that they were, and my sister said that she had given N to me when she was 8 months old and that I was her mother from that time. She said that she understood that she had no role as a mother to N. N's father agreed but did not say anything more. The circumstances and reasons for giving N to me were mentioned: that my sister was struggling and not supported to bring up a girl and that she had a son to support, that I was childless lonely and depressed and that my sister had a lot of difficulties and could not look after N.

The registrar also spoke to N was asked whether she wanted me as her adoptive mother and whether she was willing to go to the UK with me, her mum; she said that she was and that she wanted to live with me and missed me and wanted to study in the UK.

The registrar then asked me questions about my care of N and my circumstances. I told him that I send money for N and make decisions about her welfare, that my brother attends school meetings on my behalf and tells me all about her progress and I spoke about my close contact, the time I live with her and that I call every day. I was asked whether I will look after N for the rest of my life as my whole and sole responsibility. I said that I would. The registrar was told about the death of my husband, N's close attachment to him and that I would not have any more children. I gave an account of my circumstances in the UK and said that I work for the British government in a hospital and that I have my own house with a mortgage and no dependents. I showed proof of my residence status in England and my old passports, also letters from the hospital that confirmed where I worked and my earning capacity. I showed the Registrar the letter that I had from the hospital. The registrar also asked me questions about my medical circumstances and support network in England. I said that I was healthy and that if I had any problems I had family in Preston,

> Bolton and Coventry who I or N could go to. I showed my husband's death certificate, my birth certificate, my sister's marriage certificate."

8. The Deed of Adoption was in the following terms:

> "WHEREAS
>
> 1 The adoptive mother has no issue, male or female, and having regard to her circumstances, she has no expectation of any issue in future.
>
> 2 The adoptive mother want to adopt a child as her daughter.
>
> 3 The natural father has two children, one son and one daughter.
>
> 4 The adoptive mother has approached the natural father and mother for giving a female child in adoption.
>
> 5 The natural father and mother have agreed for giving in adoption one of their female child named [N] aged 13 years to adoptive mother.
>
> 6 The ceremony of giving and taking in adoption has been duly performed along with our religious ceremonies customary with the parties on the day of Oct 27, 2011.
>
> 7 The parties considered it expedient and necessary that a proper deed of adoption be executed as an authentic record of adoption.
>
> NOW THIS DEED WITNESSETH AS FOLLOWS:
>
> 1 Declaration of Adoption The parties hereto do hereby declare that the adoptive mother has duly adopted the said child as her daughter from the day of Oct 27, 2011 i.e. the day on which ceremony of giving and taking in adoption has been duly performed our religious ceremonies customary with the parties.
>
> 2 Legal rights and liabilities of adopted daughter, the said daughter has been transferred to the family of adoptive mother and shall have, from the date of adoption, all the legal rights and liabilities of an adopted daughter.
>
> 3 maintenance, etc., of adopted daughter. The adoptive mother shall be liable for the maintenance, education and other expenses of the adopted daughter and shall bear all such expenses in accordance with her status.
>
> 4 what ever rights to my own children as per law, from this day onwards the said adoptive daughter also will have every

> legal rights as per law as my own children and she also having funeral rights."

9. On 18 November 2011 N's birth was officially re-registered to show the applicant and her deceased husband as N's parents.

The expert evidence

10. Expert evidence of Indian law, which has not been challenged before me (see a letter from the Government Legal Department, on behalf of the Secretary of State for the Home Department, dated 15 July 2016), is contained in a report dated 8 April 2016 by an appropriately qualified Indian lawyer, Lavanya Regunathan Fischer, an advocate practising in the Supreme Court of India with an office in New Delhi. She explains that:

> "Adoptions in India are covered by two streams of law, one the 'secular' non-religious law for which the statutory provisions are contained in the Juvenile Justice Act, 2000 (the JJ Act, amended in 2006, 2011 and 205). The second method of adoption is to conduct the proceedings according to religion based personal laws. Both these sets of Acts, Rules and procedures are equally valid in India and so a person can choose to adopt under the procedures of either of these two sets of laws.
>
> In the instant case the adoption has been undertaken according to court sanctioned religious practises. This is understandable since it is an intra family adoption as the mother giving the child and the mother taking the child in adoption are sisters."

11. Having then explained the jurisprudence and case-law and analysed it in some detail, she continued:

> "The adoption deed has been registered as per the provisions of the Stamp Act of the state. The birth certificate itself records the change in parentage. This is correct and in keeping with the procedure regarding the re-registration of birth certificates after adoptions. As per procedure the original birth certificate should have been sealed and kept away but since all parties are aware of the adoption its presence in the bundle is not an issue. All these actions are in conformity with the guidelines on the registration of birth certificates sent to the State Registrars by the Registrar General of India in 1999 in order to enable the recording of adoptions and protect the privacy of the persons involved. The state government machinery would not record, register and go to the extent of changing a birth certificate if the slightest doubt existed as to the validity of the adoption."

12. She summarised matters as follows:

> "The adoption of N by [the applicant] is a valid and final adoption as the Karnataka High Court has recognised adoptions amongst the Christian communities of the state. The procedure as accepted by state authorities with regard to such adoptions has been followed. Various state departments have been involved in examining whether a valid adoption existed, the giving and the taking of a child in adoption is recorded in a very detailed deed once the registrar has been satisfied that the adoption was intended to have its full consequences. The fact that the registrar went into the details of the procedure and ensured that all the pre requisites of an adoption had been fulfilled and that the parties were willing and capable of accepting the consequences of the adoption is very important. If there had been any doubt as to the validity or the capacity of any of the parties to undertake this adoption, the registrar would not have accepted and registered the deed especially keeping in mind the primacy of the concept of best interests of the child. Thereafter, various other governmental agencies have satisfied themselves with regard to the bona fide nature of the adoption. These in depth and detailed investigations are especially important in customary adoptions as they serve to ensure that the adopting parents are capable of fulfilling their responsibilities upon adoption and also that the adoption was done with the consent of all parties involved. This deed document has been properly registered as per the Stamp Act. On the basis of these investigations and records, the birth certificate itself has been changed. The birth certificate with the names of the adopting parents has been issued by the appropriate governmental authority recognising the rights of the adopting parents and the relation between the child and its adopting parents. In addition to the state machinery, the community has participated in the ceremony and the religious sanction is evidenced by the presence of the Priest at the ceremony. This above all confirms a final and valid adoption. In addition the child was given in adoption by the birth parents sometime in 1999, which was before the JJ Act even came into force in 2000 and much before the 2006 amendment creating rules for adoption. Therefore, it is clear that this is a valid and recognised adoption as per the laws of India currently in force."

The family history

13. I need at this point to go back and explore the family history in a little more detail.

14. Following their marriage in India in 1997, the applicant and her husband returned to their employment in Saudi Arabia, where she had been employed since 1990. They remained in Saudi Arabia, without N, following the informal adoption in 1999. In 2003 the applicant obtained employment in this country. Her husband followed her here in 2005. In 2009 they travelled to India for the purpose of formalising the adoption. Before this could be done, the husband was killed in a car accident in India.

Throughout all this time, N had been placed by the applicant with her brother, PVV, and his wife in India.

15. In her witness statement, the applicant described these arrangements:

> "My husband and I paid for N's care completely. We paid money into my brother's account for everything that N's needed. We made a regular payment to my brother every month for her day to day to day living, including school expenses. If my brother ran out of money or if N needed something extra then we would send additional money.
>
> I had as much contact with N as I could. From the day of her placement with me I have spoken to her every day. We would speak on the telephone daily even though initially, she could not speak back to me. I wanted her to hear my voice. Every year since her placement with us, my husband and I travelled to India for 2 months and we spent this time at my brother's house with N. When I was there N lived with me, sleeping in our room with us and spending all our time together. It was wonderful to have her in my life and to be called mummy. I loved every moment that I had with her; I remember that I would make chapattis whilst she crawled around and played, hiding from me and laughing. And then as she grew older I chose her clothes, her school, kept close touch with her teachers, knew everything she did at school, supervised her homework by phone and talked with her about her friends and everything that was going on. She told me everything and confided in me. We are very very close."

16. In his witness statement, her brother said this:

> "N was a lovely niece for me and my wife … When [the applicant] and S left for Saudi Arabia they left their adopted child N with us. [The applicant] made all the financial arrangements for N and sent us money every month. Since we didn't have any girl child we took good care of our niece. In time she went to school with my son and we loved her very much. [The applicant] and her husband used to visit us in Bellary twice a year. N used to stay with them in their room in our house during their holidays. [The applicant] loved taking care of her daughter during their visits. Both of them used to treat N with great love. N loved them as well and she used to call them her mum and dad. We did not think to tell N about her adoption. Parents think these matters are not ones to discuss with children. N came to know of her adoption when she was about 13. After the death of S, [the applicant] returned to her work in [the] UK in October 2011 and said she cannot stay alone in the UK and will take N with her. As per the suggestion made by the lawyer, we told N that she would be legally

> adopted so that she could go to the UK and explained everything to her about her consequences. She is well aware of her adoption.
>
> I remember she felt confused for a time. [The applicant] and S spoke to her at length and she came to understand how she was wanted. They did not tell her that PM was unable to care for her because of the domestic abuse. She was told that [the applicant] wanted a child and could give her a better life. N has had a sheltered life protected from these family problems.
>
> [The applicant] wanted N to keep contact with her birth parents and her elder brother. However, PM did not visit often – only for family celebrations or when she needs to escape from her home. SS was distanced from us. He wasn't ready to listen to our advice. [The applicant] always tried to convince him to be a responsible person and to take good care of his family. It is hard for [the applicant] to see him because she arranged the marriage and was confident that he was from a good family and would bring happiness to PM. We all feel sad and disappointed at their unhappy marriage. N therefore has had little contact with her birth parents or with her brother. PM's son was good in the beginning but as he grew up, he followed his father's footsteps avoiding school, learning bad things etc We now see him very rarely. [The applicant] has tried to encourage him back into education but this has not been successful."

17. Following her husband's death in March 2009, the applicant remained in India with N until April 2010, when she (the applicant) returned to this country. Between April 2010 and October 2011, when the adoption was formalised, the applicant was in India with N from 22 October 2010 until 15 November 2010, from 19 March 2011 until 27 April 2011, and then again from 25 October 2011. Following the formal adoption, the applicant was in India with N until 15 November 2011 and then from 6 April 2012 until 2 May 2012, from 19 October 2012 until 14 November 2012, from 14 June 2013 until 10 July 2013, from 18 October 2013 until 1 November 2013, from 18 April 2014 until 12 May 2014, from 19 December 2014 until 12 January 2015, from 30 July 2015 until 19 August 2015, and from 2 December 2015 until 16 December 2015. On 16 December 2015 N came to this country with the applicant. They have lived here together ever since.

18. Throughout all this time the applicant retained her employment in this country and, following the formal adoption in October 2011, N remained placed in India with the applicant's brother and sister-in-law, until she came to this country in December 2015.

19. In 2014 the applicant was naturalized as a British Citizen.

The immigration proceedings

20. On 15 October 2012 the applicant had applied on behalf of N for entry clearance to the United Kingdom for the purposes of settlement in accordance with paragraph 310

of the Immigration Rules, HC 395, as amended, on the basis that N was the applicant's adopted child. On 10 April 2013 N was interviewed by the Entry Clearance Officer (ECO) – at the time she was 14 years old. The application was refused by the ECO later the same month. The ECO gave the following reasons:

> "Although there are doubts regarding your actual living arrangements given the contradictions between yours and your Mothers statements it is apparent that you were not adopted due to the inability of your original parents to care for you or that there has been a genuine transfer of parental responsibility to the adoptive parent. I am also not satisfied that you have lost or broken his ties with his family of origin (paragraph 310 (ix) and (x) of HC 395 (as amended).
>
> I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant Paragraph of the United Kingdom Immigration Rules."

The reference to the "mother" is to N's biological mother. The applicant appealed to the Entry Clearance Manager (ECM) by way of review; the appeal was refused on 31 October 2013.

21. On 25 April 2013, the applicant had appealed from the decision of the ECO to the First-Tier Tribunal (Immigration and Asylum Chamber), supporting her appeal with a very short undated witness statement. The appeal was heard on 4 August 2014 and dismissed on 18 August 2014. Judge Beg explained his decision as follows:

> "The issue before me is whether the appellant meets the requirements of paragraph 310 of the Immigration Rules HC 395. The Entry Clearance Officer considered that the adoption is one of choice rather than necessity and that there is no apparent transfer of parental responsibility from the appellant's biological parents to the United Kingdom sponsor. It is common ground that the appellant's biological parents are alive and well and living in India. It is also common ground that the sponsor legally and formally adopted the appellant in India on 29 October 2011.
>
> … In considering the evidence as a whole and on a balance of probabilities, I do not find that the appellant's biological parents are unable to care for her. Nor do I find that the appellant has been informally adopted by the sponsor when she was young. I find that the official adoption was to facilitate the appellant's entry to the United Kingdom. I find that the appellant is being well cared for both by her maternal uncle and by her parents. I find that they spend time both at the appellant's maternal uncle's house but also in the village. I find that the sponsor undoubtedly loves the appellant especially since she has no children of her own and is now a widow. She

> gave evidence that tragically she has no children and suffered a number of miscarriages during her marriage. In conclusion I find that the appellant does not meet all the requirements of paragraph 310 of the Immigration Rules HC 395. I find that there has not been a genuine transfer of parental responsibility to the adoptive parent."

22. On 4 August 2015 the applicant applied on behalf of N for entry clearance as a student. N was interviewed by the ECO on 18 August 2015. The application was refused by the ECO on 21 August 2015. A further application was made on 26 November 2015, on this occasion successfully. On 8 December 2015, the ECO granted N permission to enter the United Kingdom as a Tier 4 (Child) Student from 8 December 2015 to 30 October 2017. As we have seen, she arrived in this country on 16 December 2015.

Domicile

23. In relation to her domicile, the applicant said this in her second witness statement:

> "England has become my home. This is where I want to live with my daughter for the present. This is where I have my home, my job and my friends. However, when I think about the country I have the strongest connection to, this is and always has been India. This is where I was born and brought up, where all of my siblings and close relatives still live, including my brother, sister and their children. This is where I returned to marry my husband and this is where I returned to adopt N. N and I speak Telugu at home, which is our mother tongue.
>
> It was my most wonderful husband's wish to be buried in his family plot in the state of Kerala when he died and this is where we laid him after the car accident. It is my clear wish on my death to be buried with my husband in his family plot."

The proceedings in the Family Division

24. The first application before me, dated 26 April 2016 is stated as being made under the inherent jurisdiction. It seeks:

> "a Declaration of recognition from this Court of my Indian adoption so that I can be recognised as N's legal parent in this jurisdiction, just as I am legally recognised in India. The adoption was formalised and sealed under Karnataka State powers on 29 October 2011."

It will be noted that the application was *not* formulated as being made pursuant to section 57 of the Family Law Act 1986.

25. The second application before me, dated 9 August 2016, is for the making of an adoption order in accordance with the Adoption and Children Act 2002.

26. The matter has twice been before me for directions. On the first occasion, on 29 April 2016, the applicant having undertaken to file an application pursuant to section 42(6) of the 2002 Act for leave to apply for an adoption order (it was subsequently issued on 3 May 2016), having confirmed that as soon as she was eligible to do so she would give the relevant local authority notice of her intention to apply for an adoption order in accordance with section 44(2) of the 2002 Act (in the event she gave notice on 6 May 2016), and having stated her intention on the expiry of the three month notice period referred to in section 44(3) of the 2002 Act to apply for an adoption order (hence the issue of the application on 9 August 2016), I ordered that the applicant "is granted leave to apply for an adoption order." I gave directions providing for service of the papers on both the Attorney General and the Secretary of State for the Home Department. I fixed a further directions hearing on 10 June 2016, indicating that at that hearing I would make anticipatory directions in the adoption application before it was issued.

27. The grant of leave in accordance with section 42(6) is a matter requiring careful consideration. The court has to apply the principles explained by Wilson LJ, as he then was, in *Re A (a minor)* [2007] EWCA Civ 1383, [2008] 1 FLR 959, para 10: the welfare of the child is a relevant but not the paramount consideration; another relevant consideration is whether the proposed application has a real prospect of success. In a case where this feature is present, the court will also be alert to consider the implications, if any, of the fact that there is, to adopt Pauffley J's expression, an intermingling of immigration and adoption issues: see *Re IH (A Child) (Permission to Apply for Adoption)* [2013] EWHC 1235 (Fam), [2014] 1 FLR 70, paras 72, 102.

28. In that case, Pauffley J was faced with what she described as a perhaps bold submission from counsel:

> "52 Mr Greatorex's perhaps bold submission is that I should approach the leave question on this basis – that if applicants do not comply with Immigration Rules, the court will not normally exercise its discretion to circumvent them. He also suggests that as a general rule, in order to surmount the permission hurdle it should be necessary to show 'something exceptional,' something over and above ordinary welfare arguments. That, Mr Greatorex urges, should be the proper approach when the court is considering whether to sanction an application which does not comply with the residence arrangements contained within s 42(5) of the 2002 Act as well as the requirements of the Immigration Rules.
>
> 53 Whilst Mr Greatorex's arguments at first blush might appear attractive, particularly against the background history of these proceedings, I decline his invitation to create a new test and for two reasons. First, I see no proper basis for further refinements to readily understandable and appropriately workable guidance. Secondly, as a matter of judicial precedent, as a puisne judge, I am bound to apply the legal principles laid down by the Court of Appeal.

> 54 Moreover, it seems to me that the existing framework is no straightjacket. A myriad of differing features will be of potential relevance whenever an application of this kind is confronted. Each and every case will turn on its own unique facts. In some instances there will be an extremely sound and realistic basis for exercising discretion so as to grant leave. In others, the circumstances will be such that the balancing exercise will come down against the giving of permission perhaps decisively so."

I respectfully agree with every word of that.

29. In that case, it might be thought unsurprisingly given the facts, Pauffley J refused permission: see her trenchant observations at paras 94-96. The present case is very different. Putting it at its lowest, it seemed to me that the adoption application had very real prospects of success, that the making of an adoption order was probably in N's best interests and that it was, accordingly, a very clear case for granting leave.

30. By a letter dated 25 May 2016 from the Government Legal Department the applicant and the court were informed that the Attorney General would not intervene in the proceedings. By a letter dated 2 June 2016 from the Government Legal Department the applicant and the court were informed that the Secretary of State for the Home Department wished to intervene and would be represented by counsel at the hearing on 10 June 2016.

31. At the second directions hearing on 10 June 2016 I gave comprehensive directions in relation to both applications, including, in relation to the as yet unissued application for an adoption order, directions for the filing (a) by the local authority by 15 August 2016 of the Rule 14.11 report and (b) by the reporting officer by 12 September 2016 of the reporting officer's report (the time for this subsequently being extended until 28 September 2016 by an order of MacDonald J dated 6 September 2016). I ordered that N's birth parents were to be joined as parties to both applications and gave consequential directions designed to ensure that they were properly informed about the applications and served with translations of the key documents. I listed both applications for final hearing before me on 12 October 2016.

32. I interpolate at this point to explain why I made these rather unusual directions. While recognition of the Indian adoption might confer on N certain benefits and advantages under the Immigration Rules, it would *not* confer citizenship. An adoption order made under the 2002 Act *could* have that effect, but only if the person being adopted is a minor (in other words under the age of 18) when the adoption order is made: see sections 1(5) and 1(5A) of the British Nationality Act 1981, as amended by the 2002 Act. So any adoption order, if it was to have this effect for N, had to be made before her eighteenth birthday on 4 December 2016. On the other hand, the applicant could not apply for an adoption order until the expiration of the period of three months referred to in section 44(3) – which at the earliest would be in early August 2016. To avoid any risk of the application for the adoption order being stultified by delays after it had been issued, it was, in my judgment, appropriate to make anticipatory directions.

33. On 12 July 2016 N's natural parents executed and signed before a Notary in Ballari, a document the material parts of which read as follows:

> "In India we the Wife and Husband whole heartedly given our child **N** in adoption to my own sister **[the applicant]** … **we do not have any objection regarding legal adoption of the child in foreign (UK)** we accept foreign legal adoption from the bottom of our Heart."

34. By letter from the Government Legal Department dated 15 July 2016, and in accordance with the directions I had given on 10 June 2015, the Secretary of State for the Home Department gave notice that she proposed to cross-examine the applicant and wished to cross-examine N. Formal applications to do so were issued on 25 July 2016 in relation to the applicant's first application and on 6 September 2016 in relation to her second application. On 9 September 2016 I made an order giving the Secretary of State liberty to cross-examine N in relation to both applications and directing her to attend the hearing, but giving her permission to apply to vary or revoke the order.

The hearing

35. The hearing before me began on 12 October 2016. The applicant was represented by Ms Kathryn Cronin, N by Ms Deirdre Fottrell QC and Ms Gemma Kelly, and the Secretary of State for the Home Department by Mr Paul Greatorex. N's birth parents were neither present nor represented. I had two witness statements from the applicant, a witness statement from her brother, PVV, and a witness statement by N's solicitor. I must return to them below. I had the expert report of Ms Fischer to which I have already referred. Mr Greatorex complained, with every justification, that the applicant's second witness statement and the witness statement from her brother had both been served only very shortly before the hearing and without permission. He opposed the admission of this evidence but made explicitly clear that if I admitted it, which I did, he would not seek an adjournment.

36. In addition, I had the reports which are usual in an application for an adoption order under the 2002 Act: an adult health report on the applicant from her GP dated 14 July 2016; a summary report on her health from the agency medical advisor dated 15 August 2016; a medical report on N from her GP dated 10 October 2016; the Rule 14.11 report from the local authority's social worker dated 10 August 2016; and the Reporting Officer's report dated 28 September 2016. None of these raises any matters of concern. It suffices to say that the author of the Rule 14.11 report recommended, giving reasons for her recommendation, that I should make an adoption order.

37. So too did the Reporting Officer, who noted that N's primary attachment is with the applicant, who she calls 'mum', and that she does not identify her birth parents as people she communicates with. She described the applicant as having "the capability, ability and willingness to provide a secure home environment for N where she can flourish and develop." She went on:

> "I have considered and balanced all of evidence available to me in order to reach my conclusion. The paramount consideration is N's welfare throughout her life. I am satisfied that no other

> Order will achieve the outcome that birth parents, the applicant and N all desire for N to become an adopted person. Her lifelong prospects in term of emotional and psychological impact, having a home, nationality, succession and inheritance will be secured via the making of an Adoption Order. I am assured that N, the applicant and the birth parents all understand that the making of the Adoption Order will mean that birth parent's parental responsibility is extinguished. N will not lose her sense of identity as she will remain in her birth family which will maintain her right to family life (Article 8).
>
> In my view the making of an Adoption Order would confirm the status of N and the applicant as a family unit as a matter of law and for the security and stability they have always wanted which in my view necessary.
>
> The applicant has evidenced she is fully committed to fulfilling her legal and parental responsibilities for N. I have considered all of the other alternative options for permanency, including no Order, a Special Guardianship Order, Child Arrangement Order, rehabilitation back to birth parents care or a Care Order. This is a non-agency adoption application and the local authority have completed an Annex A which supports the application made. No safeguarding concerns have been raised. I consider that the making of an Adoption Order is better for N than not doing so, given her primary attachment to the applicant and the negative impact it would have on her emotional well-being if it were not to be granted."

38. In her witness statement, N's solicitor, Ms Sheila Donn, said this:

> "N says that she has for as long as she can remember seen her adoptive mother, [the applicant], as her mother and was not until she was about aged 13 that she was even aware of her birth mother. Her birth mother lives away from the city where she lived with her uncle, [PVV], in a small village called Baskoda. N has only ever seen her birth mother at large family gatherings. The same applies to her birth brother.
>
> N has known that her adoptive mother has had to work abroad for most of her life. N has always known that both her adoptive mother and her adoptive father, when he was alive, provided all the financial support for her financially. They also used to support her emotionally and with her studies. N has a lot of toys which her father used to send to her and she has kept them in remembrance of him at her uncle [PVV]'s house.
>
> When she lived in India she went to St. Philomena's school in Bellary near her uncle's home. When she would return each day from school she would speak to the applicant by telephone.

> N can't remember how old she was when these phone calls started but it seems to her that she always had these talks with her mother or her father, possibly even before she started going to school. Both her mother and her father were very keen on her studies and were very pleased when it seemed she would follow them and aim to pursue a career in the medical sciences. They usually chatted about her school work and a bit about friends during these phone calls."

39. The first issue I had to address was whether N should be required to give evidence. That was a matter dealt with in my order dated 9 September 2016. Unhappily it emerged very shortly before the hearing that I had made the order in ignorance of the fact that both the applicant, in a skeleton argument dated 26 August 2016, and N, in a skeleton argument dated 8 August 2016, had set out reasons why N should not be cross-examined. I therefore reconsidered the matter in the light of those skeleton arguments (and a further written note on behalf of N dated 10 October 2016). Having heard oral submissions, I decided that N should *not* be required to give evidence or be cross-examined.

40. The Secretary of State's objective in seeking to cross-examine N was, in principle, perfectly appropriate: Mr Greatorex wished to probe the accounts N had given in her two interviews, both to challenge those accounts and to identify discrepancies between her accounts and the evidence of the applicant with a view to undermining the applicant's evidence.

41. Ms Cronin pointed out that the officials who had interviewed N had failed to comply with the Secretary of State's own guidance, *Immigration Directorate Instructions*, Chapter 19, section 1, stating the need to follow the instructions contained in *Processing Children's Asylum Claims*. She directed me to the observations of the Court of Appeal in *R (AN and FA (Children)) v Secretary of State for the Home Department* [2012] EWCA Civ 1636, esp paras 117-118. She submitted that, in breach of the guidance, when N was interviewed in 2013 there was no responsible adult present, the purpose of the interview was not explained, and nor were the interviewer's role, and N's rights explained. She pointed to the lack of clarity in some of the questions put during the interview, which suggested, she said, that the relevant official was not trained in interviewing children: thus questions were put referring both to "your natural parents" and to "your original parents" and neither question 28 ("Is Uncle Mother's or Father's brother?" nor the answer ("My own Mother's brother") is entirely clear as to whether "Mother" is a reference to N's birth mother or to the applicant. In the second interview, N used the word "mother" to refer both to the applicant (answer to question 3) and to her birth mother (answer to question 17).

42. Ms Fottrell referred me to the guidance given by the Supreme Court in *In re W (Children) (Care Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, paras 24-28, to the Guidelines in relation to children giving evidence in family proceedings issued by the Family Justice Council in December 2011, set out in the Family Court Practice 2016 pp 2630-2634, and to the judgment of King LJ in *Re R (Children)* [2015] EWCA Civ 167, explaining (para 11) that the court must weigh the advantages that the child giving evidence will bring to the determination of the truth and the damage that giving evidence may do to the welfare of the child and (para 14) that

justice must be seen to be done to both sides. Ms Fottrell submitted that Mr Greatorex did not get to first base, for there was, she said, nothing useful to be gained by N giving evidence: N was not a direct participant in the planning or decision-making, and was therefore limited in what she could recall; she makes no concrete assertions as to the history; and I was not going to be assisted either by Mr Greatorex going on a fishing expedition or even, given the real issues in the case, by him demonstrating that N's evidence is unreliable or even false. Moreover, she submitted, N did not want to give evidence and it is only in a rare case that a reluctant child should be compelled to give evidence.

43. While sharing Ms Cronin's concerns about the circumstances in which N had been interviewed, in particular in 2013, my decision was driven in major part by Ms Fottrell's submissions, which in substance I accepted. For the reasons articulated by Ms Fottrell, I was sceptical as to whether calling N would in fact be of any real assistance in ascertaining the truth – in reality the case, so far as the evidence was concerned, in large measure stood or fell on the applicant's evidence. And, whether or not N was called, it would be open to Mr Greatorex to make submissions drawing attention to any inadequacies or discrepancies in what N had said at interview.

44. In these circumstances, the only oral evidence I heard was that of the applicant. Her cross-examination by Mr Greatorex was directed in large part to three matters: first, to attempting to demonstrate the limited role in N's life that the applicant had played prior to October 2011, and indeed thereafter until N arrived in this country in December 2015; secondly, to attempting to demonstrate that the applicant was primarily motivated by her wish to enable N to enter this country to be educated here and, by means of adoption, to become a citizen of this country; and, thirdly, to attempting to demonstrate that the applicant had been permanently settled here since 2003, or shortly thereafter, and was therefore no longer domiciled in India in October 2011.

45. Mr Greatorex managed to make some headway in relation to the last point, demonstrating the roots the applicant had put down in this county well before 2011. And he somewhat dented the applicant's credibility when she insisted that the assertion in her witness statement in the immigration proceedings that she and N "keep in touch *every* day and I speak to her *at least 3 times a day*" (emphasis added) was the literal truth. Yet the reality, at the end of the day, as I assess what she did or did not say in the witness box, is that the applicant's case, as she had set it out in the various passages in her witness statements which I have quoted above, survived intact in all its essentials. In all its essentials I accept the applicant's evidence. Even taking N's interviews at their highest against the applicant, they do not, in my judgment, impact significantly upon either the applicant's credibility as a witness or her reliability as a historian.

46. The applicant sought to bolster her case by producing a list, running to 190 pages, of all the telephone calls she had made between 8 July 2013 and 16 December 2015, marked up to identify the very large number of calls she said she had made to N. An analysis of the records for the first six months undertaken by Mr Greatorex demonstrated, he said, (a) that during the period from 8 July 2013 to 31 July 2013 there were 13 days when there were only one or two calls a day, rather than the 3 claimed by the applicant, and (b) that during the first six months there were 23 days

when there were no calls at all. The applicant's telling riposte to the latter point was that 15 of these days – 18 October 2013 to 1 November 2013 – were during a period when the applicant was in fact in India with N (see paragraph 17 above). I was not provided with any further analysis of this material. What in my judgment, it demonstrated was that although the applicant was over-egging the pudding when in cross-examination she maintained her stance that she had spoken to N *every* day at least *3 times*, she was nonetheless speaking to her most days and often 2 or 3 times a day. At the end of the day, nothing, in my judgment, turns on this comparatively modest gap between the rhetoric and the reality.

Findings of fact

47. In these circumstances I can summarise my key findings of fact very shortly:

i) N was informally adopted in 1999 by the applicant and her now deceased husband in the circumstances she and her brother described in the passages in their witness statements set out in paragraphs 2-3 above.

ii) The adoption was formalised in 2011 in the circumstances the applicant and her brother described in the passages in their witness statements set out in paragraphs 5-7 above.

iii) The arrangements for N's care from 1999 until she arrived in this country in December 2015, and the extent of the applicant's involvement in her life throughout that period, were as the applicant and her brother described in the passages in their witness statements set out in paragraphs 14-18 above.

48. The customary ceremony which took place on 27 October 2011 is reminiscent of the similar ceremonies which took place in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, [1998] 1 FLR 225, in *Pawanadeep Singh v Entry Clearance Officer, New Delhi* [2004] EWC Civ 1075, [2005] QB 608, and, more recently, in *Re J (Recognition of Foreign Adoption Order)* [2012] EWHC 3353 (Fam), [2013] 2 FLR 298, and in *Re R (Recognition of Indian Adoption)* [2012] EWHC 2956 (Fam), [2013] 1 FLR 1487. I need not repeat the detailed analysis I undertook in *Pawanadeep Singh v Entry Clearance Officer, New Delhi* [2004] EWC Civ 1075, [2005] QB 608, but for very much the same reasons as in that case, I am entirely satisfied here that the applicant and N have shared family life within the meaning of Article 8 since well *before* the Indian adoption in 2011.

49. If the point is made here that, on the applicant's own account, over many years she saw N for only a small portion of the year, and that for most of the year she was in England while N was being looked after by her (the applicant's) brother in India, then my riposte is the same as to a similar submission we heard in *Pawanadeep Singh v Entry Clearance Officer, New Delhi* [2004] EWC Civ 1075, [2005] QB 608, para 90:

> "Mr Garnham very properly drew attention to what he suggested was the somewhat limited involvement of the adoptive parents in their son's daily life. Dyson LJ has set out the details and I need not rehearse them again. I merely add this comment, that these parents' practical involvement – never mind their emotional involvement – with their son is at least as

> great as that which characterised those many English officers of the Indian Army or the Government of India and their wives who, in the days of the Raj, left their infant child to be brought up in this country by some aunt before sending him off at an early age to boarding school, seeing him only at infrequent intervals when on furlough. There are many children who even in contemporary Britain for one reason or another see their parents only infrequently. We must be cautious before setting too high a benchmark for the existence of family life, certainly where there is the constancy and commitment which these parents have shown to a boy who is emotionally and psychologically their son."

Recognition of the Indian adoption

50. Against this factual background I turn to consider the first of the two applications before me: the application for a declaration of recognition of the Indian adoption.

51. This requires some detailed analysis, first in relation to the question of domicile.

Recognition: domicile

52. Domicile is central to the issues in relation to recognition. It is important at the outset to have a clear understanding of why domicile is significant and what is its role and function.

53. I start with the speech of Lord Westbury LC in *Udney v Udney* (1869) LR 1 Sc & Div 441, 457, cited by Lord Hope of Craighead in *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98, para 4:

> "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend."

54. As Lord Hope put it (para 5):

> "Private law issues, on the other hand, are referred to the law of the person's domicile. The criteria for the determination of a person's domicile are governed by a single principle which ought to be capable of being applied universally."

55. Thus, the basic feature of status as fixed by the law of the domicile is its universality: *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker v Luck and others* [1940] Ch 864, 894, *In re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 2 WLR 713, [2016] 1 FLR 621, para 96 (not affected on this point by the decision of the Supreme Court on appeal, *Re N (Children)* [2016] UKSC 15, [2016] 2 WLR 1103, [2016] 1 FLR 1082).

56. Baroness of Hale of Richmond in her speech in *Mark v Mark* said this (para 38):

> "As the Hong Kong Law Reform Commission explain, in their recent Consultation Paper on Rules for Determining Domicile [2004] HKLRCCP 1, para 1.2, "a person's domicile connects him with a system of law for the purposes of determining a range of matters principally related to status or property." Thus, for example, it governs capacity to marry or to make a will relating to moveable property; it is one of the factors governing the formal validity of a will; the domicile of the deceased also governs succession to moveable property and is the sole basis for jurisdiction under the Inheritance (Provision for Family and Dependants) Act 1975; legitimacy, to the extent that it is still a relevant concept, is governed by the law of the father's domicile; domicile is one of the bases of jurisdiction, not only in matrimonial causes but also in declarations of status or parentage under the Family Law Act 1986; it is the sole basis of jurisdiction to make an ordinary adoption order under the Adoption Act 1976, s 14, or a parental order under the Human Fertilisation and Embryology Act 1990, s 30. This is not an exhaustive list but it shows the particular importance of domicile as a connecting factor in family law."

57. Deriving from this view of the function played by domicile are two important consequences spelt out by Baroness Hale. The first (para 37) is that:

> "A person must always have a domicile but can only have one domicile at a time. Hence it must be given the same meaning in whatever context it arises."

The second (para 44) is that:

> "The object of the rules determining domicile is to discover the system of law with which the propositus is most closely connected for the range of purposes mentioned earlier. Sometimes that connection will be an advantage to him. Sometimes it will not. As Hughes J put it, at para 73:

> "the concept of domicile is not that of a benefit to the propositus. Rather, it is a neutral rule of law for determining that system of personal law with which the individual has the appropriate connection, so that it shall govern his personal status and questions relating to him and his affairs."

Acquiring a domicile of choice

58. As we have seen, there is a dispute as to whether the applicant was still domiciled in India in 2011, or whether, as the Secretary of State asserts, she had before then acquired a domicile of choice in this country.

59. I start with what Baroness Hale said in *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98, para 39:

> "An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely."

She continued, paras 46-47:

> "46 As a matter of principle, that connection is established by the coincidence of residence and the animus manendi. If a person has chosen to make his home in a new country for an indefinite period of time, it is appropriate that he should be connected to that country's system of law for the kind of purposes for which domicile is relevant
>
> 47 … English law requires only that the intention be bona fide, in the sense of being genuine and not pretended for some other purpose, such as getting a divorce to which one would not be entitled by the law of the true domicile."

She made clear, para 50, that the required animus manendi is a question of fact.

60. The relevant principles, and the application of those principles to the facts of particular cases are considered at length in *Dicey, Morris & Collins*, The Conflict of Laws, ed 15, 2012, with 3rd Supplement 2016, paras 6-018 – 6-020, 6-034 – 6-052. I was referred to *Barlow Clowes International v Henwood* [2008] EWCA Civ 577, [2008] BPIR 778, where the principles are summarised, and to *Cyganik v Agulian* [2006] EWCA Civ 129, [2006] 1 FCR 406. The facts of that case are striking for, despite residence in this country for 45 years and having built up a very substantial business here, the deceased was held not to have lost his domicile of origin. What is more important for present purposes is something Mummery LJ said (para 46):

> "Although it is helpful to trace Andreas's life events chronologically and to halt on the journey from time to time to take stock, this question cannot be decided in stages. Positioned at the date of death in February 2003 the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred

> intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes."

61. I turn to the application of these principles.

Recognition at common law

62. The modern law begins with the decision of the Court of Appeal in *In re Goodman's Trusts* (1881) 17 ChD 266, allowing an appeal from the judgment of Sir George Jessel MR, (1880) 14 ChD 619. The issue in this case related to the right to share in the estate of an intestate who had died domiciled in England. The deceased's next of kin for the purposes of the Statute of Distributions 1670 were the children of her two deceased brothers. The dispute was as to which of the five children of the deceased's brother, LG, were "children" of his within the meaning of section 7 of the Statute. The question arose in this way. LG had three illegitimate children in England, where he was then domiciled, by CS. Subsequently LG and CS went to Holland, where LG acquired a domicile of choice. While there he had a fourth illegitimate child by CS, HP. Subsequently, and while still in Holland, LG married CS. English law did not at that time[1] recognise the Roman and Canon Law doctrine of legitimation by subsequent marriage (legitimatio per matrimonium subsequens) but Holland did. Accordingly, all four previously born children became legitimate according to the law of Holland. Following the marriage, LG and CS had a fifth child, AD. It was accepted that the three older children had no claim, LG having been at the dates of their births domiciled in England and English law, as I have said, not recognising the doctrine of legitimation by subsequent marriage. The question was whether AD alone inherited or whether HP was also entitled.

63. Sir George Jessel MR at first instance and Lush LJ, dissenting in the Court of Appeal, disallowed HP's claim, holding that AD alone took. Cotton and James LJJ allowed HP's claim. So, HP succeeded. Understanding of the decision is assisted by the penetrating analysis of Mustill LJ, as he then was, in *R v Secretary of State for the Home Department ex p Brassey and anor* [1989] 2 FLR 486. I need not for present purposes go any further into that analysis. It suffices for present purposes to go first to the judgment of Cotton LJ, at 291:

> "it was urged that in an English Act of Parliament the nearest of kin must be taken to mean those who by the law of England are recognised as nephews and nieces, that is, as legitimate children of the intestate's deceased brothers. This is a doubtless correct, but the question is, who are by the law of England recognised as legitimate. It was urged in support of the decision of the Master of the Rolls that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who

[1] This in consequence of the Statute of Merton of 1235, recording the famous declaration of the Earls and Barons of England that "Nolumus leges Angliae mutare:" see *In re Goodman's Trusts* (1881) 17 ChD 266, 271-272, 297-298. The law has since been changed by the Legitimacy Acts of 1926, 1959 and 1976.

> at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of *status*, and in my opinion by the law of England questions of *status* depend on the law of the domicile."

64. James LJ agreeing with Cotton LJ said this, 296-297:

> "According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English Law as to an English child is. We have in this country form all time refused to recognise legitimation of issue by the subsequent marriage of the parents, and possibly our peculiarity in this respect may deserve all that was said in its favour by Professor, afterwards Mr Justice Blackstone, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws. But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin – the law under which he was born … The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations."

This part of his judgment culminated in this peroration (297-298):

> "suppose [a father] were to come … to this country … would it be possible to hold that he would lose his right to the guardianship of [his legitimated] child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, *Nolumus leges Angliæ mutare*? Can it be possible that a Dutch father, stepping on board a steamer at *Rotterdam* with his dear and lawful child, should on his arrival at the port of *London* find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*?
>
> ... I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing."

65. So much for the general principle: status is determined by the law of the domicile. I turn to consider how this principle applies to the recognition of foreign adoptions.

Recognition of foreign adoptions at common law

66. The starting point here is the decision of the Court of Appeal in *In re Valentine's Settlement, Valentine and others v Valentine and others* [1965] Ch 831, affirming the decision of Pennycuick J, [1965] Ch 226. This, like *Re Goodman's Trusts*, was a succession case. The question was who were the "children" of Alastair for the purposes of the residuary trusts in favour of Alastair's "children or remoter issue" under a settlement made in 1946 by Alastair's mother, who died in 1953. Alastair was the life tenant under the settlement. The question arose, following his death in 1962, in this way. Alastair was at all material times domiciled in Southern Rhodesia. He and his wife had a son, S, in 1936. They adopted a child, C, by court order in South Africa in 1939 and another child, T, also by court order in South Africa in 1944. The question was whether the trust fund devolved on S or equally on S, C and T. Pennycuick J, treating the law of Alastair's domicile as decisive, held that C and T were not his children for the purpose of the settlement. The Court of Appeal by a majority, Lord Denning MR and Danckwerts LJ, Salmon LJ dissenting, dismissed the appeal.

67. I go first to the judgment of Lord Denning MR, 841-842:

> "Do the courts of this country recognise the adoption orders made by the courts of South Africa so as to give [C and T] the status of children?
>
> I start with the proposition stated by James LJ in *In re Goodman's Trusts* (1881) 17 ChD 266, 297: "The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations." That was a legitimation case, but the like principle applies to adoption.
>
> But when is the status of adoption duly constituted? Clearly it is so when it is constituted in another country in similar circumstances as we claim for ourselves. Our courts should recognise a jurisdiction which mutatis mutandis they claim for themselves … We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also, out of the comity of nations, we should recognise an adoption order made by another country when the adopting parents are domiciled there and the child is resident there.
>
> Apart from international comity, we reach the same result on principle. When a court of any country makes an adoption order for an infant child, it does two things: (1) it destroys the legal relationship theretofore existing between the child and its natural parents, be it legitimate or illegitimate; (2) it creates the legal relationship of parent and child between the child and its adopting parents, making it their legitimate child. It creates a new status in both, namely, the status of parent and child. Now

> it has long been settled that questions affecting status are determined by the law of the domicile. This new status of parent and child, in order to be recognised everywhere, must be validly created by the law of the domicile of the adopting parent. You do not look to the domicile of the child: for that has no separate domicile of its own. It takes its parents' domicile. You look to the parents' domicile only. If you find that a legitimate relationship of parent and child has been validly created by the law of the parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it … But it is an essential feature of this principle that the parents should be domiciled in the country at the time: for no provision of the law of a foreign country will be regarded in the English courts as effective to create the status of a parent in a person not domiciled in that country at the time … I ought to say, however, that in order for adoption to be recognised everywhere, it seems to me that, in addition to the adopting parents being domiciled in the country where the order is made, the child should be ordinarily resident there: for it is the courts of ordinary residence which have the pre-eminent jurisdiction over the child: see *In re P (GE) (An Infant)* [1965] Ch 568, 585 … The child is under their protection and it would seem only right that those courts should be the courts to decide whether the child should be adopted or not.
>
> In my opinion, therefore, the courts of this country will only recognise an adoption in another country if the adopting parents are domiciled there and the child is ordinarily resident there."

Accordingly, because Alastair and his wife were not domiciled in South Africa, the court could not recognise the adoption orders as conferring the status of children on C and T.

68. Danckwerts LJ, 846, agreed with the Master of the Rolls:

> "I fear that our law's attachment to the idea of domicile is too much for us. I reluctantly, therefore, have come to the conclusion that I must agree with the opinion of the Master of the Rolls that the courts of this country will only recognise an adoption in another country if the adopting parents are regarded by the law of this country as domiciled there."

69. Salmon LJ dissented. He began, 847, a follows:

> "would our courts consider that the adoption orders made [T and C] the legitimate children of Alastair entitled to take under the settlement? Had Alastair been domiciled in South Africa at the material time, the answer to this question would in my

> judgment be clearly yes. This is because our courts, observing the comity of nations, generally recognise the status which the laws of a foreign country confer upon any children ordinarily resident there by reason of an adoption order made by the courts of that country in favour of adoptive parents domiciled there at the date of the adoption."

70. But Alastair was not domiciled in South Africa at the relevant time. Salmon LJ would nonetheless have allowed the appeal, 852:

> "It has been suggested that according to the theory of our law no foreign adoption should be recognised unless, at the time it was made, both adopted child and adoptive parent were domiciled within the jurisdiction of the foreign country and that this appeal should be decided accordingly. Our law, however, develops in accordance with the changing needs of man. These have always been ascertained by experience rather than by the rigid application of abstract theory. Experience has shown that there are sound sociological reasons for recognising an adoption in circumstances such as these. Adoption – providing that there are proper safeguards – is greatly for the benefit of the adopted child and of the adoptive parents, and also, I think, of civilised society, since this is founded on the family relationship. It seems to me that we should be slow to refuse recognition to an adoption order made by a foreign court which applies the same safeguards as we do and which undoubtedly had jurisdiction over the adopted child and its natural parents.
>
> The laws of adoption in South Africa are very nearly the same as our own. The principles underlying them are the same. The whole emphasis is upon the welfare of the child and elaborate precautions are laid down for assuring that the adoption order shall not be made unless it is for the benefit of the child; the consent of the natural parents is required. It is difficult to see why in these circumstances, unless compelled to do so, our courts should refuse to recognise these adoption orders made lawfully in South Africa which conferred nothing but benefits on all the parties concerned."

Salmon LJ would accordingly, 854, have recognised the validity of the adoption orders made by the South African courts and held that C and T were children of Alastair and as such entitled to take under the settlement.

71. The Master of the Rolls recognised the force of Salmon LJ's analysis, observing, 843, that:

> "I may, however, be wrong about this: because I recognise the force of the opinion which Salmon LJ will express, namely, that the courts of this country should recognise an adoption in another country if it is effected by an order of the courts of that

> country, provided always that their courts apply the same safeguards as we do. If this be right, then we should recognise the adoption orders in South Africa as conferring the status of children on [C and T]."

72. Given what has been said in the more recent authorities to which I must come in due course, it is necessary to pause at this point and take stock.

73. The first point is perhaps obvious, but needs emphasis. As *Re Goodman's Trusts* shows, we are not here concerned with a rule confined to the recognition of a status conferred, as in *Re Valentine's Settlement*, by a foreign court order. In *Re Goodman's Trusts* the status was conferred by operation of law. Thus the rule of recognition will also apply, for example, to customary or religious ceremonies, without court order, which are recognised by the foreign law as affecting status.

74. The second point relates to what exactly it was that *Re Valentine's Settlement* identified as being necessary if English law is to recognise a foreign adoption. On a straight-forward reading of the judgements there are, as it seems to me, four, and only four, strands in the majority's reasoning: first, the adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption; second, there must be proof of the relevant foreign law, demonstrating that the child has been legally adopted in accordance with the requirements of the foreign law; third, the foreign adoption must in substance have the same essential characteristics as an English adoption; and, fourth, there must be no reason in public policy for refusing recognition. The first, second and fourth of these require no elaboration. The third is not spelt out explicitly but is, as it seems to me, implicit in Lord Denning's description, in the passage quoted in paragraph 67 above, of what the foreign court is doing when it makes an adoption order. It was subsequently made explicit in the judgment of Johnson J in *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534, where he refused recognition of a Paraguayan 'simple' adoption which, in contrast to a Paraguayan 'full' adoption, maintained a link between the child and his or her biological parent and was, in certain circumstances, revocable.

75. In the light of more recent developments it is important to note that Lord Denning does not seem to have regarded proof of the adoption as having been in the child's welfare as a separate pre-requisite to recognition – though, no doubt, in egregious cases, it would in his view have fallen for consideration under the heading of public policy. Thus, in his summary (840-841) of the provisions of the Adoption of Children Act 1926, the Adoption Act 1950 and the Adoption Act 1958 he makes no reference at all to, respectively, sections 3(b), 5(1)(b) and 7(1)(b) of those Acts, the predecessors to section 6 of the Adoption Act 1976 and to what is now section 1 of the 2002 Act. Nor do I read his judgment as requiring that the *process* by which the foreign adoption was obtained should contain the same or similar safeguards as English adoption law would require. Read in context, his comment, set out in paragraph 67 above, about a foreign adoption "constituted in another country in similar circumstances as we claim for ourselves," is a reference to substance and not to process. The natural reading of the passage, set out in paragraph 71 above, where he comments on Salmon LJ's alternative view, is that he is describing what might be a *sufficient* condition if Salmon LJ is correct, not what is on his own analysis a further

necessary condition. So, as I read Lord Denning's analysis, whereas similarity as to the *substance* is essential to recognition, similarity in *safeguards* is not.

76. Before coming to the more recent authorities I need to touch on a group of four decisions: *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534, to which I have already referred (Johnson J), *Re Adoption Application 96 AO 147* (unreported, 31 January 1997; His Honour Judge Hague QC, sitting as a deputy High Court judge), *Re AMR (Adoption-Procedure)* [1999] 2 FLR 807 (His Honour Judge David Gee, sitting as a deputy judge of the High Court) and *Re AGN (Adoption: Foreign Adoption)* [2000] 2 FLR 431 (Cazalet J). Each relates to the recognition in this country of an order made by a foreign court preliminary to the making of an adoption order.

77. In *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534, Johnson J referred to and applied, 537, what Scott Baker J had said in *Re KAP* (unreported, 14 November 1988):

> "In my judgment there is no half-way house. Either English law recognises the Chinese adoption or it does not; either the Chinese adoption stands or it goes root and branch. I accept the submission of Mr Holman on behalf of the Official Solicitor that adoption is a single act carrying with it a bundle of correlative consequences.
>
> … It seems to me that the consequence of adoption is extinction of the mother's rights. But if the English court does not recognise the adoption then the adoption cannot be effective to the extent of extinguishing the mother's rights albeit non-effective for the purpose of re-establishing those rights with the adoptive parents."

78. The Paraguayan order with which Johnson J was concerned did two things: it constituted a 'simple' adoption order (which, as we have seen, was, as such, not entitled to recognition) and it contained a provision terminating the natural mother's patria potestas. Accordingly, as Johnson J put it, 537,

> "The adoption order made in Paraguay is not an order that is recognised by the law of this country and, following the decision of Scott-Baker J, I hold that in the eyes of English Law P's natural mother remains his mother."

The consequence was, 540, 541, that, for the purpose of the proceedings in England, the natural mother remained the child's parent and had to be served with notice of the English proceedings.

79. The other three cases, all to the same effect, are distinguishable in the outcome from *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534, because in each of them there were *two* orders of the foreign court: first in time an order which had the effect of terminating the natural parent's rights and, separately and subsequently, an adoption order. *Re Adoption Application 96 AO 147* (unreported, 31 January 1997) and *Re AGN (Adoption: Foreign Adoption)* [2000] 2 FLR 431 involved orders of the

Romanian court. *Re AMR (Adoption-Procedure)* [1999] 2 FLR 807 involved orders of the Polish court.

80. In each of the two Romanian cases the Romanian court had made a "declaration of abandonment" in relation to the child, declaring that parental rights should be transferred to and exercised by the orphanage in which the child was then placed. This had the effect under Romanian law of transferring from the birth parents to the orphanage all the parental rights which they held in the child (I take this summary from *Re AGN (Adoption: Foreign Adoption)* [2000] 2 FLR 431, 433, 436). In each case there was a subsequent Romanian adoption order which was not recognised in England because the adoptive parents were not domiciled in Romania.

81. In the first case, *Re Adoption Application 96 AO 147* (unreported, 31 January 1997; the relevant parts of the judgment are set out in *Re AGN (Adoption: Foreign Adoption)* [2000] 2 FLR 431, 436-437), His Honour Judge Hague QC distinguished the Romanian abandonment order from the Romanian adoption order. He pointed out that since the adoption order had been made on the application of English adopters, that order raised questions of status under English law, whereas the abandonment order was in no way concerned with the English adopters or any question of status in regard to them. Referring to the abandonment order he said:

> "That did not involve any English person. It involved only Romanian persons and English law *does* recognise and give legal effect to it. The important part of this Order for present purposes is that under Article 4 of the Law 47/1993 the exercise of parental rights was granted to the orphanage. From the translation of this law before me, it appears that this extinguished the parental rights of the natural parents. Under Article 6, a natural parent can apply for the regrant to him or her of parental rights unless the child has been adopted in the meantime. That this is the legal effect of Article 4 is confirmed by the advice or a Romanian lawyer which has been obtained who states:
>
> > "If the court finds that legal requirements are fulfilled, it decrees the child legally abandoned and grants the exercise of parental rights to the orphanage, hospital etc which petitioned for legal abandonment. When the court decree becomes final and absolute, birth parents have no more rights as regards the child, the consent to adoption being duly given by the Institute which took over the custody of the child"
>
> So, as a result of the Order, the natural parents of Z ceased to be his parents under Romanian law which is no doubt why the parents were not parties to the adoption proceedings.
>
> As I have indicated, English law recognises and gives effect to this Order. This means, somewhat unusually, that the natural parents need not be considered in English adoption

> proceedings, because they have lost all parental rights. There is no real equivalent to law 47/1993 in English law. It has some similarity to a care order, which confers parental responsibilities on the local authority which obtains it. Such an order only limits the exercise of the natural parent's rights and does not extinguish them."

82. That analysis was followed by His Honour Judge David Gee in *Re AMR (Adoption-Procedure)* [1999] 2 FLR 807. In that case the Polish court had made an order depriving the parents of their "parental authority" for the child. Subsequently, the Polish court made an order appointing the child's great-grandmother as her "guardian." In the context of a subsequent application in England for an adoption order under the Adoption Act 1976, Judge Gee had to answer two questions: (1) Did the first order of the Polish court also have the effect in English law of depriving the parents of parental responsibility (in which case the effect of the definition of "parent" in section 72(1) of the 1976 Act was that their consent to the making of an adoption was *not* required under section 16 of the 1976 Act)? (2) Was the great-grandmother, as a result of the second order of the Polish court, also a "guardian" within the meaning of section 72(1) of the 1976 Act (in which case her consent *was* necessary under section 16)? Applying *Re Valentine's Settlement* and *Re Adoption Application 96 AO 147*, Judge Gee held that both orders of the Polish court should be recognised. He held, 815, that the effect of the first Polish order had been to deprive the natural parents of parental responsibility and that in consequence their consent was not required. Differing from the earlier decision of Holman J in *Re D (Adoption: Foreign Guardianship)* [1999] 2 FLR 865, he further held, 816, that the effect of the recognition of the second order was that the great-grandmother was a guardian for the purpose of the 1976 Act and that accordingly her consent was required unless dispensed with.

83. In *Re AGN (Adoption: Foreign Adoption)* [2000] 2 FLR 431, the second Romanian case, Cazalet J followed and applied the reasoning of Judge Hague QC and Judge Gee in concluding, 437, that the declaration of abandonment by the Romanian court divested the child's birth mother of parental responsibility for him:

> "As a result of the abandonment order and its recognition by English law, A's birth mother no longer held parental responsibility under English law. Accordingly her agreement was not required for the purpose of the making of an order under the Adoption Act 1976."

Cazalet J also followed Judge Gee in preference to Holman J in holding that the Romanian orphanage was the child's "guardian" for the purpose of section 72 of the 1976 Act.

84. I respectfully agree with Johnson J, Judge Hague QC, Judge Gee and Cazalet J. Their analyses are completely consistent with the principles of recognition explained in *Re Goodman's Trust* and *Re Valentine's Settlement.* It follows that, subject only to the qualification explained by Johnson J in *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534, where a foreign court, properly seised of the matter, has made an order removing a parent's parental responsibility, that order will be recognised by the

English court. The consequence of such recognition is that (updating the statutory references to refer to the relevant provisions of the 2002 Act) the natural parent will *not* be a "parent" within the meaning of section 52(6) and the natural parent's consent will therefore *not* be required under sections 47(2) and 52(1). Nor for the same reason will the natural parent be a respondent to the application for an adoption order (FPR 14.3), or be entitled under section 47 to apply for leave to oppose the making of an adoption order, or be given notice of the final hearing (FPR 14.15). See further the Family Court Practice 2016, pp 278-279.

85. There followed a period during which there appear to have been no reported cases on the point. In recent years there has been a spate of decisions, all at first instance. Before proceeding further, and I shall need to analyse them in some detail, it is convenient to list these cases in chronological order. They are *D v D (Foreign Adoption)* [2008] EWHC 403 (Fam), [2008] 1 FLR 1475 (Ryder J), *Re N (Recognition of Foreign Adoption Order)* [2009] EWHC B29 (Fam), [2010] 1 FLR 1102 (Bennett J), *Re T and M (Adoption)* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487 (Hedley J), *Re J (Recognition of Foreign Adoption Order)* [2012] EWHC 3353 (Fam), [2013] 2 FLR 298 (Moor J), *Re R (Recognition of Indian Adoption)* [2012] EWHC 2956 (Fam), [2013] 1 FLR 1487 (Hedley J), *Z v Z (Recognition of Brazilian Adoption Order)* [2013] EWHC 747 (Fam), [2014] 1 FLR 1295 (Theis J), *A County Council v M and others (No 4) (Foreign Adoption: Refusal of Recognition)* [2013] EWHC 1501 (Fam), [2014] 1 FLR 881 (Peter Jackson J), *Re G (Recognition of Brazilian Adoption)* [2014] EWHC 2605, [2015] 1 FLR 1402 (Cobb J), and, very recently, *QS v RS and T (No 3)* [2016] EWHC 2470 (Fam) (MacDonald J).

86. First, *D v D (Foreign Adoption)* [2008] EWHC 403 (Fam), [2008] 1 FLR 1475, a case involving adoption orders made by a court in India in accordance with the Hindu Adoption and Maintenance Act 1956 in respect of two children ND and TD. Ryder J dealt with the law, paras 10-15. He referred, paras 11-12, to section 66 of the 2002 Act. He continued, para 13:

> "Section 1 of the Act provides that in coming to a decision relating to the adoption of a child the paramount consideration of the court must be the child's welfare throughout his life, and sets out the matters which the court must have regard to."

He then, para 14, quoted from Lord Denning MR's judgment in *In re Valentine*, continuing, para 15, with this quotation from *Dicey, Morris & Collins*, *The Conflict of Laws*, ed 14, 2006, para 20-133:[2]

> "If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to

[2] The passage is repeated, unchanged, in the current edition, *Dicey, Morris & Collins*, The Conflict of Laws, ed 15, 2012, para 20-133, though with this additional footnote after the phrase "differ from those of English law": "Approval of this interpretation is found in: *D v D (Foreign Adoption)* [2008] EWHC 403 (Fam), [2008] 1 FLR 1475*; Re N (Recognition of Foreign Adoption Order)* [2009] EWHC B29 (Fam), [2010] 1 FLR 1102."

> a foreign adoption on the grounds of public policy merely because the requirements for adoption in the foreign law differ from those of the English law. Here again the distinction between recognizing the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself."

87. Having considered the expert evidence, para 16, and what he referred to as 'Immigration considerations', paras 17-22, he expressed his conclusions as follows, paras 23-27:

> "23 … It is clear that the process in respect of both the adoptions has been rigorous and directed towards the best interests of ND and TD. These are full adoptions, all links with the birth parents have been severed and the adoptions are irrevocable.
>
> 24 It is in the best interests of ND and TD that they should remain in the care of Mr and Mrs D, that they should be recognised as the adopted children of Mr and Mrs D in this jurisdiction, and that the family should be able to be together in the UK … Mr and Mrs D … are asking for recognition of the adoptions in order that there is full and formal recognition of their parental responsibilities for ND and TD and to ensure that TD can comply with the immigration rules for adopted children.
>
> 25 … It must now be in the best interests of the children for Mr and Mrs D to have parental responsibility for them and for them to be legally recognised in this country as Mr and Mrs D's adopted children.
>
> 26 There are no public policy considerations which override the best interests of the children or the principle that the court in this country should recognise adoption orders properly made in India under The Hindu Adoption and Maintenance Act.
>
> 27 Mr & Mrs D, ND and TD have an established family life. By recognizing these adoptions, the court is safeguarding the Article 8 rights of ND and TD, as well as those of Mr and Mrs D."

88. It will be noted that Ryder J referred, and seems to have attached weight, to the "rigorous" nature of the Indian court process as well as to the best interests of the children.

89. The next case is *Re N (Recognition of Foreign Adoption Order)* [2009] EWHC B29 (Fam), [2010] 1 FLR 1102, where Bennett J was concerned with the recognition of an adoption order made by the Armenian court. For present purposes, the only significance of the case lies in Bennett J's decision, para 21, that:

> "a decision whether to grant a declaration as sought in the instant case is a decision 'relating to the adoption of a child' (see s 1). Thus the court must take as its paramount consideration in considering whether to grant the declaration IN's welfare throughout his life."

90. The next case is *Re T and M (Adoption)* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487, where Hedley J was concerned with the recognition of an adoption order made by the Nicaraguan court. Having referred to *Re Valentine's Settlement* and Ryder J's decision in *D v D*, he continued, para 12:

> "The key questions seem to be: first, was the adoption order obtained wholly lawfully in the foreign jurisdiction; secondly, if it was, did the concept of adoption in that jurisdiction substantially conform to the English concept; and thirdly, if so, is there any public policy consideration that should mitigate against recognition?"

91. In relation to the second and third questions, he added this, para 13:

> "The second question relates to the concept of adoption for the word itself can bear many shades of meaning from the idea of complete substitution of adopted family for natural family at one end of the spectrum through to an idea much more closely akin to our concept of special guardianship. Clearly the English court should not be recognising (and thus giving effect to) a foreign adoption unless what was conferred by that order is substantially the same as would be conferred by an English order. The third question relates to matters that would be repugnant to our jurisdiction as, for example, if what in reality was involved was the buying and selling of children irrespective of their actual welfare needs."

Referring to the expert evidence he said, para 14:

> "The effect of her opinion is twofold. First, she satisfies me that this adoption was obtained fully in compliance with the laws and procedure of Nicaragua; the order was and remains valid in that jurisdiction. Secondly, she satisfies me that the Nicaraguan concept of adoption is broadly in accord with that of England and Wales; in particular the effect of the order in Nicaragua is to achieve the complete substitution of M as the legal parent for the biological parents who retain no remaining rights."

92. It will be noted that Hedley J did not extend the list of relevant criteria beyond those which had appeared in *Re Valentine's Settlement*, and that his comparison between

the two systems was, consistently with *Re Valentine's Settlement*, confined to *concept* and not *process*, *substance* rather than *safeguards*.

93. The next case is *Re J (Recognition of Foreign Adoption Order)* [2012] EWHC 3353 (Fam), [2013] 2 FLR 298, where Moor J was concerned with the recognition of an Indian religious adoption. There had been no Indian court order. Moor J dealt with law as follows, para 10:

> "This is a non-Convention adoption but I can recognise it pursuant to the common law. I must apply the adoption welfare test in s 1 of the Adoption and Children Act 2002 in which AJ's welfare throughout her life is paramount. As a result of *Re Valentine's Settlement* [1965] Ch 831, I am not entitled to recognise a foreign adoption order unless the adopting parents were domiciled in India at the relevant time. Pursuant to the decision of Hedley J in *Re T and M* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487, when I have to consider the question of whether to recognise a foreign adoption under the common law, there are three questions which I must ask myself: (i) was the adoption order obtained wholly lawfully in the foreign jurisdiction; (ii) did the concept of adoption in that jurisdiction substantially conform to the English concept; and (iii) if so, was there any public policy consideration that should mitigate against recognition?"

94. Dealing with question (ii), Moor J said this, paras 12-14:

> "12 Did the concept of adoption in that jurisdiction substantially conform to the English concept? Again, I am quite satisfied as a result of the expert opinion that that is indeed the case …
>
> 13 I am quite satisfied that although this adoption does not conform exactly to the way in which we do it in this jurisdiction, this is an adoption under which, following the adoption, the child is deemed to be the child of the adopting parents for all purposes with effect from the date of the adoption order; that all other legal rights and remedies, such as inheritance, will now flow from the adopting family and the child does not have any rights vis-à-vis her birth family.
>
> 14 I am quite satisfied that this was an adoption that I can safely say satisfies entirely the second test of Hedley J. I accept that there was not the detailed welfare investigation in India that there would have been in this jurisdiction. But I am satisfied, first, that that was because this was an inter-family adoption and there was, therefore, no need; and, second, I am entirely satisfied that if there had been such a welfare investigation it would have come to exactly the same conclusion as social services came to in this jurisdiction."

Having dealt with questions (i) and (iii), Moor J continued, para 16:

> "Finally, am I, therefore, satisfied, pursuant to s 1 of the Act, that my recognising this adoption will promote AJ's welfare throughout her life? I am quite satisfied that it will."

95. It will be noted that, although Moor J followed Hedley J's analysis in *Re T and M (Adoption)*, he did touch, in para 13, on what he referred to as "the way" in which the adoption was done, and briefly discussed, in para 14, the extent to which the *process* in India fell short of what would have been expected in this country. But, it is important to note, this did *not* stand in the way of the adoption being recognised.

96. The next case is *Re R (Recognition of Indian Adoption)* [2012] EWHC 2956 (Fam), [2013] 1 FLR 1487, where Hedley J was concerned with the recognition of an Indian religious adoption which had been followed by the making by the Indian court of an order recognising the adoption in accordance with the Hindu Adoption and Maintenance Act 1956. Hedley J explained, paras 5-6, why that latter step had been taken:

> "5 … the applicants' legal advisors in this country took the view (rightly, as will appear) that the courts of this country were unlikely to recognise [the religious] adoption not least because it lacked the inquiries and protective measures that should accompany adoption.
>
> 6 Accordingly the applicants applied in the Indian courts for recognition of that adoption under Indian statutory authority. In their case they applied under the Hindu Adoption and Maintenance Act 1956 … The procedure has protective safeguards and involves a Home Circumstances report which here is plainly more than satisfactory."

97. Hedley J summarised the law as follows, paras 12-13:

> "12 The criteria for recognition on non-convention cases (and this is one such) are accurately summarised in the head note to *Re T & M (Adoption)* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487 as follows –
>
> (i) Was the adoption order obtained wholly lawfully in the foreign jurisdiction?
>
> (ii) If, so, did the concept of adoption in that jurisdiction substantially conform to the English concept?
>
> (iii) If so, was there any public policy consideration that should mitigate against recognition?
>
> I agree with Ms Cronin that this summary should be amplified in relation to (ii) by adding: were the status conditions required

> by our domestic adoption law replicated or fulfilled in the foreign jurisdiction?
>
> In this case the religious adoption of 2009 would probably fail under (ii) and would almost certainly fail under (iii) given the absence of enquiries and procedural safeguards. If, however, an order is made in the Indian court there seem no grounds for concern under (i) and (iii) but it will be necessary for the court to be satisfied under (ii) by evidence from a properly qualified Indian lawyer.
>
> 13 The outstanding issue relates to the jurisdictional requirements for recognition and it is to that that the court must now turn and in particular to the case *Re Valentine's Settlement* [1965] 1 Ch 831."

98. It was submitted to Hedley J that *Re Valentine's Settlement* had to be read in the light of the changed jurisdictional requirements for an English adoption set out in sections 49(2), (3) of the 2002 Act, providing that an adoption order can be made either if one of the adoptive parents is domiciled, or if both of the adoptive parents are habitually resident, in the British Islands. Hedley J accepted the argument, para 16:

> "In my judgment the 'ratio' of *Re Valentine's Settlement* is that we will recognise an order affecting status where (and only where) the conditions exist which would permit a domestic court to make such an order. In this case that would seem to be that the husband is domiciled in India or both parents are habitually resident there, and of course that the child is (as all accept) habitually resident there."

99. In that case there was a question as to whether the adoptive father, who had lived, indeed, as Hedley J found, been habitually resident, in this country since at least 1997, was still domiciled in India. Having referred to *Cyganik v Agulian* [2006] EWCA Civ 129, [2006] 1 FCR 406, and *Barlow Clowes International v Henwood* [2008] EWCA Civ 577, [2008] BPIR 778, Hedley J held, para 18, that he was still domiciled in India and had not acquired an English domicile of choice.

100. Recognising the adoption, Hedley J said this, paras 21-22:

> "21 It follows that the requirement of *Re Valentine's Settlement* are met in this case and that the court has jurisdiction to recognise this Indian adoption. In my judgment the adoption order made in 2009 and recognised by the Indian Court on 4 August 2012 should be recognised in this jurisdiction.
>
> 22 My reasons are briefly as follows. I am satisfied that this father is domiciled in India. I am satisfied that the Indian adoption (after full enquiry and recognition in 2012) is sufficiently similar to the concept of adoption in this jurisdiction. I am satisfied that there are no public policy

> objections; indeed I am satisfied that the welfare of this child will be promoted by the recognition."

101. It will be noted that, notwithstanding the way in which he had formulated the relevant questions in para 12, Hedley J in fact extended the *Re Valentine's Settlement* criteria in two important respects: first, para 16, by relaxing the 'domicile' requirement and accepting that habitual residence would suffice; secondly, paras 5, 12, by treating *process* or *safeguards* as a criterion to be met in addition to *concept* or *substance*.

102. The next case is *Z v Z (Recognition of Brazilian Adoption Order)* [2013] EWHC 747 (Fam), [2014] 1 FLR 1295, where Theis J was concerned with the recognition of an adoption order made by the Brazilian court. The core of her reasoning is explained as follows, paras 37-42:

> "37 … the criteria for recognition of an external adoption such as in this case are summarised by Hedley J in characteristically coherent form in both *Re R (Recognition of Indian Adoption)* [2012] EWHC 2956 (Fam), [2013] 1 FLR 1487 and *Re T and M (Adoption)* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487. There are three considerations:
>
> "(i) Was the adoption order obtained wholly lawfully in the foreign jurisdiction?
>
> (ii) If, so, did the concept of adoption in that foreign jurisdiction substantially conform to the English concept and replicate or fulfil the status conditions required by our domestic adoption law? And
>
> (iii) If so, was there any public policy consideration that should mitigate against recognition?"
>
> 38 It is submitted by Ms Cronin that Mrs Z's adoption satisfies these criteria. Firstly, consistent with the status conditions required in s.49(2) of the ACA 2002 Mrs Z is domiciled and was habitually resident in Brazil during the twelve months preceding the adoption when the children were placed in her interim custody …
>
> 39 Secondly, the adoption in Brazil was obtained lawfully and is valid. That is demonstrated very clearly from the documents which I have seen and has been confirmed by all the investigations which have been carried out.
>
> 40 Thirdly, as is clear from the judgment in the Brazilian adoption proceedings and the report from the Brazilian lawyer, the adoption gave paramount consideration to the children's best interests. It severed the birth mother's parental rights and responsibilities and transferred those rights and responsibilities irrevocably to Mrs Z. So that accords with the English concept of adoption.

> 41 Fourthly, the Brazilian adoption process is protective of the children's welfare and is very similar to the domestic adoption arrangements here. There is an extensive vetting procedure which has been gone through. There are comprehensive home study reports and provision for seeking, or dispensing with, parental consent where the welfare of the children demands that.
>
> 42 Finally, … there are no public policy reasons against recognition. This family have been subjected to considerable investigation by professionals not only in Brazil, but also in this country … I have seen nothing in what I have read and seen in the detailed documents before me to suggest that there is any public policy consideration against this recognition."

For those reasons, para 43, Theis J made the declaration sought.

103. It will be noted that Theis J took into account both, para 40, the child's best interests and, paras 41, 42, the similarity in *process*.

104. The next case is *A County Council v M and others (No 4) (Foreign Adoption: Refusal of Recognition)* [2013] EWHC 1501 (Fam), [2014] 1 FLR 881, where Peter Jackson J was concerned with the recognition of an adoption in Kazakhstan of a child, C. He began his legal analysis as follows, paras 61-62:

> "61 The case-law establishes that an application for the recognition at common law of a foreign adoption must satisfy a number of specific criteria:
>
> (1) The order must have been lawfully obtained in the foreign jurisdiction.
>
> (2) The concept of adoption in that jurisdiction must substantially conform to that in England.
>
> (3) The adoption process that was undertaken must have been substantially the same as would have applied in England at the time.
>
> (4) There must be no public policy consideration militating against recognition.
>
> (5) Recognition must be in the best interests of the child.
>
> 62 The parties have reached the common position that the first and second of these criteria are met in C's case, and I do not go behind that agreement. The dispute relates to the other criteria."

He then listed, para 63, the decisions of Ryder J, Bennett J, Hedley J, Moor J and Theis J to which I have already referred.

105. Having referred to *Re Valentine's Settlement*, Peter Jackson J continued, para 66:

> "The decision in *Re Valentine's Settlement* was considered by Hedley J in *Re R (Recognition of Indian Adoption)*, a case in which only one of the adopters was domiciled in the relevant foreign country. Consequently, if the decision of the Court of Appeal was applied literally, recognition could not be granted. However, Hedley J held (and I respectfully agree) that the ratio of *Re Valentine's Settlement* is that our courts will recognise an order affecting a person's status if, but only if, the conditions exist that would permit an order to be made in this jurisdiction. In reaching this conclusion, Hedley J described how English law had materially changed since 1965. In the first place, it has since 1973 been possible for spouses to have different domiciles. In addition, the qualifying conditions for domestic adopters had long since changed, and s 49 of the 2002 Act now requires one adopter to be domiciled in the British Islands or both adopters to be habitually resident here. As this criterion was satisfied in the case before Hedley J, he found that the foreign adoption could be recognised."

106. Peter Jackson J then addressed, paras 67-69, a submission that *Re Valentine's Settlement* should be distinguished and not followed:

> "67 … Mr Verdan QC and Ms McMillan for M [the adoptive mother] argue that *Re Valentine's Settlement* should (as Mr Verdan at first put it) be distinguished. It is the only reported decision in which recognition has been refused.[3] The world, he says, has changed. Domestic adoption law has changed, the importance of domicile has diminished, and the enactment of the Human Rights Act 1998 shows the need for a fresh approach.
>
> 68 Analysing the judgments in *Re Valentine's Settlement*, Mr Verdan points to expressions of doubt and reluctance on the part of the majority and to the persuasive arguments of Salmon LJ, who believed that the law should develop with the changing needs of the time, rather than being bound by 'abstract theory'. In this case, he argues, the Art 8 rights of the siblings in particular show that *Re Valentine's Settlement* cannot (as he finally expressed it) be followed.
>
> 69 I do not accept this submission. In my judgment, the *ratio* of *Re Valentine's Settlement*, as expressed by Hedley J, remains binding on this court for these reasons:
>
> 1. *Re Valentine's Settlement* is a decision of the Court of Appeal of long standing that has been repeatedly followed

[3] This is not in fact correct: see *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534 referred to above.

> at first instance and remains binding authority on a trial court.
>
> 2. The Human Rights Act aside, arguments based on the legal developments since *Re Valentine's Settlement* were considered and synthesised by Hedley J in *Re R (Recognition of Indian Adoption).* It is not necessary to go further than he did in acknowledging those changes.
>
> 3. It is at least arguable that there is good reason why standards for recognition should not be relaxed where approved procedures have not been followed in the case of an adoption from a country that is neither a signatory to the Hague Convention nor a designated country. The world has indeed changed since 1965, and with it the world of intercountry adoption. The ease of international travel has made adoption from overseas more available, with all its benefits and possible pitfalls. The Hague Convention and the overseas adoption procedure are mechanisms that increase confidence that standards are maintained. The same confidence cannot always be felt in relation to adoptions effected in countries that are not Convention signatories, and the importance for child welfare of following approved procedures in these cases is consequently the greater.
>
> 4. If the result of applying the principle contained in *Re Valentine's Settlement* is that recognition cannot be afforded, the option of making a domestic application to adopt may be available in appropriate cases."

He then turned, paras 70-76, to an argument based on Article 8 of the Convention. I will deal with this below. For the moment I merely note that the argument did not prevail.

107. Peter Jackson J then turned to deal with public policy, citing from *Dicey, Morris & Collins*, The Conflict of Laws, ed 15, 2012, para 20-133, the corresponding passage to that, expressed in identical terms, in the previous edition cited by Ryder J in *D v D.* Having set out the opposing contentions, he continued, paras 81-84:

> "81 I will first address the policy arguments based upon the procedural route chosen by M in bringing C to this country. As to these, I conclude that the situation is not as clear-cut as the local authority contends. Making full allowance for M's manipulation of the system, she is someone who had nine years previously been approved as one of an adoptive couple following a painstaking assessment process, which incidentally did not succeed in identifying her unsuitability to adopt. C was not smuggled into this country, but came here with the full

> knowledge of the UK authorities, and indeed those of the US. Both countries granted her citizenship.
>
> 82 While I share the concerns about the way in which M used her US nationality to subvert UK intercountry adoption policy and procedure, it has not been established that the process of which M took advantage was unlawful, and in particular that any criminal offence was committed in bringing C to this country. The reality is that M took advantage of a loophole in the system whereby she was able to employ her status as a dual national of the US and the UK to her advantage. While this was reprehensible, I am not persuaded that public policy requires non-recognition in order to mark the court's disapproval of a process in which the administrative authorities in both jurisdictions cooperated. I agree with the authors of Dicey, Morris and Collins that something more exceptional is required before public policy is used to deny recognition to an adoption that might be in the interests of an individual child. None of the children in this case is responsible for M's actions and it is no part of the court's function to penalise M or to enforce international adoption standards if that might be at the expense of their interests.
>
> 83 In contrast, M's criminal conduct towards the children, including C, is in my view capable of amounting to a reason for declining recognition. While the primary focus of any consideration of public policy will be on events surrounding the adoption itself, that is not to say that subsequent events must be ignored. In this exceptional case, M's behaviour rightly disqualifies her from adopting in this country and where her own rights are concerned might be said to make any endorsement of her parental status repugnant. There is a strong argument that recognition of the adoption should be refused as a matter of public policy.
>
> 84 However, I find it unnecessary to express a final view on this aspect of the matter, but rather to base my ultimate conclusion on an assessment of C's welfare. My reasoning is that recognition would scarcely be refused for policy reasons if C's welfare demanded that it be granted. If, on the other hand, recognition does not serve C's interests, reasons of policy add nothing to the outcome."

108. Addressing the issue of C's welfare, Peter Jackson J, para 85, treated the question as being governed by section 1 of the 2002 Act, adding, para 88, that "I seek to position myself firmly from the perspective of C's welfare." He expressed his conclusion as follows, paras 90-92:

> "90 … I consider that any reinforcement of the relationship between C and M would be strongly against C's interests. Her

> difficulties are due in no small measure to M, who has shown no sign during the course of these proceedings of any genuine change of attitude. Albeit she has not been named, her conduct is notorious. She remains a potentially dangerous and destabilising influence and cannot be trusted to promote C's real interests at any foreseeable stage in the future. By her actions, she has set the children at odds with each other, and so far as I can tell she has done nothing to repair those wounds.
>
> 91 Furthermore, recognition of the adoption would have the practical effect of conferring parental responsibility on M, which is not in any way in C's interests. M would be likely to use parental responsibility in competition with the local authority and with that of C's carers if in future they were to become her Special Guardians.
>
> 92 Weighing all these matters up, I conclude that it would not be in C's interests, now or throughout her life, for her Kazakh adoption to have been recognised in this jurisdiction. Her welfare now depends upon her being given the opportunity of forming new parental ties and in being protected from further harm from M. I have considered the effect of non-recognition upon the Art 8 rights of all the family members and find that the interference with those rights is solidly based upon considerations of child welfare generally and C's welfare in particular."

109. Declaring that C's adoption by M in Kazakhstan was not recognised by the law of England and Wales, Peter Jackson J summarised his conclusions, para 93:

> "My conclusions in relation to the questions that must be answered are accordingly these:
>
> 1. C's adoption was lawfully obtained by M in Kazakhstan.
>
> 2. So far as I can tell, the Kazakh concept of adoption substantially conforms to that in England.
>
> 3. The adoption process that was undertaken was not substantially the same as would have applied in England at the time: M had no roots in Kazakhstan and recognition is not available on the basis of the decision in *Re Valentine's Settlement*.
>
> 4. While M's strategy for bringing C into the United Kingdom was reprehensible and calculated to evade proper scrutiny, public policy would not demand refusal of recognition on that ground.
>
> 5. Decisively, recognition would not in all the circumstances be in the best interests of C either now or throughout her life."

110. It will be noted that Peter Jackson J was explicit in adding two additional criteria to the triad as formulated by Hedley J and followed, at least in form, by both Moor J and Theis J. First, his number (3), that "The adoption process that was undertaken must have been substantially the same as would have applied in England at the time." And second, his number (5) that "Recognition must be in the best interests of the child." It is interesting also to note that although he held that *Re Valentine's Settlement* remained binding, and although he was prepared to accept that what he referred to (para 69) as "legal developments since *Re Valentine's Settlement*" could be "synthesised", as by Hedley J in *Re R (Recognition of Indian Adoption)*, into the current understanding of the ratio of *Re Valentine's Settlement*, Peter Jackson J concluded that it was "not necessary to go further than [Hedley J] did in acknowledging those changes."

111. The next case is *Re G (Recognition of Brazilian Adoption)* [2014] EWHC 2605, [2015] 1 FLR 1402, where Cobb J was concerned with recognition of an adoption order of the Brazilian court. Having referred, para 20, to *Re Valentine's Settlement*, he continued, paras 21-23:

> "21 The subsequent jurisprudence has refined the test at common law to three essential questions:
>
> (i) Was the adoption obtained wholly lawfully in the foreign jurisdiction?
>
> (ii) If so, did the concept of adoption in that jurisdiction substantially conform with the English concept?
>
> And
>
> (iii) If so, was there any public policy consideration that should mitigate against recognition?
>
> On this see, in particular, the relatively recent cases of *Re T and M (Adoption)* [2010] EWHC 964 (Fam), [2011] 1 FLR 1487; see also *Re N (Recognition of Foreign Adoption Order)* [2009] EWHC 29 (Fam), [2010] 1 FLR 1102.
>
> 22 Although Peter Jackson J added a further requirement (namely that the adoption is in the best interests of the child: see *A County Council v M and Others (No 4) (Foreign Adoption: Refusal of Recognition)* [2013] EWHC 1501 (Fam), [2014] 1 FLR 881) this additional element does not appear to be supported by other authority: see *Re T and M* and *Re R (Recognition of Indian Adoption)* [2012] EWHC 2956 (Fam), [2013] 1 FLR 1487 (where welfare would only be considered when, after recognition, the court goes on to consider making an adoption order).
>
> 23 Notable of the other cases to which my attention has been drawn is *Z v Z (Recognition of Brazilian Adoption Order)* [2013] EWHC 747 (Fam), [2014] 1 FLR 1295. The case has

> some factual similarities with this one, quite apart from the Brazilian connection. In that case, Theis J described the Brazilian adoption process as having been 'undertaken with the same careful, thorough and best interests assessment as in a UK adoption' (para 13); she further reflected that the adoption order there would irrevocably transfer parental rights to the applicants."

112. Cobb J then proceeded, para 24, to respond to the questions he had posed in para 21. Having answered questions (i) and (ii) in the affirmative, he turned to question (iii), referring to the by now familiar passage from *Dicey, Morris & Collins*. He said, para 24(iii):

> "I am satisfied that there is no public policy reason against recognition of these adoption orders … In this case, the family has been subjected to very considerable scrutiny by way of social work assessment during their two 'rounds' of adoption process. Their applications for adoption orders in Brazil were well-motivated, and their application here for recognition appears to be for an entirely proper purpose: recognition of their adoption will give equal status within the family to the three children under English law and allow for their relocation to the UK as a family."

He added, para 25:

> "If it were necessary to go on to consider whether such recognition were in D and E's best interests (see *A County Council v M and Others (No 4) (Foreign Adoption: Refusal of Recognition)* at para 22), I can confirm that it would manifestly be so."

113. Cobb J's reservations about Peter Jackson J's addition to the list of criteria will be noted.

114. The final, and very recent, case is *QS v RS and T (No 3)* [2016] EWHC 2470 (Fam), where MacDonald J was concerned with the recognition of a Nepalese adoption. MacDonald J's detailed survey of the authorities included, paras 34-36, extensive citations from *Re Valentine's Settlement*. He continued, paras 37-39:

> "37 Nonetheless, the common law rule established by *Re Valentine's Settlement* is clear and has been applied consistently since 1965. Within this context, pursuant to the Adoption and Children Act 2002 s 49(2) domicile (or, in the alternative, habitual residence) is still a part of "the circumstances we claim for ourselves" when constituting a valid domestic adoption, a valid application for an adoption order under the Act requiring at least one of the couple (in the case of an application by a couple) or the applicant (in the case of an application by one person) be domiciled or habitually resident in a part of the British Islands.

> 38 Accordingly, as recognised by Moor J in *Re J (Recognition of Foreign Adoption Order)* [2013] 2 FLR 298, as result of *Re Valentine's Settlement* the English court is not entitled to recognise a foreign adoption order at common law unless the adopting parents were domiciled in the relevant country at the relevant time. Accordingly, an adoption made in any country outside Great Britain and valid by the law of that country will be recognised in England at common law only if at the time of the adoption the adopters were domiciled in that country (Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 15 Edn, 2007) at 20R-117).
>
> 39 In *Re R (Recognition of Indian Adoption)* [2013] 1 FLR 1487 Hedley J held that the ratio of *Re Valentine's Settlement* is that this jurisdiction will recognise a foreign order affecting status (in this case a foreign adoption order) where, and only where, conditions exist that would permit a domestic court to make such an order. Having reviewed the changes to the law of domicile and the law of adoption that have occurred since the decision of the Court of Appeal in *Re Valentine's Settlement* Hedley J held that courts in this jurisdiction can recognise a foreign adoption at common law provided that the qualifying conditions as to domicile or habitual residence contained in the Adoption and Children Act 2002 s 49(2) and 49(3) are met (in *A County Council v M and Others (No 4)(Foreign Adoption: Refusal of Recognition)* [2014] 1 FLR 881 at [66] Peter Jackson J respectfully agreed with Hedley J's reasoning in this regard)."

It will be noted that MacDonald J does not seem to address explicitly the tension between Moor J's view that domicile is the only basis for recognition and the view of Hedley J, shared by Peter Jackson J, that habitual residence will suffice.

115. MacDonald J then summarised, para 40, by reference to Hedley J's judgments in *Re T and M (Adoption)* [2011] 1 FLR 1487 and *Re R (Recognition of Indian Adoption)* [2013] 1 FLR 1487,

> "the criteria for determining whether the court should recognise an adoption made in any country outside Great Britain and valid by the law of that country at common law … :
>
> (i) Were the status conditions required by English domestic adoption law replicated or fulfilled in the foreign jurisdiction, including the status conditions as to domicile or habitual residence;
>
> (ii) Was the adoption obtained wholly lawfully in the foreign jurisdiction in question;
>
> (iii) If so, did the concept of adoption in that jurisdiction substantially conform with the English concept of adoption;

> (iv) If so, was there any public policy consideration that should mitigate against recognition of the foreign adoption."

116. Having set out, para 42, the familiar passage from *Dicey, Morris & Collins*, MacDonald J noted, para 43, that:

> "In *A County Council v M and Others (No 4) (Foreign Adoption: Refusal of Recognition)* [2014] 1 FLR 881 Peter Jackson J articulated a further criterion for the recognition of a foreign adoption at common law, namely that recognition of the adoption must be in the child's best interests."

He went on, para 82:

> "The criterion of the child's best interests was not included by Hedley J in *Re T and M (Adoption)* and *Re R (Recognition of Indian Adoption)* as part of the list of criterion for the recognition of a foreign adoption at common law. However, as noted above, in *A County Council v M and Others (No 4) (Foreign Adoption: Refusal of Recognition)* [2014] 1 FLR 881 Peter Jackson J articulated the further criterion that the recognition of the adoption must be in the child's best interests. In circumstances where the court is considering whether to give the child the status of an adopted child in this jurisdiction, I agree with Peter Jackson J that the question of whether that step is in the child's best interests falls to be considered by the court."

117. MacDonald J, para 77, thus articulated as follows:

> "the criteria for determining whether the court should recognise an adoption made in any country outside Great Britain and valid by the law of that country at common law … :
>
> (i) Were the status conditions required by English domestic adoption law replicated or fulfilled in the foreign jurisdiction, including the status conditions as to domicile or habitual residence;
>
> (ii) Was the adoption obtained wholly lawfully in the foreign jurisdiction in question;
>
> (iii) If so, did the concept of adoption in that jurisdiction substantially conform with the English concept of adoption;
>
> (iv) If so, was there any public policy consideration that should mitigate against recognition of the foreign adoption.
>
> (v) Is recognition of the adoption at common law in the child's best interests."

He answered questions (ii), (iii) and (v) in the affirmative.

118. Question (i) was more problematic. MacDonald J approached the matter in this way, paras 85, 87:

> "85 The law governing the recognition of foreign adoptions at common law that I have set out above is very well settled. I am bound by the decision of the Court of Appeal in *Re Valentine's Settlement* regarding the need for the status conditions to be met and I make clear that the decision for this court has been not whether the rule in *Re Valentine's Settlement* is right or wrong (which would be a matter for the Court of Appeal) but rather whether there is a permissible reason for not applying the rule in this case.
>
> 87 The totality of the evidence that has subsequently become available demonstrates that it cannot be said that either the mother or the father were domiciled or habitually resident in Nepal at the time they adopted T under the law of that jurisdiction. In circumstances where this court is bound by the precedent set in *Re Valentine's Settlement*, the following questions now therefore arise in this case when the court is considering whether it is able to and should recognise T's foreign adoption:
>
> (i) Can the facts of this case be distinguished sufficiently from those in *Re Valentine's Settlement* for the court to conclude that the principles articulated therein have no application in this case; or
>
> (ii) Are there are any circumstances in which the rule in *Re Valentine's Settlement* does not apply or may not be applied such that an adoption made in a country outside Great Britain and valid by the law of that country will be recognised in England at common law notwithstanding that at the time of the adoption the adopters were not domiciled in that country."

The answer to question (i) was No. The answer to question (ii) turned on Article 8 of the Convention. I deal with this below, for the moment merely noting that here, in contrast to in *A County Council v M and others (No 4) (Foreign Adoption: Refusal of Recognition)* [2013] EWHC 1501 (Fam), [2014] 1 FLR 881, the argument *did* prevail.

119. Finally, MacDonald J turned to his original question (iv), the issue of public policy. He said, para 105, that:

> "There is a plain public interest in the maintenance of all the safeguards which the developed law of adoption in this jurisdiction has devised in respect of foreign adoptions."

He continued, paras 106-107:

> "106 … this is not a case where the relevant safeguards fall to be considered in the context of, for example, an adoption arising from the buying and selling of children irrespective of their actual welfare needs (to use the example cited by Hedley J in *Re T and M (Adoption)*) or an adoption to promote some immoral or mercenary object, like prostitution (to use the example cited in Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 15 Edn, 2007) at 20-133). Rather, this is a case in which the safeguard comprised of the status conditions fall to be considered in respect of a foreign adoption achieved in good faith and which complies with the requirements for recognition in all other respects, the recognition of which adoption is manifestly in the child's best interests.
>
> 107 … Whilst it is important for the reasons I have given to maintain all the rules which the developed law of adoption in this jurisdiction has devised to safeguard the welfare of children who are subject of foreign adoptions, it would be contrary to public policy in my judgment to apply those rules in a way that results in the breach of the fundamental rights of the parties to the proceedings in a given case, as I am satisfied it would in this case for the reasons that I have already given. In all the circumstances, I am satisfied that it would not be contrary to public policy to recognise the T's Nepalese adoption at common law."

120. It will be noted that MacDonald J agreed with Peter Jackson the need to satisfy the additional criterion that recognition of the adoption must be in the best interests of the child.

Recognition of foreign adoptions at common law: discussion

121. I have gone through the authorities at some length and in what may seem wearisome detail. I have done so to demonstrate the extent to which the principles which in my judgment can properly be derived from *Re Valentine's Settlement* have been re-interpreted in recent years, in a manner which has not always commanded universal judicial assent, and because, not to put too fine a point on it, I am far from persuaded that any of these developments is justified.

122. As we have seen (paragraph 74 above), analysis of the reasoning in *Re Valentine's Settlement* indicates the existence of four, and only four, criteria:

i) The adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption.

ii) The child must have been legally adopted in accordance with the requirements of the foreign law.

iii) The foreign adoption must in substance have the same essential characteristics as an English adoption. As MacDonald J put it (paragraphs 115, 117 above),

Did the concept of adoption in the foreign jurisdiction substantially conform with the English concept of adoption?

iv) There must be no reason in public policy for refusing recognition.

123. What the foregoing analysis demonstrates is that this approach has been modified in three very important respects:

i) The 'domicile' requirement has been relaxed, so that it suffices if the adoptive parents were habitually resident in the foreign country at the time of the adoption.

ii) Two additional criteria for recognition of a foreign adoption have been identified: (a) Recognition of the foreign adoption must be in the best interests of the child. (b) As formulated by Peter Jackson J, the adoption process in the foreign country must have been "substantially the same as would have applied in England at the time."

To adopt my earlier language, the effect of this last requirement is to treat *process* or *safeguards* as a further criterion to be met in addition to *concept* or *substance*.

124. Dealing first with the suggested relaxation of the 'domicile' requirement (a point which does not in fact arise in the present case, because there is no suggestion that the applicant was habitually resident in India in 2011), I confess to finding it difficult to reconcile Hedley J's analysis with fundamental and long-established principles. Authority at the very highest level establishes that domicile is the defining principle in determining which personal system of law applies: see *Udney v Udney* (1869) LR 1 Sc & Div 441 and *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98. Domicile is long-established as the defining principle in relation to a person's status: see *In re Goodman's Trusts* (1881) 17 ChD 266, followed and applied in the present context in *In re Valentine's Settlement, Valentine and others v Valentine and others* [1965] Ch 831. The effect of Hedley J's analysis is to carve an exception out of this general principle in one context – recognition of a foreign adoption – because of changes in our domestic law of adoption. Why should that be so? Given that in *Re Valentine's Settlement* the court was following the general approach articulated in *Re Goodman's Trusts*, I doubt that the language used by Lord Denning MR upon which Hedley J relied can bear the weight of the argument.

125. I turn to the question of best interests. It is easy to understand why family lawyers, involved in cases such as those which have recently come before the judges of the Family Division, should slip easily into an assumption that section 1 of the 2002 Act applies, so that recognition of the foreign adoption must be shown to be in the child's best interests. But we have to remember that the principle of recognition we are here concerned with may have to be applied in other and very different contexts, where what may appear obvious to a family lawyer is likely to be viewed very differently by others who do not have that advantage, and not always by a court.

126. I can illustrate the point by considering how this might work out in the context of a succession case such as *Re Valentine's Settlement*. It will be recalled that the question in that case was whether C, a child adopted by Alastair, was entitled to take under a residuary trust in favour of Alastair's "children or remoter issue" under a settlement

made by Alastair's mother. When the question arose for determination, C was still alive. But let us change the facts a little, and assume that C was adopted in 1949 at the age of 12, that he died in 1987 aged 50, leaving a son D, and that the last intervening life interest came to an end in 2015 when D was aged 54, so that the question becomes whether D takes as "remoter issue" under the residuary trust. This will still depend upon the answer to the original question, is C's adoption recognised in English law? If the test of best interests has to be satisfied, a number of very obvious questions arise. Are the relevant best interests those of C, who was adopted in 1949 and died in 1987 aged 50, to be evaluated, presumably, in 1949, or those of the now 55-year old D? Law and logic would suggest the former but neither inquiry has much to commend it, whether from the point of view of principle or pragmatism: what, for example, is the point of exploring in 2016 the question of whether an adoption in 1949 was in the best interests of someone who died in 1985, and how, being sensible, could such an inquiry be pursued? By reference to which version of the statutory best interests test is the inquiry to be pursued? That in section 1 of the 2002 Act (presumably not: cf Peter Jackson J's use of the phrase "at the time" in *A County Council v M*, para 61(3)) or that in the very different legislation in force in 1949? And how is this approach to be accommodated to the fact that section 1 of the 2002 Act applies only to decisions taken by a "court", for there may be no need to take the case to court at all? Is the outcome in our hypothetical example to depend upon whether the recognition decision is taken by the trustees of the settlement or by a judge in the Chancery Decision? This last point is an example of a wider problem, for in an immigration context, for example, the recognition decision will initially be made by the Secretary of State or an official and may never reach a court.

127. This last example points the way to what, in my judgment, is the correct view, namely that section 1 of the 2002 Act, like all its predecessors, has nothing to do with the question of whether a foreign adoption should be recognised, whether by a court or by anyone else. It is elementary that section 1(1)(a) of the Children Act 1989, which provides that "Where a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration", does not apply to a judicial decision in an immigration case, even though that decision impacts directly on the child's "upbringing". In much the same way, it seems to me that, read in context, including the context provided, for example, by the other provisions of section 1, the language of section 1(1) of the 2002 Act – "whenever a court … is coming to a decision relating to the adoption of a child" – is looking to the situation where the court is considering whether or not to make an adoption order and simply does not apply to a case where all the court is doing is deciding whether or not to recognise an adoption which has already taken place abroad.

128. I turn to the proposition that, if a foreign adoption is to be recognised, the adoption process in the foreign country must have been, to use Peter Jackson J's words, "substantially the same as would have applied in England at the time." Reverting to the hypothetical succession case, how is this inquiry to proceed? If Peter Jackson J is correct in his assertion that what we are concerned with is the process "at the time", and, as I have already said, law and logic would suggest that on this point he is correct, the same question arises in this context as in relation to best interests: what is the point of exploring in 2016 the question of whether the foreign process in 1949 was substantially the same as the process in this country in 1949, and how, being sensible,

could such an inquiry be pursued? It is the kind of inquiry which, being realistic, would tax the abilities of family lawyers, familiar, no doubt, with the process and practice of adoption in accordance with the 2002 Act but wholly unfamiliar with adoption process and practice in the utterly different world of 1949; I hope I do no disrespect to anyone if I suggest that the exercise would be even more taxing if it had to be conducted in the Chancery Division.

129. In my judgment, and with all respect to those who take a different view, there is no justification for importing these two additional criteria – best interests and similarity in *process* – into the principles laid down by the Court of Appeal in *Re Valentine's Settlement*. I am not suggesting that they are irrelevant, but each, in my judgment, is properly to be considered, and considered only, as an aspect of public policy, *not* as a separate requirement. This distinction, which may appear somewhat pedantic, is in fact very important. For public policy in this context has a strictly limited function and is, in my judgment, properly confined to particularly egregious cases, as explained, compellingly and correctly, in the passage from *Dicey, Morris & Collins, The Conflict of Laws*, ed 15, 2012, para 20-133. I have already set it out, but it requires to be repeated (with emphasis added):

> "If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, *apart from exceptional cases* like these, it is submitted that *the court should be slow to refuse recognition to a foreign adoption on the grounds of public policy merely because the requirements for adoption in the foreign law differ from those of the English law*. Here again the distinction between recognizing the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but *public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself*."

130. In my judgment, and with all respect to those of my brethren who have taken a different view,

i) *Re Valentine's Settlement* remains good law and binding upon judges at first instance unless and until the Court of Appeal decrees otherwise.

ii) Accordingly, recognition at common law of a foreign adoption, whether the question arises in a court or elsewhere, depends upon, and only upon, the four criteria identified in *Re Valentine's Settlement* and set out in paragraphs 74 and 122 above.

iii) Public policy in this context operates in the limited and narrow manner described in *Dicey, Morris & Collins*.

Recognition of foreign adoptions: Article 8

131. For the reasons set out below, I have concluded that the applicant is entitled to succeed in her application for recognition of N's adoption without having to rely upon Article 8. But if I am wrong on that, the question arises whether the applicant can establish her claim for recognition by reference to her, and N's, rights under Article 8 of the Convention.

132. I have already explained, by reference to *Pawanadeep Singh v Entry Clearance Officer, New Delhi* [2004] EWC Civ 1075, [2005] QB 608, why, in my judgment, the applicant and N have shared family life within the meaning of Article 8 since well *before* the Indian adoption in 2011. Ms Cronin and Ms Fottrell submit that, in these circumstances, the application of the 'domicile' rule in *In re Valentine's Settlement* in a case where the applicant is unable to satisfy the domicile requirement involves a breach of Article 8.

133. The convenient starting point is the discussion in *Dicey, Morris & Collins*, ed 15, 2012, para 20-129 of the decision of the Strasbourg court in 2007 in *Wagner and JMWL v Luxembourg (Application no 76240/01)*:

> "The European Court of Human Rights has held that criteria applied to the recognition of a foreign adoption order must comply with the European Convention on Human Rights. The implications of this ruling remain to be explored in an English context, but at the very least it opens the door to a challenge of the existing common law rule on recognition, should an adopter have established family ties with a child as the result of an enforceable foreign adoption, but is unable to satisfy the domicile requirement. In *Wagner* an enforceable Peruvian adoption order was denied enforcement in Luxembourg on the grounds that it did not comply with Luxembourg choice of law rules; the latter designated Luxembourg law, which in turn permitted adoption only by married couples. The strict application of the choice of law rules was held to be a violation of Article 8. The European Court of Human Rights, noting that the best interests of the child were paramount in such a case, held that the Luxembourg courts 'could not reasonably disregard the legal status validly created abroad and corresponding to a family life'."

134. In explaining its decision in *Wagner*, the Strasbourg court said this (paras 132-133, 135):

> "132 The Court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family.

> 133 Bearing in mind that the best interests of the child are paramount in such a case, the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the persons concerned in order to apply the limits which Luxembourg law places on full adoption.
>
> …
>
> 135 The Court concludes that in this case the Luxembourg courts could not reasonably refuse to recognise the family ties that pre-existed de facto between the applicants and thus dispense with an actual examination of the situation …"

135. This approach was followed by the Strasbourg court in 2011 in *Negrepontis-Giannisis v Greece (Application no 56759/08)*, para 74 (judgment available only in French and Greek).

136. The question was first considered in this country by Peter Jackson J in *A County Council v M and others (No 4) (Foreign Adoption: Refusal of Recognition)* [2013] EWHC 1501 (Fam), [2014] 1 FLR 881, paras 70-76. Having set out the passage from *Dicey, Morris & Collins*, para 20-129, and summarised the decision in *Wagner*, Peter Jackson J continued (paras 75-76):

> "75 Broadly viewed, the decision in *Wagner and JMWL v Luxembourg* calls for an 'actual examination of the situation' in circumstances where domestic procedural rules conflict with the reality of the family situation. However, the decision cannot in my view be so broadly read as to extend to the sweeping away of all procedural rules in favour of an approach that decides each application on a case-by-case basis. The factual situation in *Wagner and JMWL v Luxembourg* was quite particular. The jurisdictional obstacle was that Luxembourg law did not allow adoption by a single person, and in consequence the child's adoption could never be recognised, regardless of merits. In contrast, English law would have allowed a domestic adoption on the same facts. Additionally, in *Wagner and JMWL v Luxembourg* the practical daily disadvantages for the child of non-recognition were real; the position is significantly different in C's case.
>
> 76 I would therefore hold that the common law requirements for recognition of foreign adoptions are necessary in the sense that the reasons for them are relevant and sufficient, and that they are proportionate to the legitimate aim of securing safeguards for children concerned in intercountry

> adoption. I would regard *Re Valentine's Settlement* as forming an element of the third criterion for recognition, namely that the foreign adoption process must have been substantially the same as would have applied in England at the time. This conclusion is in my view unlikely to prevent a child achieving full adoptive status by other means in an appropriate case."

137. MacDonald J came to a different conclusion in *QS v RS and T (No 3)* [2016] EWHC 2470 (Fam), paras 91-104. His analysis is detailed and painstaking. He began (paras 91-97) with a careful analysis of both *Wagner* and *A County Council v M*, before concluding (para 100):

> "I am satisfied that in determining an application for the recognition of a foreign adoption at common law and an application for a declaration pursuant to the Family Law Act 1986 s 57 the court must ensure that it acts in a manner that is compatible with the Art 8 right of the mother, the father and T to respect for family life. Further, within this context, and after much anxious deliberation, I am satisfied that the strict application of the rule as to status conditions in *Re Valentine's Settlement* to the very particular circumstances of this case, with a concomitant refusal to recognise the adoption lawfully constituted in Nepal in terms which substantially conform with the English concept of adoption by reason of the failure to comply with status conditions as to domicile or habitual residence applicable in this country, would result in an interference in the Art 8 right to respect for family life of the mother, father and T that cannot be said to be either necessary or proportionate."

He elaborated (para 102) his reasons for having come to that conclusion by reference to eight factors, many of which have a resonance in the present case, but importantly (para 102(vii)) because:

> "these various difficulties are not capable of being remedied by the option of T being adopted by each of her parents under the domestic law of adoption. This is not a realistic option in the circumstances of this particular case"

138. MacDonald J concluded this part of his judgment by making clear (para 104) that:

> "my conclusion does not amount to a decision that the rule in *Re Valentine's Settlement* is incompatible with Art 8 of the ECHR *per se*. Rather, it amounts simply to a decision that the *application* of that common law rule in the very particular circumstances of *this* case would breach the Art 8 rights of the parents and T."

139. I respectfully agree with MacDonald J's analysis and with his formulation of the relevant principle. I put it that way because, for reasons which will be apparent, I have

some difficulty with that part of Peter Jackson J's analysis set out in *A County Council v M*, para 76.

Recognition of N's adoption: discussion

140. Ms Cronin and Ms Fottrell submitted that, correctly applying the relevant principles to the facts of this case, the proper outcome is clear: I should recognise the Indian adoption. Mr Greatorex submitted otherwise.

141. Addressing the *Re Valentine's Settlement* criteria, Mr Greatorex submitted that, however they are expressed, there are four necessary elements of the recognition application that are not met in the present case:

i) The ratio of *Re Valentine's Settlement* is not satisfied: The applicant was not domiciled in India in October 2011. She had acquired a domicile of choice in this country in or around 2003 when, to quote her own words, she and her husband decided to "settle in the UK."

ii) The adoption *process* that was undertaken was not substantially the same as would have applied in England at the time and the Indian adoption was not sufficiently similar in *concept* to an adoption in the UK: Mr Greatorex relied upon what was said by Hedley J in *Re R (Recognition of Indian Adoption)*, paras 5, 12, quoted in paragraphs 96, 97, above. Recognising that the expert, Ms Fischer, said that the Indian process had involved "in depth and detailed investigations", he nonetheless submitted that "there is no evidence to support this" and that it is "inconsistent with" what had been said on the point by Hedley J in *Re R (Recognition of Indian Adoption)*.

iii) There are public policy considerations militating against recognition: Mr Greatorex identified these as being: (a) the lack of enquiries and procedural safeguards; and (b) what he called the circumvention of the relevant immigration rules, found by Judge Beg not to be met – he submitted that, "at least in ordinary circumstances, it is not open to a disappointed applicant to try again in this way."

iv) Put rhetorically, Is recognition in N's best interests? Mr Greatorex made clear that the Secretary of State is not concerned about 'ordinary' welfare considerations. He focused on two points: (a) "The criteria in the immigration rules are designed to protect children's welfare and so where they have been found (by an independent judge) not to be met, that is at least an indicator that recognition would not be in her best interests." (b) The application appears to be as much about N's immigration status and/or the applicant's desire now (as opposed to at any point previously) to live with N as it is about N's best interests. As he put it is his skeleton argument, it is "difficult to avoid the conclusion that the primary motivation is an immigration one."

142. The only real issue, in my judgment, relates to the question of the applicant's domicile in 2011. There is, in my judgment, and with all respect to Mr Greatorex, nothing in his other points.

143. It is quite clear from Ms Fischer's unchallenged report that N was legally adopted in accordance with the requirements of the relevant foreign law and that her Indian adoption in substance had the same essential characteristics as an English adoption, in the sense that the concept of adoption in the foreign jurisdiction substantially conformed with the English concept of adoption.

144. So far as concerns the proposition that the Indian *process* was not substantially the same as would have applied in England at the time, I reject Mr Greatorex's submission for two reasons. In the first place, for reasons I have already explained, this is not a separate criterion that has to be established and, insofar as the Indian process falls for consideration as an aspect of public policy, any deficiencies in that process fell far short of anything that could possibly engage public policy as understood in this context. Secondly, if I am wrong on the point of principle, and Peter Jackson J's test has to be satisfied, I agree with Ms Cronin that, in the light of all the evidence as to what happened and, not least, Ms Fischer's expert report, the Indian process was sufficiently congruent with our procedures as to meet the test. I adopt the reasoning and approach of Moor J in *Re J (Recognition of Foreign Adoption Order)* [2012] EWHC 3353 (Fam), [2013] 2 FLR 298, paras 13-14.

145. So far as concerns questions of public policy, I have already considered and rejected Mr Greatorex's first point. His second point raises an issue of great importance which I consider below but which, for the reasons there set out, I reject.

146. In relation to his submissions in relation to N's best interests, I reject them for two reasons. In the first place, for reasons I have already explained, this is not a separate criterion that has to be established and, insofar as N's best interests fall for consideration as an aspect of public policy, the matters relied upon by Mr Greatorex fall far short of anything that could possibly engage public policy as understood in this context. Secondly, and in any event, for the reasons I explain below, there is, in my judgment, nothing in any of Mr Greatorex's points.

147. The real question, as I have said, relates to the question of the applicant's domicile in 2011. It is quite clear, and not disputed by her, that in an important sense of the expression the applicant had decided to settle and had indeed settled in this country in or around 2003. But that fact, though telling and, I accept, of great importance, is not conclusive. I have to look at the full picture of the applicant's life, as it was in 2011, "understood backwards", to adopt Kierkegaard's illuminating phrase. The reality, and this is based not merely on the applicant's assertions as I have quoted them in paragraph 23 above but more particularly on the facts as I have found them, is that in 2011 the applicant retained many connections with and was a frequent visitor to India. As Ms Cronin put it, the applicant's history shows a manifest attachment to India's personal law, including her role in arranging the marriages of her siblings, her own marriage and, not least, N's customary adoption in India. Throughout the period down to 2011, the applicant's focus was India, where N – her daughter as she thought of her – was living and being supported by her financially and emotionally, almost daily over the telephone and twice yearly staying there. Ms Cronin submitted that this is a case, like many, where someone has left their home country to provide for their family and their time abroad has been directed in large measure to providing financial support for close and extended family in the home country. That is so, but what is so important, at the end of the day, is the fact that N – the applicant's daughter, and a

citizen of India – was in India, the place where she had been informally adopted by the applicant in 1999 and where the formal adoption was to take place in 2011.

148. Taking everything into account and looking at matters in the round I am satisfied that, at the time of the adoption in India in October 2011, the applicant was still domiciled in India.

149. In these circumstances, the applicant is, in my judgment, entitled to the declaration she seeks. English law recognises N's Indian adoption by the applicant in October 2011.

150. I should add that, if I am wrong about this, it is doubtful whether the applicant would be able to make good her claim by reliance on Article 8. The difficulty is presented by the point made by MacDonald J in *QS v RS*, para 102(vii), quoted in paragraph 137 above. If the applicant were to be denied the declaratory relief she seeks, she would not be denied a remedy, assuming that she is able to adopt N under the 2002 Act. An English adoption order, it might be thought, would sufficiently ensure that there could be no breach of either her or N's rights under Article 8.

Adoption under the Adoption and Children Act 2002

151. I turn to the applicant's application to adopt N in accordance with the 2002 Act.

Adoption under the Adoption and Children Act 2002: the law

152. Recognition of a foreign adoption, even if the adoptive parent is a British citizen, does *not* confer British citizenship on the child. It is, of course, otherwise if the child is adopted in accordance with the 2002 Act. Adoption of a child who is not a British subject has been possible ever since the previous law was changed by section 1(2) of the Adoption of Children Act 1949. And ever since the enactment of section 8 of the 1949 Act, an adoption order has operated in certain circumstances to confer British citizenship on the child. The history is set out in *In re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 2 WLR 713, [2016] 1 FLR 621, paras 79-83. It suffices to set out the provisions currently in force, sections 1(5) and 1(5A) of the British Nationality Act 1981, as amended by the 2002 Act:

> "(5) Where –
>
> (a) any court in the United Kingdom … makes an order authorising the adoption of a minor who is not a British citizen; or
>
> (b) …,
>
> that minor shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made …
>
> (5A) Those requirements are that on the date on which the order is made … –

> (a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen …"

153. This automatic consequence of an adoption order inevitably creates the potential for conflict with the legitimate requirements of immigration control. This tension arises from time to time in the family courts. It is a topic which has been considered in many cases. I need here refer to only two.

154. The first is *In re B (A Minor) (Adoption Order: Nationality)* [1999] 2 AC 136, [1999] 1 FLR 907, a decision of the House of Lords where Lord Hoffmann gave the only speech of substance. At that time, the relevant provision was section 6 of the Adoption Act 1976, which required the court to:

> "have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood."

155. There are two passages in Lord Hoffmann's speech which need to be set out in full. In the first, 141, he said this:

> "Section 6 requires the judge to have regard to 'all the circumstances' and to treat the welfare of the child 'throughout his childhood' as the first consideration. I do not see how, consistently with this language, the court could simply have ignored the considerable benefits which would have accrued to T during the remainder of her childhood. That the order would enable her to enjoy these benefits was a fact which the court had to take into account. No doubt the views of the Home Office on immigration policy were also a circumstance which the court was entitled to take into account, although it is not easy to see what weight they could be given. Parliament has not provided, as I suppose it might have done, that the adoption of a non-British child should require the consent of the Home Secretary. On the contrary, it has provided that the making of an adoption order automatically takes the child out of the reach of the Home Secretary's powers of immigration control. The decision whether to make such an order is entirely one for the judge in accordance with the provisions of section 6. In cases in which it appears to the judge that adoption would confer real benefits upon the child during its childhood, it is very unlikely that general considerations of 'maintaining an effective and consistent immigration policy' could justify the refusal of an order. The two kinds of consideration are hardly commensurable so as to be capable of being weighed in the balance against each other.
>
> The cases … justify two … propositions. The first is that the purpose of an adoption is, as section 12 of the Act says, to give parental responsibility for a child to the adopters. The court will therefore not make an adoption order when the adopters do not

> intend to exercise any parental responsibility but merely wish to assist the child to acquire a right of abode. This is what Cross J. in *In re A (An infant)* [1963] 1 WLR 231, 236, called an "accommodation" adoption. The second proposition is that the court will rarely make an adoption order when it would confer no benefits upon the child during its childhood but give it a right of abode for the rest of its life. In such a case there are no welfare benefits during childhood to constitute the "first consideration." The court is in effect being asked to use adoption to confer citizenship prospectively upon an adult. This is a power which Parliament has entrusted to the Home Secretary and the courts are reluctant to trespass upon the area of his authority."

In the second, 142, he said this:

> "I think it is wrong to exclude from consideration any circumstances which would follow from the adoption, whether they are matters which will occur during childhood or afterwards. This … would be contrary to the terms of section 6. Such benefits may include a right of abode or a possibility of succession. But benefits which will accrue only after the end of childhood are not welfare benefits during childhood to which first consideration must be given. And if a right of abode will be of benefit only when the child becomes an adult, that benefit will ordinarily have to give way to the public policy of not usurping the Home Secretary's discretion. It is perhaps a curious feature of this case that if the Home Office had been willing to allow Ms B to remain in this country for the two years during which a residence order was in force, the case for an adoption, conferring a right of abode for life, would have been very much weaker. It would not have given Ms B any benefits during her childhood which she would not have been able to enjoy anyway."

156. Section 6 of the 1976 Act has now been replaced by section 1(2) of the 2002 Act, which provides that:

> "The paramount consideration of the court … must be the child's welfare, throughout his life."

The changes are apparent: first, the child's welfare is "paramount", whereas previously it was only the "first consideration;" secondly, and of greater import, what is now relevant is "the child's welfare, throughout his life", whereas previous it was only "throughout his childhood."

157. The effect of these changes was considered by the Court of Appeal in *S v Bradford Metropolitan District Council and another* [2015] EWCA Civ 951, [2016] 1 WLR 407. Sales LJ gave the only judgment of substance; Macur and Briggs LJJ agreed. Of the first change he said, para 7, that it:

> "strengthens the weight to be given to the child's interests in relation to the relevant period in respect of which the obligation to give such weight applies."

He dealt with the second change at greater length.

158. Sales LJ analysed Lord Hoffmann's approach as follows, paras 36-39:

> "36 The effect of this reasoning is that, in respect of the period in which the child's interests were to be treated as a first consideration (i.e. "throughout his childhood", according to the terms of section 6), the interests of the child (including material welfare benefits he would derive as a result of being granted British citizenship) would almost invariably have to be given priority as against the state's interest in maintaining effective immigration controls. Lord Hoffmann contrasted the position in relation to benefits which would accrue after childhood (ie after the period in respect of which the child's interests were to be treated as a first consideration according to section 6) …
>
> 38 … in relation to benefits for the child which would only accrue in the period after that in which the child's interests were to be treated as a first consideration, as a matter of interpretation of section 6 there was far greater scope for the state's interest in maintaining effective immigration controls to be treated as outweighing those matters, and it would ordinarily do so.
>
> 39 Lord Hoffmann's reasoning in relation to both periods (ie benefits accruing during childhood, on the one hand, and benefits accruing after childhood, on the other) was tied to the language and structure of section 6, which gave paramountcy to the child's interests in the first period but not in relation to the second. In relation to both periods, on the proper construction of section 6 in accordance with the ordinary meaning of the language used in it, Lord Hoffmann treated the practical benefits which would accrue from becoming a British citizen by operation of the 1981 Act as relevant matters to be brought into account in deciding whether to make an adoption order."

159. Having observed, para 41, that "Parliament has made a deliberate change in section 1(2) in specifying the period in relation to which the impacts (both positive and negative) of adoption for a child should be brought into account for the purpose of determining what is for the welfare of the child," Sales LJ continued, paras 41-42:

> "41 … in my view, the points made by Lord Hoffmann in *In re B* by reference to the then relevant period under section 6 for bringing benefits into account (during childhood) … apply with similar effect in relation to the new relevant period under section 1(2) (throughout the child's life).

> 42 The result of this is that if, after taking account of the practical benefits of adoption for a child throughout his life, it can be seen that it best promotes the child's welfare that he be adopted by a British citizen so as automatically to acquire British citizenship under section 1(5) of the 1981 Act, the court should ordinarily make the adoption order which is sought. Just as for the first of the periods considered by Lord Hoffmann in the context of applying section 6 of the 1976 Act in *In re B*, the state's interest in maintaining effective immigration controls will have very little significance. It will not be appropriate for a court to refuse to make the order as some sort of indirect means of reinforcing immigration controls."

Adoption of N under the Adoption and Children Act 2002: discussion

160. I have set out the procedural history of the application. It is apparent that all the formal prerequisites for an adoption under the 2002 Act have been complied with. There is the fact, given the declaration I have made, that the applicant is already recognised in English law as being N's mother, but Ms Cronin points to section 51(4) of the 2002 Act as permitting the court to make an adoption order in such a case.

161. That an adoption order is very much in N's interests, now, for the last few days of her minority, and hereafter throughout her life, is, in my judgment, clearly demonstrated by the materials I have referred to in paragraphs 36-38 above. Sales LJ's analysis in *S v Bradford Metropolitan District Council and another* [2015] EWCA Civ 951, [2016] 1 WLR 407, demonstrates that there is no objection in principle to my making an adoption order in a case like this, just because the child is almost an adult, if that is the outcome demonstrated, as in my judgment it manifestly is here, by a proper application of the determining principles set out in sections 1(2) and 1(4) of the 2002 Act. Ms Cronin submitted that I should make an adoption order because, by conferring British citizenship on her, N will be assured of her right to go on living with the applicant in this country, thereby giving her security in the full enjoyment of her family life which is not assured merely by recognition of the Indian adoption. As Ms Fottrell put it, an adoption order is necessary to safeguard, now and into the future, the established and central relationship – legal and factual – between N and the applicant, her mother. I agree with Ms Cronin and Ms Fottrell.

162. In my judgment it is manifestly in N's best interests, now and throughout her life, that I make the adoption order the applicant seeks.

163. Mr Greatorex submitted that I should not make an adoption order, relying for this purpose on three points:[4] First, the matters referred to in paragraph 141(iv) above. Secondly, a wider submission that the adoption application here is an impermissible attempt to circumvent the statutory scheme of immigration control. Thirdly, what he called "the circumvention of the detailed statutory scheme that is in place for such adoptions", that is, the "strict requirements", as he put it, of section 83 of the 2002 Act and regulations 3 and 4 of the Adoptions with a Foreign Element Regulations 2005, SI 2005/392.

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[4] He referred in this context to *Cabeza, Bhutta and Braier* International Adoptions, 2006, paras 7.76-7.77.

164. The short answer to the argument based on section 83 of the 2002 Act and the 2005 Regulations is that section 83 applies only to cases where either a child is brought into this country "for the purpose of adoption" (section 83(1)(a)) or where there has been "an external adoption effected within the period of twelve months" before the child arrives (section 83(1)(b)) and that the Regulations apply only where section 83 of the 2002 Act applies. So, in the circumstances of this case, section 83 does not apply. N was not brought into this country "for the purpose of adoption." She came to this country to live here with her adoptive mother (she arrived here *after* she had been adopted in India) and to be educated here. And since the adoption in India was in October 2011 and N arrived in this country in December 2015, section 83(1)(b) does not apply.

165. I reject Mr Greatorex's other points for the reasons to which I now come.

166. All Mr Greatorex's objections out of the way, and an adoption order being, as I have said, manifestly in N's best interests, now and throughout her life, I shall accordingly make the adoption order the applicant seeks.

The Secretary of State's objections

167. I come, finally, to what has been a central feature of Mr Greatorex's submissions on behalf of the Secretary of State in relation to both applications.

168. In his position statement dated 25 July 2016, expressly incorporated into his skeleton argument dated 10 October 2016, Mr Greatorex indicated that the Secretary of State's "primary concern" is with "matters of principle and how cases like this are dealt with in future rather than the question of whether either of these particular applications should, on their facts, be granted." What he calls the Secretary of State's "core submission" is so important that I need to set it out verbatim:

> "where an adoption application relates to a non-British citizen and either (a) the relevant adoption and immigration rules could have been complied with but have not been or (b) an application has been made under the relevant adoption and immigration rules and has failed, then the court should ordinarily refuse leave for and/or dismiss an alternative application such as for recognition or for an adoption order."

By way of elaboration, he submitted that:

> "something exceptional is likely to be necessary to persuade the court that it is appropriate for all of these detailed rules to be circumvented in this way and the application instead to be determined by the court in accordance with directions it makes."

169. He submitted that this approach is justified "to ensure that the very detailed adoption and immigration rules are respected and not circumvented." He emphasised in his skeleton argument dated 10 October 2016 that the Secretary of State's concern is not about "contravention" (which is not alleged) but about "circumvention" of the

immigration rules and that the Secretary of State "is not trying to reinforce immigration controls but is concerned about their circumvention."

170. He elaborated in his position statement:

> "those rules are there for very good reasons, including the welfare of the child … To permit the system to be turned on its head by the child entering the UK first and then a great deal of time and public money having to be spent while the parties to proceedings and the court work backwards through the various requirements, throughout which time the child is here with only temporary leave to remain or without leave altogether … and in a state of legal limbo, is not only inimical to the proper operation of immigration controls but fundamentally against the child's interests."

He asserted that in cases such as this, the immigration issues, in contrast, will not be complex at all "since there is a very clear immigration route into the UK for children whom persons here who wish to adopt."

171. Mr Greatorex relied upon what Pauffley J said in *Re IH (A Child) (Permission to Apply for Adoption)* [2013] EWHC 1235 (Fam), [2014] 1 FLR 70, para 102:

> "First and most important, in normal circumstances, applications for permission to adopt particularly those intermingled with immigration issues should be determined on submissions and promptly. The time lag here of twelve months between the launch and completion of proceedings represents an unconscionable and wholly unacceptable delay. It has been a period of legal limbo for IH which has been fundamentally against his welfare interests. In addition, the delay has been inimical to the proper operation of immigration controls, a matter of considerable importance to the SSHD."

172. I would not disagree with a word of that, but I do not see how it assists Mr Greatorex in the present case. It is a clear statement of the imperative need to 'get on with' proceedings and not allow proceedings to drag on, a principle which, as Mr Greatorex pointed out, is reinforced by the 'no delay' principle in section 1(3) of the 2002 Act. But this has nothing to do with whether the proceedings themselves are appropriate.

173. What really lies behind the Secretary of State's stance, at least in part, is perhaps revealed by Mr Greatorex's observation that, although recognition of a foreign adoption does not of itself prevent leave to enter or remain being refused, it would oblige the Secretary of State to treat the relevant persons as parent and child "and this will have a significant impact upon the determination of any immigration application."

174. With great respect to Mr Greatorex these submissions are lacking in authority and devoid of substance. None of them presents any reason why I should not make the declaration and the adoption order sought by the applicant.

175. It is noteworthy that Mr Greatorex is unable to cite any convincing authority for any of this. This is hardly surprising because his submissions are not consistent with – as Ms Cronin put it, do not sit with – the reported cases to which I have referred in paragraphs 28, 107, and 159 above or with *Re Valentine's Settlement*. The Secretary of State's stance is simply contrary, she said, to the established jurisprudence. Ms Fottrell was similarly blunt, submitting that there is simply no legal basis for Mr Greatorex's core proposition and that it runs entirely contrary to the established approach to applications for recognition. The Secretary of State was seeking in effect to introduce additional criteria in the form of a further filter limiting the family court's discretion.

176. More fundamentally, as Ms Cronin pointed out, Mr Greatorex's submissions are simply inconsistent with the well-established principles which received their classic formulation in the judgment of Hoffmann LJ, as he then was, in *R v Secretary of State for the Home Department ex p T* [1995] 1 FLR 293 and which have since been applied in cases such as *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921, to which Ms Cronin referred me, and *R (Anton) v Secretary of State for the Home Department; Re Anton* [2004] EWHC 2730/2731 (Admin/Fam), [2005] 2 FLR 818. I need not explore these authorities in any detail. For present purposes the key point is that the Secretary of State (or the FTT judge) and the family court are performing different functions; that they are applying different tests arising under different legal regimes; and that the perspective of the family court is a narrow focus on the welfare of the individual child, whereas the perspective of the Secretary of State is different and much wider, having to balance the child's private interest against the public interest in a proper system of immigration control, so that the child's interests whilst a "primary consideration" in the immigration context are not, as in the family court, "paramount": *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

177. Plainly, as I said in *Re A*, paras 66, 71, although the family court "does not act as a policeman for the Secretary of State", it must be alert to the possibility that in cases such as this it is "being used by desperate parents for ulterior purposes." And where the proceedings are being used for some impermissible purpose amounting to an abuse of process they will be struck out: *S v S* [2008] EWHC 2288 (Fam), [2009] 1 FLR 241. But that is simply not this case.

178. Ms Cronin complained that the Secretary of State's stance is in any event erroneous in seeking to afford presumptive weight to the immigration judge's decision. As she pointed out, and as Judge Beg's judgment as I have set it out in paragraph 21 above indicates, the relevant provisions in the Immigration Rules contain distinctive criteria that have no place in the family court when it comes to consider whether to recognise a foreign adoption or to make an adoption order – she drew attention, for example, to paragraphs 310(i), (iv), (ix) and (x) of the Immigration Rules. So, a finding that a child does not satisfy the requirements of Paragraph 310 cannot logically stand as even an "indicator" that recognition would not be in her best interests.

179. I agree with Ms Cronin and Ms Fottrell's submissions. Boiling the key point down to fundamentals, the relationship between family law and immigration law, and the extent to which the one should have regard to the other, are for present purposes explained definitively in the judgment of Hoffmann LJ in *R v Secretary of State for*

the Home Department ex p T [1995] 1 FLR 293 and, in the specific context of adoption, in the judgment of Sales LJ in *S v Bradford Metropolitan District Council and another* [2015] EWCA Civ 951, [2016] 1 WLR 407. Mr Greatorex would in effect have me defy both.

180. I leave the last word to Thorpe LJ, that great master of family law, and in particular of international family law, who drew an important distinction in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, 429, [1998] 1 FLR 225, 229, between "real applications tainted by deception in their history" and "sham applications or applications of convenience comparable to the marriage of convenience." He continued:

> "In those cases the application or the ceremony are solely designed to achieve a legal status unsupported by the fundamental foundations: in the one case intimate cohabitation and sexual union with a view to procreation, in the other the creation of the psychological relationship of parent and child with all its far-reaching manifestations and consequences. But where the adoption application is supported by that fundamental foundation then the function of the court is to apply s 6 of the Adoption Act 1976."

I respectfully agree.