***Reporting restrictions***
A reporting restriction order was made on 17 July 2012
This judgment may be published in this form on the basis that the family members are not identified

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

NC number [2013] EWHC 1501 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 06/06/2013

**Before** :

**THE HONOURABLE MR JUSTICE PETER JACKSON**

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**Between :**

| | |
|---|---|
| **A Council** | **Applicant** |
| **- and -** | |
| **M** | |
| **- and -** | |
| **A** | |
| **- and -** | |
| **B** | |
| **- and -** | |
| **C** | |
| **(by her Children's Guardian)** | **Respondents** |

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**Alex Verdan QC and Carol McMillan** for M
**Martin Downs** for the Children's Guardian for C
**Mary Lazarus** for the Local Authority
**Maria Hancock** for B
A was not represented

The names of solicitors are omitted in the interests of confidentiality

Hearing dates: 17-18 April 2013 Judgment date: 6 June 2013

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# JUDGMENT 4 (Foreign Adoption: Refusal of Recognition)

**RELEASED FOR PUBLICATION – SEE NOTE ON REPORTING RESTRICTIONS OVERLEAF**

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**This judgment consists of 94 paragraphs. Pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken and copies of this version as handed down may be treated as authentic.**

## NOTE ON REPORTING RESTRICTIONS

This is the fourth judgment in this matter. It deals with the question of the legal status of the child C. It can be reported, provided the family is not identified.

Reporting restriction orders were made on 21 February 2012, 17 May 2102 and 17 July 2012. The last of these remains in force but has been varied so that reference can now be made to C's country of origin (Kazakhstan), which was previously referred to as country Y. The effect of the order is now to restrict publication of:

*(a) the names and address of any of*

*i. the Children whose details are set out in the order;*
*ii. the Parents, whose details are set out in the order;*

*(b) any picture being or including a picture of either the Children or the Parents;*

*(c) any other identifying details relating to the Children or the Parents, and in particular descriptions of them as being connected with any of the following geographical areas: [two towns]; [the county]; [the region of the country]; [foreign country X].*

*IF, BUT ONLY IF, such publication is likely to lead to the Children or Parents being identified as being or having been:-*

*i. parties to proceedings in the Family Division of the High Court;*

*ii. in foster care, or provided with accommodation by a local authority;*

*iii. adopted from or having adopted children from X;*

*iv. involved with artificial insemination;*

*v. involved in a dispute over the circumstances of conception of a child;*

*vi. concerned in criminal charges brought against M.*

The full text of the order is attached to the third judgment which can be found at http://www.bailii.org/ew/cases/EWHC/Fam/2012/2038.html.

**Mr Justice Peter Jackson:**

## Overview

1. This is an application concerning C, a girl born in December 2004 and now aged 8. In August 2005, at the age of 7 months she was adopted in her native country of Kazakhstan by M, as I shall call her. M now applies for a declaration that this adoption is recognised in England and Wales. By a cross-application, in fact issued earlier in time, C's Children's Guardian seeks a declaration that the adoption is not so recognised.

2. M's application is supported by B, the second oldest child. It is opposed by the local authority, which holds a care order for C. The oldest child, A, has not been represented at this hearing, though she has made a short written submission.

3. The application on behalf of C is brought under s.57 Family Law Act 1986, which empowers the court to declare that a person is or is not an adopted person for the purposes of the Adoption Act 1976 ('the 1976 Act') and the Adoption and Children Act 2002 ('the 2002 Act'). The application brought by M seeks a declaration under the common law. The question for the court in each case is: *"Does English law recognise C's Kazakh adoption or does it not?"*

4. This is the fourth judgment in this matter, previous ones given in 2012 being concerned with fact-finding, welfare and reporting restrictions. They too are to be found on the Bailii website.

5. The family members are

   M the adoptive mother of three children from abroad, now serving a sentence of imprisonment for cruelty towards A and C.

   F the adoptive father of A and B, long separated from M, now living abroad and playing no part in the proceedings concerning C.

   A a girl aged 19, adopted by M and F from country X at the age of 5 months and now living with her child D in a foster home

   B a girl aged 17, adopted by M and F from country X and now living in the home that she shared with M

   C the subject of the present application, a girl aged 8, adopted by M alone in Kazakhstan, and now subject to a care order and living in a different foster home to A and D

   D the son of A, aged 1

6. Because C's adoption has not thus far been recognised in this jurisdiction, M has never had parental responsibility for her. In fact, until a care order was made in July 2012, no one held parental responsibility for C. Since then, parental responsibility has rested with the local authority alone.

7. In an earlier judgment, I found that:

   a. From 2000 onwards, M excluded F from the children's lives. He only re-established contact with A and B recently.

   b. The children had lived an isolated life with M, having no other relatives, and a social life conditioned by M's interests. They were home-educated.

   c. M mistreated C in a number of ways, amounting to cruelty.

   d. M made A impregnate herself with donor sperm purchased by M from abroad in order that A should bear a child for M to bring up as her own. The programme, which took place with B's knowledge and participation, began when A was aged 14 and B aged 12. A became pregnant at the age of 14, but miscarried. At the age of 16 she again became pregnant, and D was born in 2011. A then revealed what had been going on and the proceedings began.

8. In July 2012, I made a care order in relation to C, who remains in long-term foster care with separate monthly contact with A and B. She will not return to M's care and there is currently no direct contact between them.

9. In October 2012, M entered a guilty plea and was sentenced by the Crown Court to imprisonment for 5 years and 4 months for cruelty to A and C: six months of the sentence relates to her treatment of C.

10. Despite everything, this was for many years a family unit consisting of a mother and three children and as such the family members have the right to respect for their family life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950:

***Article 8***
***Right to respect for private and family life***

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the*

*economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

11. In recognition of this, in July 2012, when placing C in the care of the local authority, I made these declarations at the request of the parties:

*(1) Family life exists between M and C pursuant to Article 8 of the European Convention of Human Rights and Fundamental Freedoms on the basis that M has acted as the de facto mother of C since she registered the adoption of C pursuant to the law of Kazakhstan on 25 June 2005.*

*(2) Family life exists between C and A and B pursuant to Article 8 of the European Convention of Human Rights and Fundamental Freedoms on the basis that C has a de facto sibling relationship since M registered the adoption of C pursuant to the law of Kazakhstan on 25 June 2005.*

*(3) The consequence of the existence of family life as set out in (1) and (2) above is that, subject to any order or direction of the Court, M:*

*(i) shall automatically be a Respondent to any family proceedings concerning C for her minority;*

*(ii) shall not require the permission of the Court before making applications in family proceedings;*

*(iii) shall be consulted by the local authority and any other relevant public body about the care and welfare of C as if she were the adopted mother of C.*

12. The declarations are of significance in acknowledging the family life that in some ways continues to exist for these children. They are so regarded by A, whose written submission refers to the declarations as reflecting the importance of her relationship with C, and it is on that basis that she does not make any submission in relation to the recognition of C's adoption.

13. In April 2013, my earlier judgments were published in an anonymised form and the case has now been publicly reported without identifying the family. After what they have been through, the children need this protection.

14. The hearing of the present applications took place over the course of two days. M, who has filed detailed statements, followed events from prison by video-link. None of the children attended. Oral evidence was unnecessary and the matter proceeded by way of submissions with judgment being reserved.

15. As required by Rule 8.21 of the Family Procedure Rules, notice of the proceedings was given to the Attorney-General, who has not intervened in view of the fact that the public interest has been adequately covered by the submissions of the parties.

**The background: the adoption of A and B**

16. M is now 48 years old. She came to England in 1984, working as a nanny, and has been habitually resident here since that time. In 1985 she married a British citizen, and in consequence obtained British nationality. She was divorced in 1988 and in the following year met F, whom she married in 1992. They wanted to have children and later that year approached their local authority (not the present one) for information about adoption. They decided to adopt from overseas.

17. In 1993, after energetic efforts, they obtained a positive home study report from the local authority and were approved by the Department of Health to adopt a child from country X, a designated country that I will not identify.

18. A was born in country X in early 1994. M and F travelled there and adopted her from foster care when she was aged five months. They brought A to the UK in July 1994 and she was in due course granted British citizenship. M subsequently arranged for her to obtain US citizenship as well.

19. In 1995, M and F were reassessed by their local authority for a second child, again with a positive outcome, and they again received the support of the Department of Health.

20. B was born in country X in mid-1995 and was adopted by M and F from an orphanage at the age of five months. She entered the UK in October 1995 and in 2003 she was granted British citizenship. Like A, she also holds US citizenship.

21. It is common ground that the adoptions of A and B are recognised in this jurisdiction as overseas adoptions occurring in a designated country. The course followed was in accordance with the principles and procedures regulating intercountry adoption at the time. For fuller discussion of these procedures, see below.

22. However, in 1993, and before A's adoption had been completed, M complained on behalf of herself and F of poor service by the relevant local authority. The complaint was upheld and they received an apology. They then complained to the Local Government Ombudsman that, having paid for the local authority home study report, it should have been released to them to use as they wished (and in particular to enable them to use an American

agency), rather than being sent to the local authority panel for approval and then to the Department of Health. That complaint was rejected.

23. The present relevance of this is that, even though both A and B were securely adopted, M was unhappy with the process. Her view, quoted by the Ombudsman, was that *"Quite frankly, [country X] has a lot of problems of its own and don't want to deal with adoptions in detail. They're quite happy for them to take place as long as they don't have to do the leg work."* The Ombudsman did not accept this.

24. In 1997, M and F separated. They were divorced in 2000 and from then M stopped contact between F and the two children A and B.

25. In my first judgment at paragraphs 32 to 36, I recorded some positive aspects of M's parenting of the children to set alongside the negatives.

**The adoption of C**

26. Now a single parent, M wanted to enlarge the family by adoption and from 2001 onwards she began to make plans. She decided not to adopt via the UK system but via US procedures. She did this in the belief that the approach was more straightforward and encouraging than the UK system. She concluded that, while the UK authorities would dislike her chosen approach, it was neither illegal nor clandestine, each step being approved by the US authorities and known to the UK authorities.

27. By 2004, it had become harder for a single adopter to adopt from country X, and M therefore selected Kazakhstan as a country from which to adopt a third child.

28. In November 2004, M obtained a complimentary home study report from a chosen American social worker (Ms S), who described herself as an 'International Adoption Social Worker'. Ms S held a license to practise from the State of Florida and was then living on a US Army base in Germany. This report, whose substance ran to just four pages, was based on a week's stay by Ms S at the family home. It assessed M as an expatriate US citizen, resident in the UK but intending to return to the US with the children at some point.

29. M says that *"There was no need for a UK home study as the US home study was carried out on me as an American expat living abroad, not as a UK national."* However, the fact is that she had lived in the UK since 1984 and had been a British citizen since 1985. Whether or not she was entitled to be assessed as a US citizen, M's choice clearly conflicted with the reality of her chosen life, and did so in way that was calculated to avoid the scrutiny that a UK resident would expect.

30. Furthermore, the assessment of a family living in England by a social worker who, so far as I am aware, had no special knowledge of this country, was an ambitious venture and there are indeed significant difficulties with Ms S's report. In the first place, for a privately commissioned social worker to stay for a week with the family she is assessing scarcely promoted the degree of distance and perspective necessary for sound professional judgement. Added to that, Ms S relied almost entirely on the self-report of M and the two young children, together with written references from family friends. In consequence, the report contained significant inaccuracies. It described the relationship between M and her parents in the US as being ongoing, with visits by the parents to England twice a year, when in fact the maternal family's relationship was very poor with M and non-existent with the children. More remarkably, the loss of the children's relationship with F after the divorce was mentioned without any comment from Ms S. Nor is there any reference to Mr E, who was M's boyfriend between September 2000 and July 2004 and who spent a great deal of time with the family. Likewise, the report merely referred to a *'hope'* on M's part that she would return to the US at some point in the future: there was no exploration of this possibility, or of the effect of it on any children for whom M was responsible. In fact, at no stage during these proceedings has there been evidence of a plan to return to the US at any stage.

31. In the summer of 2006, Ms S visited the family to carry out a post-adoption report for the Kazakh authorities.

32. In 2008, M wrote to Ms S explaining that she had been prevented from adopting a fourth child by *"someone she knew making untrue allegations about her to the US embassy."*

33. In July 2011, within days of the birth of D, M asked Ms S to confirm that she had carried out the home study report in 2004, receiving this reply by return: *"Hi [M's first name]! Good to hear from you! Sure that's no problem. [Briefly verifies that she carried out the home study.] Give your girls a big hug for me [M] and I wish you all the best. Love [Ms S's first name]"*

34. In November 2011, M wrote by email to Ms S asking her for a character reference. To this, Ms replied in January 2012: *"Hey [M's first name] and a Happy New Year to you and the girls. A reference was no problem… Lots of love to you all, [Ms S's first name]".* To this, Ms S attached a supportive character reference for M, saying that the family had been a pleasure to know and work with. Referring to the 2008 allegations against M, Ms S's only comment was that she knew that this had deeply upset M and that she had *"offered her my support in any way that she thought I could help".*

35. As I have not heard from Ms S directly, I do not name her in this judgment. However, I have enough information to conclude that her work on this case came nowhere near to meeting the requirements of a proper home study report. In this jurisdiction, those requirements are now contained in the Adoption Agencies Regulations 2005, the Suitability of Adopters Regulations 2005 and the Adoptions with a Foreign Element Regulations 2005 which, while they did not come into force until 30 December 2005, contain elements of good practice that should have been well understood at the time of Ms S's work in November 2004. To take one example, no report into M's suitability to adopt a third and fourth child could have any integrity when the author had made no attempt to speak to the adoptive father of the first and second children. After all, it was only in June 2004, that M had written her letter to him saying the children did not want to see him and that *"You are no longer a part of our lives in any way."* Had Ms S spoken to F, she would have learned about matters that must have caused any competent reporter to have serious concern about M's parenting. Nor did Ms S make any effort of which I am aware to speak to M's own family or to check M's account of their position in the children's lives. Nor did she contact any local agencies to find out whether they held any relevant information on the family.

36. Looked at overall, the home study report written by Ms S, was a woefully superficial piece of work. It could have been written by M herself. Or, more worryingly, by a friend of M. No doubt M appreciated this more 'encouraging' approach, in contrast to the assessments she experienced when adopting A and B.

37. Likewise, it was irresponsible for a professional social worker to write a character reference without taking any care to inform herself about the circumstances in which the reference was being sought, or the use to which it might be put. It epitomises the relationship that seems to have existed between M and Ms S that M sought the reference without disclosing that she was at the time on bail for offences against the children, and that Ms S did not apparently ask why a person who had already had allegations made against her was now seeking a character reference.

38. Little as work of this standard does for child welfare or child protection, it was produced by a social worker advertising her US state license and was accepted by the US authorities as a basis for M's approval as an adopter. I will direct that a copy of this judgment is sent by the Local Authority to the US Embassy, giving Ms S's full name and contact details, so that the US authorities are aware of these concerns.

39. Equipped with Ms S's report and with US and UK police checks, M presented her application to the US Embassy in London and was granted a document called the I-600A, the US equivalent of the Department of Health certificate. This approved M for the adoption of two children at the same time. It was

valid for 18 months and was transmitted to the US Embassy in Kazakhstan and to the State Department for final certification.

40. C was born in December 2004. She was premature and was left in hospital before being transferred to an orphanage. The adoption process in Kazakhstan was difficult. M travelled there twice with A (11) and B (10).

41. C's adoption in Kazakhstan occurred on the basis of the information in Ms S's report and it was registered in August 2005. In September 2005 C was brought by M to England, entering the UK via the US on a US passport. On arrival, she was granted indefinite leave to remain and in March 2006, she was registered as a British subject.

42. M states: *"I did not contact any UK Local Authority following any of the girls' adoptions as I did not see that there was any reason to do so, nor was I contacted by any Local Authority. C's adoption was done via the US and I therefore had no obligation to inform any UK authority save the Home Office."* She further describes the process whereby, in 2008, she obtained US citizenship for C, as she had previously done for A and B.

43. Any account of C's adoption must acknowledge the uncertainties and hardships that M and the other children underwent in bringing her to the UK, a process described in detail by M in a diary. As ever, those who circumvent regular adoption procedures are able to point to the conditions from which a parentless child has been rescued, and C's case is no different.

44. M states: *"I have spent many years and thousands of pounds/dollars obtaining correct legal documentation for my daughters. Each of them now holds full US and UK citizenship and can choose to live and work in either country at any time they wish. This is a privilege that many, many people envy and covet but it has not come easily or cheaply for me. I have followed the law every step of the way for each adoption and subsequent acquisition of nationality and I would not have been granted the status or documentation for any of my daughters had I done something considered illegal."*

45. In my first judgment, I described the difficulties that arose following C's arrival and the demands that this placed on all members of the family. Unfortunately, M's response was to use aggressive methods to secure C's compliance:

- regular smacking

- pouring milk over C when she failed to say *'ta'* at the age of 18 months, followed by shutting her in her bedroom for about two hours

- putting C in the kitchen alone and forbidding the other children to talk to her while she was being potty-trained, and pouring water from a jug over her when she wet herself

- tying her to a chair when she would not sit still

- putting duct tape over her mouth for a few minutes for answering back

- dropping her on the floor, or pushing her to the floor

- calling her grossly abusive names.

46. At an earlier hearing in these proceedings, M admitted some but not all of these actions, and she has since pleaded guilty to cruelty to C on a similarly selective basis. I approach matters on the basis of my overall findings, which were founded on A's evidence.

47. It need hardly be said that the overall consequences of M's criminal offences have been devastating for these children, and specifically for C. She has necessarily (in the case of M) and unavoidably (in the case of A and B) been separated from her family and she will remain in a substitute family throughout her childhood. She has been psychologically assessed as a child who has suffered highly significant harm in her social, emotional and behavioural development, and whose attachment patterns are flawed. She needs therapy and her carers need ongoing support.

**Adoption**

48. Adoption gives parental responsibility for a child to the adopters and permanently extinguishes the parental responsibility of any other person. An adoption order is irrevocable, except in very restricted circumstances. The child is regarded as if she had been born to the adopter. Adoptive parents are treated in law as the child's parents and adoptive siblings as the child's siblings.

49. At the time of C's Kazakh adoption in August 2005, the governing domestic legislation was the Adoption Act 1976 ('the 1976 Act'). s.38 defined adoption in similar terms to the definition in the Adoption and Children Act 2002 ('the 2002 Act'), which came into force on 30 December 2005.

50. The routes to adoption now set out at s.66(1) of the 2002 Act are these:

(1) adoption by an adoption order, or a Scottish or Northern Irish adoption order;

(2) adoption by an order made in the Isle of Man or any of the Channel Islands;

(3) a 'Convention adoption';

(4) an 'overseas adoption';

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

51. Convention adoptions are adoptions that are automatically recognised by operation of law as having been effected in a country that is a signatory to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 ("the Hague Convention"). On 1 June 2003, by means of the Adoption (Intercountry Aspects) Act 1999, the Convention was ratified and implemented in England and Wales.

52. Overseas adoptions are adoptions effected in a country specified in the Adoption (Designation of Overseas Adoptions) Order 1973. Designated countries include the countries of Western Europe, the United States and many Commonwealth countries.

53. As Kazakhstan is neither a Convention country nor designated country, the only route to recognition that is available is by way of recognition at common law.

54. In consequence of M's conviction for offences against children and Regulation 23 of the Adoption Agencies Regulations 2003, she could not be approved as an adopter by a UK adoption agency. Accordingly, it is not realistically open to M to apply for a UK adoption order and she is therefore driven to seek recognition of C's Kazakh adoption.

**Intercountry adoption**

55. The non-legal term 'intercountry adoption' describes the adoption of a child who is habitually resident in one country by an individual or couple who are habitually resident in another country. The Hague Convention and domestic primary and secondary legislation exist to establish safeguards to protect the best interests of children by facilitating co-operation between countries to prevent child trafficking and to seek to ensure that safeguards and standards for intercountry adoption are equivalent to those that apply in domestic adoption.

56. Section 56A of the 1976 Act made it a criminal offence for a person habitually resident in the British Islands to bring into the United Kingdom for the purpose of adoption a child who is habitually resident outside those Islands

unless such requirements as may be prescribed by regulations made by the Secretary of State were satisfied.

57. The regulations in effect when C was brought into the UK in 2005 were the Adoption (Bringing Children into the United Kingdom) Regulations 2003 ('the 2003 Regulations'). These required a prospective adopter to apply to an adoption agency for an assessment of her suitability and, before the child's entry into the UK, to have received written notification from the Secretary of State that he has issued a certificate confirming to the relevant foreign authority that the person has been assessed and approved as eligible and suitable to be an adoptive parent and that the child will be authorised to enter and reside permanently in the UK.

58. On 30 December 2005, with the coming into effect of the 2002 Act, the 2003 Regulations were succeeded by the Adoptions with a Foreign Element Regulations 2005. These render it a criminal offence, punishable with up to twelve months' imprisonment and/or a fine, for a person who is habitually resident in the British Islands to bring a child, who is habitually resident outside the British Islands, into the UK for the purpose of adoption, unless the requirements of the statutory regulations have been satisfied. Like the 2003 Regulations, the 2005 Regulations require the prospective adopter to have obtained the Secretary of State's certificate. Furthermore, the prospective adopters must visit the child in the state of origin (and before doing so have given required information to the relevant local authority). They must inform the local authority of the expected date of the child's arrival and must travel into the UK with the child. They must then, within a period of 14 days, give notice to the local authority of the intention to apply for an adoption order.

59. Among the policy objectives of the 2003 and 2005 Regulations are the prevention of abuses that arise when children are brought into this country by unsuitable adopters: see for example Re C (Adoption: Legality) [1999] 1 FLR 370 (Johnson J), Flintshire County Council v K [2001] 2 FLR 476 [2001] 2 FLR 476 (Kirkwood J), and Re M (Adoption: International Adoption Trade) [2003] 1 FLR 1111 (Munby J).

60. When bringing C to the UK, M, an experienced intercountry adopter, chose not to follow the course provided for by the 1976 Act and the 2003 Regulations, which would have led to automatic recognition: on the contrary, she made the deliberate choice not to do so, and she asserts that she was entitled to do this.

**Recognition under common law**

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.

63. The case law consists of a series of first instance decisions:

- D v D (Foreign Adoption) [2008] 1 FLR 1475 (Ryder J)
- Re N (Recognition of Foreign Adoption Order) [2010] 1 FLR 1102 (Bennett J)
- Re T and M (Adoption) [2011] 1 FLR 1487 (Hedley J)
- Re R [2012] EWHC 2956 (Fam) (Hedley J)
- Re J [2012] EWHC 3353 (Fam) (Moor J)
- Z v Z [2013] EWHC 747 (Fam) (Theis J)

64. It is unnecessary to set out the individual circumstances of these cases: in each the foreign adoption was recognised without opposition and in each the child had been adopted in the country of domicile or habitual residence of a least one of the applicants. Transposed to this case, the equivalent scenario would have been that M was a Kazakh national or had been habitually resident in Kazakhstan at the time of C's adoption.

65. In each of the above cases bar the last, direct reference is made to the old decision in Re Valentine's Settlement [1965] 1 Ch 831 (CA), in which the Court of Appeal (Denning MR and Danckwerts LJ, Salmon LJ dissenting) refused recognition to a South African adoption on the basis that at the time of the adoption the adoptive father had not been domiciled in that country. The relevant English legislation (the Adoption Act 1926) provided that a domestic adoption order could only be made where both adopters were domiciled here, and the majority in the Court of Appeal held that the same should apply to the foreign adoption if it was to be recognised. Salmon LJ, dissenting, would have held that a foreign adoption obtained in a jurisdiction that

applied substantially the same safeguards as ourselves should be entitled to recognition.

66. The decision in Re Valentine was considered by Hedley J in Re R (above), 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 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.

67. In these proceedings, Mr Verdan QC and Ms McMillan for M argue that Re Valentine should (as Mr Verdan at first put it) be distinguished. It is the only reported decision in which recognition has been refused. 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, 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 Article 8 rights of the siblings in particular show that Re Valentine cannot (as he finally expressed it) be followed.

69. I do not accept this submission. In my judgment, the *ratio* of Re Valentine, as expressed by Hedley J, remains binding on this court for these reasons:

    1. Re Valentine is a decision of the Court of Appeal of long standing that has been repeatedly followed 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 were considered and synthesised by Hedley J in Re R. 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 is that recognition cannot be afforded, the option of making a domestic application to adopt may be available in appropriate cases.

**The Article 8 rights of the family members**

70. It remains to consider whether the right to respect for family life requires the rule in Re Valentine to be revisited to allow for the recognition of adoptions from countries that are neither signatories to the Hague Convention, nor designated countries, in circumstances where the qualifying conditions that would be applied to a domestic adoption have not been met. This argument was not addressed in Re R or in the reported decisions.

71. M and B do not accept that the declarations made by the court adequately satisfy the rights arising under Article 8, and particularly those that arise as between the three children. Non-recognition, it is said, deprives them of full legal acknowledgement by the state in which they live of their lifelong relationships.

72. In this case, the Article 8 rights of each of the family members are clearly engaged. Non-recognition of C's Kazakh adoption would in my view amount to an interference with these rights, which can only be justified if it is in accordance with law, necessary and proportionate.

73. Mr Verdan refers to the commentary on the topic in Dicey, Morris and Collins, in which the authors record the rule in Re Valentine in its literal form but go on at 20-128 to question the view of the majority. In particular they refer to the ECHR decision in Wagner v Luxembourg [2007] ECHR 76240/01 in at 20-129:

*"The European Court of Human Rights has held that the 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 a result of an enforceable foreign adoption, but is unable to satisfy the domicile requirement. In Wagner an enforceable Peruvian adoption was denied enforcement in Luxembourg ion 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 interpretation 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 family life"."*

74. At paragraphs 133 and 135 of Wagner, the ECHR emphasised that conflict rules should not take precedence over the social reality and the situation of the persons concerned and that the Human Rights Convention is a living instrument to be interpreted in the light of present-day conditions. At paragraph 155-156, the daily disadvantages to the child in that case of living in *"a legal vacuum"* were described: these concerned disadvantages in the labour market and insecurity and inconvenience in immigration status. Finally, at paragraph 158, the Court emphasised that the child herself could not be blamed for the circumstances, yet was being penalised in her daily existence.

75. Broadly viewed, the decision in Wagner 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 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 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 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.

**Public policy**

77. Recognition of a foreign adoption may be withheld on the ground that it would offend public policy. I note the observation in Dicey, Morris and Collins on The Conflict of Laws 15th Edn. (2012) at 20-133, in which the authors state that the distinction between status and its effects is of vital importance and that public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself. The authors write:

*"Adoption is taken very seriously indeed in this country and is surrounded by all the safeguards which an active social policy can devise. In some other countries it is taken far less seriously and serves quite different objects. If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain for 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 merely because the requirements for adoption in the foreign law differ from those of English law."*

78. On behalf of M, it is argued that the C's adoption was lawful and regularly conducted in Kazakhstan with a benign, parental and humanitarian motivation on her part. She had good reason for rejecting the route that she and F had followed in the cases of A and B, as shown by the complaints made at the time. Ms S's report was, it is said, a regular piece of work.

79. In response, the local authority contends that the route chosen by M when bringing C into the UK was thoroughly dishonest and calculated to evade the requirements of s.56 of the 1976 Act. She presented herself to the Kazakh authorities as a US citizen who intended in due course to live in the US, when she was in fact habitually and permanently resident in the UK. It is also likely that M led the Kazakh authorities to believe that she would adopt C under US law. It is further contended that she probably committed an offence by bringing C into the UK, albeit that any prosecution would long be time-barred. The shortcomings in Ms S's report are emphasised. Recognition would, as matter of policy, set a dangerous precedent and act as an encouragement to those who wish to circumvent proper procedures.

80. The local authority also contends that as a matter of policy C's adoption should not be recognised on account of M's criminal conduct.

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 assesment 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.

**C's welfare**

85. Under s.1 of the 2002 Act, in coming to a decision concerning C's adoption the court's paramount consideration is her welfare throughout her life, having regard to the welfare checklist factors.

86. On behalf of M and B, it is argued that the Guardian and local authority have not properly investigated and balanced the consequences for C of recognition or refusal of her adoption. It is pointed out that without recognition of the

adoption, no natural person currently holds parental responsibility. She is, it is said, in legal limbo. Her position will be anomalous. How are her relationships with her family members to be described? Non-recognition would cause emotional confusion and uncertainty, while recognition would bring greater clarity and would give legal articulation to what are accepted to be established relationships. The importance of the *de facto* sibling relationships is strongly emphasised, particularly for a child in foster care.

87. In response, in a submission that acknowledges some of the contrary arguments, the Guardian concludes that recognition would be contrary to C's welfare. It is asserted that the court has only to consider the likely fate of an adoption application for it to be apparent how inimical recognition would be to C's welfare. Any lack of clarity in C's status is of no real practical effect: she is a fully-entitled British and American citizen and her Article 8 rights have been acknowledged by the declarations that have been made. It would be worrying if the adoption were recognised in the face of the undeniable fact that M is a danger to any child in her care and presents a significant risk of destablising C if she is given the opportunity.

88. In considering C's welfare, I can draw on a considerable experience of this family during litigation that has lasted for the past year. In unprecedented circumstances, I seek to position myself firmly from the perspective of C's welfare.

89. Addressing the position of the three children, I acknowledge and endorse the importance of their mutual relationships, but in practice I find that recognition or non-recognition will have a limited effect upon them. C will continue to see A and B while she enjoys and benefits from that contact, and I do not accept that any real confusion will arise from the absence of legal recognition. C is not the birth sister of A or of B and, in common with many other *de facto* relationships such as step-relationships or half-relationships, these young people will create a future, whatever it may be, that reflects their natural connections with each other. I do not accept that the issue of legal status will cause any practical or emotional obstacle. To the extent that A and B take different views from each other, this most likely reflects B's allegiance to M's outlook, while A's acceptance of the current situation, which has existed ever since C came to England, is in my view more realistic. Overall, I rate the impact of a refusal of recognition on the sibling relationships in this case as slight.

90. In contrast, 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 Article 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.

**Conclusion**

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.

    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.

94. I accordingly declare that C's adoption by M in Kazakhstan is not an adoption that is recognised by the law of England and Wales. No other declarations are necessary.

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