



Neutral Citation Number: [2022] EWHC 2910 (Fam)

Case No: OX10/2022

**IN THE HIGH COURT OF JUSTICE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17 November 2022

**Before :**

**Mrs Justice Morgan DBE**

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**Between :**

QQ

**Applicant**

- and -

XX

**First Respondent**

JJ

**Second Respondent**

ESMARELDA  
(Through her Children's Guardian Lynn  
Magson)

**Third Respondent**

A BOROUGH COUNCIL

**Fourth Respondent**

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**Sharon Segal** (instructed by **Goodman Ray**) for the **Applicant and First Respondent**  
**Second Respondent** was not represented and did not attend the hearing  
**Jamie Niven-Phillips** (instructed by **Cafcass Legal**) for the **Third Respondent**  
**Nigel Cholerton** (instructed by **A Borough Council**) for the **Fourth Respondent**

Hearing dates: 24 and 25 October 2022

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**Approved Judgment**

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This judgment was handed down remotely at 10.30am on 17.11.2022 by circulation to the parties or their representatives by e-mail.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mrs Justice Morgan :**

1. This is an application by QQ (the Applicant) for an adoption order in respect of his stepdaughter, ('Esmarelda'), who was born in March 2004 and so is now 18yrs 6m. The application was made before her 18<sup>th</sup> birthday.
2. The application is supported by Esmarelda's mother, XX who is the first respondent (the Mother); by Esmarelda herself and the children's guardian and by the relevant Local Authority. Esmarelda's Father is JJ, the Second Respondent (the Father). He opposed the making of an order setting out his opposition in a statement to the Court. He was given the opportunity and the means to join this hearing by link but availed himself of neither. I have accordingly at this hearing proceeded on the basis that his most recently advanced position - i.e. that he opposes the making of the order sought – remains the case.

**Background Summary**

3. Esmarelda was born in a European country, hereinafter ('Country F'). Both of Esmarelda's birth parents, (and Esmarelda), are Country F nationals; they married on 11 October 2003, separated in January 2008, and were divorced on 27 May 2008. Esmarelda's contact with her father, following her parents' separation when she was 4, was, according to the Mother, minimal and sporadic. The Father's evidence is that it was more than that and included time spent with his family – with whom he said she was fully integrated. His evidence is that, of course, he did not see her daily but that there was what he called *a strong and established relationship between father and daughter*.
4. The mother met QQ in January 2013. They began a relationship. On 13 June 2015, they married in England. On 7 April 2016 Esmarelda and her mother moved to England to reside with the applicant QQ. They have lived in this jurisdiction and with him since that time.
5. Over time, the applicant, mother and Esmarelda discussed the possibility of creating a legal structure to reflect what they have come to think of as the reality of their family unit, by way of an adoption order. The mother asked the father for his consent to such an order; Esmarelda, too, contacted her father seeking his support. It was not forthcoming.

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6. On 1 July 2021, the applicant notified the Local Authority of his wish to adopt Esmarelda. On 9 August 2021, the relevant area's 'Adopt' social worker, wrote to the father advising him of the notification. The letter was translated into the language of Country F. It was sent to the email address which the mother held for him, and to his last known address.
7. An Annex A report was completed on 27 October 2021. It concluded that *'Esmarelda presents as an insightful and mature person beyond her years, she genuinely wants to be adopted by the applicant, she says that "I want to finally feel like a part of a whole family. (In my early years) I've not experienced having two present parents who care for me and having [QQ] being my support system for many years - I definitely know adoption will only improve our relationship. QQ has been my father figure during times when it was my father's responsibility, and I would like to finally feel as a part of a complete family."*
8. The social worker's conclusion, which remains unchanged before me, was that: *'an Adoption Order would certainly fulfil Esmarelda's wishes and I believe would be appropriate to meet the needs of Esmarelda and her family'*.
9. The applicant's application was signed on 7 November 2021. On 19 January 2022, the father responded (in English) to the social worker's email. He stated *'...The legislation of Country F does not contain the right of a parent to renounce his parental rights. Any document containing such a condition is void (in the legal sense). My consent to Esmarelda's departure from Country F contained a ban on further adoption. The very fact of raising such a question causes me indignation! I am unequivocally against the adoption of my daughter, [Esmarelda], by Mr. QQ'*. He asked to be notified of what he termed the 'results of the notification' to the same email address and to a postal address given by him.
10. The adoption application was issued on 7 March 2022. The application was allocated to me and, in the light of Esmarelda's fast approaching 18<sup>th</sup> birthday, listed for urgent directions on 8 March 2022. An order was made transferring the application to the High Court and joining Esmarelda as a party to the proceedings. A guardian from the CAFCASS High Court Team was appointed.
11. The matter came before me for directions on 23 March 2022. On that day the applicant and mother appeared as litigants in person; the father had not been served. Timetabling directions were made to a hearing on 27 April 2022. The matter was listed on 28<sup>th</sup> June 2022 to determine *inter alia* the applicability of the Vienna Convention on Consular Relations 1963 and any application for expert evidence. By the time of the hearing listed on 27<sup>th</sup> April the applicant and mother had secured pro bono representation by specialist solicitors and Counsel. The father confirmed that he wished to receive documentation in this matter; he was encouraged to provide such evidence as he wished. The father in due course filed a detailed statement.
12. On 28 June 2022, the court declared that it was lawful and proportionate for the Local Authority and the Court not to notify the Country F Consulate of the fact of these proceedings, indicating that a reasoned judgment on its decision as to the issue of notification pursuant to *Article 37b* would be incorporated within any judgment given at the final hearing. Further timetabling directions were made providing for an expert report to be prepared by Professor T in time for the listed final hearing, on Country F

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Law, to include the effect of any order for adoption made in this jurisdiction once Esmarelda has reached her 18<sup>th</sup> birthday.

13. An addendum Annex A report was filed on 12 September 2022. The Local Authority continues to support the making of an adoption order. The Children’s Guardian supports the making of an adoption order as being in Esmarelda's life-long, best interests.

**Applicability of Article 37 of the Vienna Convention on Consular Relations 1963 ('the Convention')**

14. Esmarelda is a citizen of Country F. That fact adds an additional layer of complexity to a case which, as the Guardian, the applicant and the Mother acknowledge, is already not straightforward. That this is so has been reflected in the excellent skeleton argument prepared on behalf of the applicant and the mother by Ms Segal. Esmarelda's nationality meant that an issue which fell to be considered is whether there is a requirement to notify the Country F Consulate or, in the event that there is a discretion, whether I should exercise that discretion against notification.
15. In the circumstances of this case, the applicant and the mother submit that the Convention does not apply or in the alternative that if it does, I should exercise the Court’s discretion not to notify the Country F Consulate. This is a position with which Mr Niven-Phillips agrees and he adopts the arguments advanced and submissions made by Ms Segal. The father was provided with the skeleton argument advancing the applicant’s position so as to give him the opportunity to comment, should he so wish. Whilst he has engaged in the proceedings, filing a detailed statement he elected not to comment on this aspect and indicated in response an intention to confine himself to factual issues.
16. The Convention embodies a general framework of minimum standards on the conduct of consular relations; it provides a range of tasks for consular agents, from offering assistance and protection to nationals, to furthering the development of commercial, economic, cultural, and scientific relations between the sending and receiving States.

Pursuant to Article 37(b) of the Convention:

***‘Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents.***

*If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:*

...

*(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;*

...’

17. In **Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)** [2014] 2 FLR 151, the then President of the Family Division, Sir James Munby, considered the application of Article 37 (and 36) of the Vienna Convention, to ‘*care cases involving families from other countries in the European Union*’ [§2]. The wider context was a concern that the ‘*courts of England and Wales are exorbitant in their exercise of the care jurisdiction over children from other European countries*’[§13]; that the ‘*number of care cases involving children from other European countries has risen sharply in recent years and that significant numbers of care cases now involve such children*’ [§14], ‘*exacerbated by the fact that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent*’ [§15]. Munby P reflected that ‘*international co-operation at every level had become a vital component not merely in the day-to-day practice of family law but in our thinking about family law and where it should go*’ [§19].

Both the focus of *Re E* and the then President’s comments were in the context of care and other public law proceedings [§§21, 41, 43]. The President stated [§41]

*‘This is not the occasion for any elaborate discussion of the effect of these provisions as a matter of either public international law or English domestic law (as to which see the Consular Relations Act 1968 and the Diplomatic and Consular Premises Act 1987). I am concerned only with what they suggest as good practice in care cases. But in that context there are, as it seems to me, three points to be borne in mind: (...Third, Article 37(b) applies whenever a “guardian” is to be appointed for a minor or other foreign national who lacks full capacity. And Article 37(b) imposes a particular “duty” on the “competent authorities” in such a case.’*

He went on [§44] further to consider the implications for practice in care cases:

*‘I express no views as to the effect of Articles 36 and 37 of the Vienna Convention as a matter of either public international law or English domestic law. There is no need for me to do so and it is probably better that I do not. Nor do I take it on myself to proffer guidance to local authorities, health trusts and other public bodies as to how they should interpret whatever obligations they may have under the Convention. That is a matter for others. What I do, however, need to do is suggest how as a matter of good practice family judges, when hearing care and other public law cases, should from now on approach these provisions.’*

18. The court set out that it was [§47]

*‘highly desirable, and from now on good practice will require, that in any care or other public law case :*

...

*(iii) Whenever a party, whether an adult or the child, who is a foreign national (a) is represented in the proceedings by a guardian, guardian ad litem or litigation friend; and/or (b) is detained, the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay’*

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19. The President considered that if, in any particular case, the court is minded to adopt a different or more restrictive approach the court should hear submissions before coming to a decision and set out quite explicitly, both in its judgment and in its order, the reasons for its decision [§48].
20. The Vienna Convention fell to be considered once again by the President two years later in **Re CB (A Child) (No 2) (Adoption Proceedings: Vienna Convention)** [2016] 1 FLR 1286, he stated [§84] *‘local authorities and the courts must be appropriately pro-active in bringing to the attention of the relevant consular authorities at the earliest possible opportunity the fact that care proceedings involving foreign nationals are on foot or in contemplation’*.
21. In **Re JL and AO** [2016] EWHC 440, a group of cases concerned with babies relinquished for adoption, Baker J, as he then was, said [§70]
- ‘in circumstances where the child is joined as a party to proceedings, as summarised in FPR rule 14.1, a guardian will be appointed under rule 16.3. In practice, this includes all applications for placement orders, all applications for orders under s.84 and certain applications for adoption orders, including cases where a CAFCASS child and family reporter recommends that the child be a party and the court accepts that recommendation. Following the guidance of the President in Re E reiterated in Re CB, the court is under an obligation under Article 37 to notify the consular authorities when a guardian is appointed even in those cases where no obligation arises under Article 36’*.
22. A different approach was taken by Mr Justice Keehan in **A LA v M and O** [2021] EWHC 908. There the court was concerned with a young person, a citizen of the Democratic Republic of the Congo, who was the subject of care proceedings, with a guardian appointed to represent her interests. The discrete issue for the court to determine in that case was whether the Local Authority was under a duty to notify the Congolese authorities. Keehan J held:
- ‘In the premises does Article 37(b) impose an absolute and binding duty in all circumstances to notify a foreign authority where a court appoints a guardian in respect of one of its nationals? In my judgment it does not. In the vast majority of cases where Article 37(b) is engaged, the court will have no difficulty or face any impediment in complying with the terms of the Vienna Convention and giving the requisite notification to the foreign authority. There will be rare cases, such as the circumstances of this case, where it would wholly inimical to the welfare best interests of the child to give the requisite notice to the foreign authority. The Vienna Convention is not enshrined in our domestic law. The terms of the Convention should ordinarily be complied with but where to do so would be contrary to the welfare best interests of the child concerned, I am satisfied that the court may conclude it would not be appropriate to give the requisite notification’*.
23. In **Re K (A Child) (Private Law Proceedings: Consular Involvement)** [2017] 4 WLR 150, Bodey J considered the application of the Convention in private law proceedings (application for British citizenship, care arrangements) concerning a child born in India to Indian parents but now living in the United Kingdom, where a guardian had been appointed to represent the child’s interests. In reviewing Re E and

noting that the comments of the then President were expressly referrable to care proceedings within public law proceedings the court considered the Consular Relations Act 1968. Section 1 of that Act sets out certain articles of the Convention which appear in Schedule 1 and states that those articles shall have the force of law in the United Kingdom. Notably Article 37 is not contained within Schedule 1. Bodey J stated that :

*'since certain designated articles of the Vienna Convention have specifically been given by statute the force of law in the United Kingdom, the remaining articles of the Vienna Convention do not have the force of law in the United Kingdom and remain (as one sometimes finds) Convention articles which are not actually part of United Kingdom law. So, the word "duty" in article 37 has to be seen in that light. I have not heard any argument on this, still less argument from both sides. It does seem to me however, at least provisionally, that the court is not obliged in private law proceedings to notify the national consular offices of a child who is a foreign national (although in the circumstances of the particular issues raised in the particular proceedings, it may be desirable or even perhaps necessary to do so). It is a matter of discretion. The majority of private law proceedings involving a child of foreign nationality where a Children's Guardian is in place would not require notification of consular authorities, as this would generally be disproportionate and cause unnecessary work and clutter all round: for example, a difficulty inter-family contact or residence dispute over a child who happened to be of foreign nationality, where there happened to be a children's guardian appointed. In cases like that, foreign consular staff would have no interest or role. Here however the nationality issue means that it is appropriate for the Indian consular authorities to have been notified of the fact of the proceedings, which indeed they have now been, albeit with very little time to respond'.*

24. More recently, Article 37 was considered by Mrs Justice Lieven in **Prospective Adopters v The Mother and Another [2021] EWHC 91 (Fam)**. On the facts, the court found that there was no duty to notify the relevant authorities, and the court exercised its discretion not to do so. Lieven J noted however that *'there might be a potential argument about whether or not the appointment of a Cafcass Guardian within the meaning of the FPR falls within the terms of the appointment of a "guardian" in Article 37. However, that argument was not advanced before me and does not fall for determination in this case'*.
25. In the circumstances which Mrs Justice Lieven came to consider the question of notification there were two reasons why notification might be appropriate. The first of which was to try to trace the Father of the child concerned. The situation here might have been similar had Esmarelda's Father not been contactable and had it been necessary as had seemed might be so (when appointing a guardian for her) in the earlier part of this year to seek assistance in establishing his whereabouts and a line of communication with him. It is however quite different since communication has been established with Esmarelda's father and he has engaged with this application – and set out his opposition. The second reason for notification in the case before Lieven J (which I remind myself was in the context of an adoption of a relinquished baby arising from public law care proceedings) was to invite any view on placement and whether proceedings should be transferred to the relevant country (Romania). Whilst

those are not circumstances which arise here I hold in my mind the observations made by Lieven J that *It must be remembered that AK is a Romanian citizen and is not a British citizen. Although there is no duty under the Vienna Convention to notify, for the reasons set out above, that does not mean that the Court can simply ignore the fact that it would be making an order about a foreign national without the relevant authorities of that state being informed. As Baker J made clear in Re JL there remains a discretion to notify where the Vienna Convention does not require it.*

26. Ultimately in **Prospective adopters v The Mother and Another [2021] EWHC 91 (Fam)** Mrs Justice Lieven concluded in the way she explained at paragraph 44: *In my view, it will be the unusual case where a court would choose not to notify the relevant authorities of the other state where a foreign child is in the process of adoption. In effect, here the citizen of one country is going through a process by which he will become a citizen of another country, in circumstances where he is too young to express a view, and the first country is not being informed. However, I accept that this is an unusual case. AK is unable to express any view on the situation. For the reasons I have set out above, I consider it to be both in his best interests and those of the Mother, that the Romanian authorities are not notified because of the risk to the Mother, the lack of benefit to AK from doing so and the inevitable and possibly prolonged delay. For those reasons, I will exercise my discretion not to notify the Romanian consular authorities.*
27. I observe in passing that even a glance at that paragraph is sufficient to demonstrate how different are the circumstances of the child with whom she was concerned from those of the young person with whom I am concerned, and that this serves to underscore how fact specific will be the determinations of the question of notification.
28. The applicant and mother, through Ms Segal, contend as their primary position that the circumstances envisaged by article 37(b) are not circumstances which apply in this case, and accordingly there is no duty upon the court to notify the Country F Consulate. Ms Segal's secondary position is that in the event the court disagrees, the applicant and mother contend that I should, in the circumstances of this case, exercise my discretion not to notify the Country F Consulate. With her customary thoroughness, Ms Segal has, by way of foundation for her submissions as to the purpose of Article 37 (b), undertaken and provided to the court a review of the International Law Commission's Analytical Guides, with a view to considering the extent to which the rationale and scope of the provision has been explained through the published drafting discussions.

The following is recorded: -

**The ILC 1957 Yearbook** noted the aim of the section as follows: *'the task of consular representatives is to defend and further the economic and legal interests of their countries, to safeguard cultural relations between the sending State and the State of residence, and to protect the nationals of the State which appointed them'*. The purpose was to enable them *'To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other incapable persons who are nationals of the sending State and who are in the consular district.'* [page 92]



**The ILC 1960 Vol 2 Yearbook** confirmed the purpose of the notification *‘the proposed provision limits the consul's powers in this matter to those of: Proposing the appointment of guardians or trustees, submitting nominations to courts for the office of guardian or trustee; Supervising the guardianship of trusteeship [p.149-150]’*.

**The ICL 1961 Vol 2 Yearbook** contains comments from, for example, Sweden, who stated that the *‘the consul is not qualified to submit nomination to the court for the office of guardian or trustee; at most he may recommend such persons to the judge.’*

29. In this jurisdiction, submits Ms Segal, a ‘guardian of a child’ has statutory meaning. Pursuant to section 105 Children Act 1989 it means a guardian (other than a guardian of the estate of a child) appointed in accordance with the provisions of section 5 Children Act 1989. Section 5 Children Act 1989 provides a comprehensive statutory regime for the nomination and appointment of guardians where a child has no parent with parental responsibility for him; or a parent was named in a child arrangements order as a person with whom the child was to live and has died while the order was in force. Guardianship pursuant to section 5 is a protective jurisdiction for the upbringing of a child. Once the appointment takes effect, the guardian will have parental responsibility for the child.
30. It is this protective jurisdiction of guardianship that underpins article 37. This reading is consistent with the ILC commentary as above. It is also consistent with a case decided by the International Court of Justice on 28 November 1958: **Case concerning the application of the convention of 1902 governing the guardianship of infants: (Netherlands v. Sweden)**. There, in reference to the 1902 Guardianship Convention, the court held that :
- ‘The 1902 Convention did not seek to define what it meant by guardianship, but there is no doubt that the legal systems, as between which it sought to establish some harmony by prescribing what was the proper law to govern that situation, understood and understand by guardianship an institution the object of which is the protection of the infant: the protection and guidance of his person, the safeguarding of his pecuniary interests and the fulfilling of the functions rendered necessary by his legal incapacity. ...’*
31. A guardian of a child with responsibility for the protective upbringing of the child contrasts it is submitted on behalf of the applicant and the Mother, with the role of a children’s guardian appointed to represent the child’s interests solely during court proceedings. Against that background Ms Segal’s submission that the appointment of a children’s guardian in proceedings concerning a foreign national subject child does not automatically trigger the operation of article 37(b) and that it follows that in the circumstances of this case, and these proceedings, there is no duty to notify the Country F Consulate. I accept the submission made. Mr Niven-Phillips on behalf of the Guardian and Esmarelda made no separate submission on this point (though neither did he offer any contrary submission to that of Ms Segal). He submitted instead that discretion should be exercised not to notify in the particular circumstances of this case observing in so doing that the outcome would be the same.

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32. I do not however regard it as sufficient to leave the matter there but to go on to consider the exercise of my discretion for two reasons. First, if I am wrong that there is no duty to notify under the Vienna Convention, then I have a discretion not to do so; and, second, I remind myself that, conversely, even if there is no duty then, per Baker J in *Re JL* there remains a discretion to notify.
33. As I considered earlier, *Re E* envisages circumstances where the court can exercise its discretion not to notify. In the circumstances before me I am satisfied that the following facts and matters are relevant to the exercise of my discretion: -
- i. Esmarelda is 18;
  - ii. An adoption order will not have an automatic effect on Esmarelda's nationality;
  - iii. Both Esmarelda's birth parents are Country F nationals; the father has been given the opportunity, and has to an extent taken it, to engage in these proceedings;
  - iv. Esmarelda is aware of her origins in Country F; she is aware of the true circumstances of her paternity. She has expressed clear, articulate, cogent and informed views about the application. This is not a case where further information about the birth father and the wider family is required from or with the assistance of the Consulate or where I am considering assessments of wider family members (as per *Re JL and AO*);
  - v. This is not a case where I need to consider whether the proceedings should be transferred to another country;
  - vi. The Country F consulate will not be in a position to advance additional arguments in respect of the application for a step-parent adoption where I have in addition to the Father's statement, an expert report from Professor T ;
  - vii. These are not care proceedings (as per guidance of the then President in *Re E*). Whilst the State in the form of the Local Authority has placed evidence before the court, it does not bring these proceedings. Indeed, whilst it has been helpful in assisting and facilitating, it is only at the very last hearing that it has elected to be represented through Counsel – an observation I make not critically but simply that it is reflective of its role;
  - viii. Whilst the statutory scheme contained within the Adoption and Children Act 2002 (ACA 2002) makes no distinction between a step-parent adoption order and any other adoption order, the Court of Appeal decisions in **Re P (Step-Parent Adoption)** [2015] 1 FLR 1327 and **Re L (a child step parent adoption)** [2021] EWCA Civ 801 confirm that there is a difference in the approach of the court: it does not involve the deprivation of a parent's rights in the context of compulsory and permanent placement of her child outside the family with a view to adoption, and instead consolidates and formalises the ties (**Soderback v Sweden**[1999] 1 FLR 250); the expert evidence which I have received as

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to the likely effect of any order in Country F also gives reason to believe that it will not have the effect of deprivation of the Father's rights there and Esmarelda's status there is likely to be unaffected. That last aspect of course will fall to be considered further as part of the substantive application;

- ix. Esmarelda was not an automatic respondent to the application (rule 14.3(1) FPR 2010); the discretionary joinder of Esmarelda (rule 14.3 (2) FPR 2010), and consequential appointment of a children's guardian (rule 16.3 (1)) was made '*having regard to the likely complexities of the case and the welfare issues, in relation to her whole life, which the court will have to consider in circumstances where it is anticipated that there will be significant difficulties obtaining information about and input from her paternal family in Country F*' and not because of any perceived need for enhanced protection of her interests because of her age;
- x. Furthermore, the impact of delay here is potentially very significant and I accept the submission of Mr Niven-Phillips that there will be, now that this application is underway, only a short remaining window of opportunity for the order to be made and no other opportunity for any further application, by reason of her age.

34. I am accordingly satisfied that in the circumstances here there is no need for the Country F Consulate to be notified of this application.

**Evidence at this hearing**

35. The fact that there was consensus amongst those who attended at this hearing does not mean that an application of the life-changing seriousness of adoption should not be the subject of careful scrutiny. Quite the reverse. I know from the way in which he has set out his position that Esmarelda's father is very strongly opposed to such an order and that, as I will return to in considering the relevant and applicable law, only if I am satisfied on a proper basis and proper evidence should I conclude that her welfare requires me to dispense with his consent. The fact that he has not elected to participate in person or to make use of the facility offered to join the hearing remotely does not alter any of that. I have held in my mind throughout this hearing the way in which he has in the statement he prepared expressed his opposition. I heard, therefore, oral evidence from the Applicant, the Mother, the social worker who prepared the Annex A report and from the Children's Guardian. Whilst it is unnecessary to set out here the detail of all I have heard and read I have read carefully and had regard to all of that which has been placed before me.
36. I did not think it necessary to hear from Esmarelda herself, although had she wished to say something I made it clear to her that I would have given her the opportunity. Esmarelda has very shortly before this hearing, prepared a short statement in her own words which with a clarity of expression it would be hard to match explains her own position. As I read it, I recalled the written assessment of the social worker within the Annex A report of Esmarelda as: *extremely intelligent...who knows her own mind, and is very clear about her likes and dislikes, her wishes and feelings and her aspirations in life. Esmarelda is very clear that she really wants her stepfather to adopt her*'. I see how it is that the social worker came to that view.

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37. I had of course read the statement which the Applicant had prepared in support of his application, but there is a reason why hearings in the Family Division are not conducted as paper exercises. As I heard him speak of Esmarelda, of the way in which she had always been a daughter to him; how it was to his surprise that the feeling that she was had not been a gradual process but had been almost instant, his words were one thing but the genuine emotion with which he told me of his pride in the young woman Esmarelda has become, spoke volumes too. He gave his evidence with Esmarelda sitting only metres away from him in the well of the court and there was a near tangible connection between them. It was as illuminating to see Esmarelda watching him as he gave his evidence as it was to see him looking over at her as he spoke. In particular, I was convinced that he was not a man who would do other than support Esmarelda in whatever continuing relationship she would wish as an adult to have with her father. It was notable to me that the applicant when asked about the expert evidence that an order in this jurisdiction would be as it has been put ‘doubtful’ to have any effect in Country F, was not troubled by that. It was, he told me, about recognition legally of their lives – and continuing lives into Esmarelda's adulthood – here in this country.
38. Both the social worker who had prepared the Annex A report, and Ms Magson, the very experienced Cafcass Guardian who, in the most unusual circumstances of this case, had found herself appointed for a much older than usual subject of an adoption application, were unhesitating in their wholehearted professional views that both now, and throughout her life, the order was and would be in Esmarelda's best welfare interests. That, for them, her welfare required that her father's consent should be dispensed with.
39. Esmarelda's father, who is himself a lawyer in Country F but not in the field of family law, had within the statement filed explained his objections which I may conveniently summarise as follows:
- i. that Esmarelda knew and was part of his family including by communication with his wife, with her paternal grandmother, great grandmother and cousins;
  - ii. that he and his daughter in her younger days had what he called a ‘strong relationship between father and daughter’ and spent time together;
  - iii. that the adoption application is at the instigation of the mother rather than genuinely made and wished by the applicant and Esmarelda – an aspect I will consider further below;
  - iv. that there is by the constitution of Country F a duty of adult children to take care of their disabled parents along with what I will characterise from his statement a general duty of children who have attained the age of 18 and are not under a disability to support (including financially) their parents who are either incapacitated or have reached the generally established retirement age. From the context of the Father's statement, I have taken him to be saying, not unreasonably, that he would not wish to put himself outside this vis a vis his legal relationship with Esmarelda. I understand however that he acknowledges (as do I on the basis of the

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expert advice) the effect in Country F of an adoption order for an adult child made in this jurisdiction;

- v. that he is not prepared to agree to renounce fatherhood and regards a request to do so as contrary to his upbringing; principles; dogmas of religion and norms and laws of his country.

Those are of course powerful points to be weighed against the application made.

- 40. The father had asserted in his statement of evidence that the adoption application is driven by the Mother. *XX wants QQ to adopt Esmarelda much more than Esmarelda herself.* I am satisfied having read the way that Esmarelda expresses herself and seen the assessments of her that that is not so. Furthermore, I am struck by and entirely accept the observation made by Esmarelda herself in her statement for this court where she says: *I am not sure what any parties may think, but I want to make it very clear, that my choice is to be adopted by QQ and there were no other influences persuading me to do it, this is my choice. I know exactly what I want, and I will not stand for parties implying I have been persuaded into this, I do believe that belittles me as a person.*
- 41. The Father similarly appears to doubt the genuine nature of the applicant's application saying as he does *I would like to take this opportunity to express my gratitude to QQ for his kind and correct attitude towards my Esmarelda. I am deeply convinced that the initiator of the adoption is XX and he [QQ], as a loving and caring spouse could not refuse such at request. XX's statement is tendentious If all this blissful idyll described to her had really taken place, QQ's statement about Esmarelda's adoption would have appeared much earlier.* I reject, having seen the applicant give his oral evidence and read all of that which has been filed for this hearing, the suggestion that the application is not genuinely made but driven by the mother for some unspecified ulterior motive.
- 42. Furthermore, knowing as I do that the Mother (and Esmarelda) take a differing view from the father as to the extent of contact in the past, allowing for the fact that recollections may differ, and not being in a position to make factual determinations I have thought it safer to make decisions on the basis that there may have been more in the way of contact than the mother and Esmarelda remember from the earlier days. The father with some frankness in his statement says that *as usual the truth is somewhere in the middle.* I note as I take this approach however the evidence produced before me to substantiate that since Esmarelda moved to England in 2016:
  - i. the father has made no effort to visit her in England (though she has made three visits to Country F facilitated by her mother);
  - ii. Esmarelda last saw her father in February 2020;
  - iii. Indirect contact via WhatsApp has been inconsistent;
  - iv. Between April 2021 and March 2022 (Esmarelda's 18<sup>th</sup> birthday), the father did not contact Esmarelda (sending one message on her birthday);

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- v. The father has not played an active role in Esmarelda's care or upbringing and not shown any interest in the important decisions in her life. This has been a matter of choice not prevention;
- vi. The father has not involved Esmarelda in the important events in his own life: for example notifying her of the birth of her half-sister in May 2019 when the child was born but without any indication that a child was expected; Not telling Esmarelda at all of the existence of her second sibling but leaving her to discover during these proceedings via social media;
- vii. Failing himself to tell Esmarelda of the death of her paternal grandmother, notwithstanding his own evidence in his statement identifying the grandmother as someone in his family with whom Esmarelda had had a relationship.

So it is that in latter times – and therefore it seems reasonable to conclude featuring more prominently in Esmarelda's own lived experience - contact has been sporadic and infrequent.

***Adoption the Relevant Authorities and Legal Principles Engaged in this Application***

- 43. For an adoption order to be made, the person must be a child at the date of the application. The child can attain the age of 18 during the proceedings and still be adopted, provided the child is adopted before their 19<sup>th</sup> birthday, see section 49 of the Adoption and Children Act 2002 (ACA 2002). So it is that if it is otherwise an order which I am satisfied should be made there is no impediment by reason of the fact that she is now a young adult.
- 44. The statutory scheme contained within the ACA 2002 makes no distinction between a stepparent adoption order and any other adoption order.
- 45. On the basis that the conditions of section 49 ACA 2002 are met (domicile, habitual residence, and age), then, pursuant to section 51(2) ACA 2002 a person who is the partner of the child's parent may make an application for an adoption order. In this case therefore the applicant meets those requirements. On adoption the child will be treated in law as the child of the non-parent partner and the parent for all purposes (section 67(2) ACA 2002): the birth father's parental responsibility is extinguished (section 46(2)(a)); the step-father obtains parental responsibility for the child (section 46(1) ACA 2002).
- 46. A person is the partner of the child's parent if they are a couple but the person is not the child's parent (section 144(7) ACA 2002). A couple includes a married couple (section 144(4) ACA 2002).
- 47. An adoption order may not be made if the child has a parent unless the court is satisfied that the parent consents to the making of the adoption order or that the parent's consent should be dispensed with (section 47(1)/section 47(2) ACA 2002). In this context a 'parent' means 'a parent having parental responsibility' (section 52(6) ACA 2002). Within the context of this case it is plain that the Father does not consent.

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48. Pursuant to section 52(1) ACA 2002 the court cannot dispense with the consent of any parent of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—(a) the parent cannot be found or lacks capacity (within the meaning of the MCA 2005) to give consent, or (b) the welfare of the child requires the consent to be dispensed with.
49. In determining whether to dispense with parental consent, Esmarelda's welfare throughout her lifetime must be the court's paramount consideration (section 1, ACA 2002); the court must have regard to those matters found in section 1(4) ACA 2002. Although applying to all adoptions, the way they are applied will differ depending on the impact of the adoption on the Article 8 rights of the children and their parents.
50. In **Re P (Step-Parent Adoption)** [2015] 1 FLR 1327 the Court of Appeal considered the approach to be adopted to step-parent adoptions. Both children were Polish nationals and the mother and the birth fathers were also Polish. Adoption orders were made. The court held [§46]

*'In an adoption application the key to the approach both to evaluating the needs of a child's welfare throughout his or her life and to dispensing with parental consent is proportionality. The strong statements made by the Justices of the Supreme Court in Re B (A Child) and taken up by judges of the Court of Appeal in subsequent decisions to the effect that adoption will be justified only where 'nothing else will do' are made in the context of an adoption being imposed upon a family against the wishes of the child's parents and where the adoption will totally remove the child from any future contact with, or legal relationship with, any of his natural relatives. Although the statutory provisions applicable to such an adoption (in particular section 1 of the ACA 2002 regarding welfare and s 52 regarding consent) apply in precisely the same terms to a step-parent adoption, **the manner in which those provisions fall to be applied may differ and will depend upon the facts of each case and the judicial assessment of proportionality.***

*By way of example, in a child protection case where it is clear that rehabilitation to the parents is not compatible with their child's welfare, the court may be faced with a choice between adoption by total strangers selected by the local authority acting as an adoption agency or adoption by other family members. There is a qualitative difference between these two options in terms of the degree to which the outcome will interfere with the Art 8 European Convention rights to family life of the child and his parents; adoption by strangers being at the extreme end of the spectrum of interference and adoption by a family member being at a less extreme point on the scale. The former option is only justified when 'nothing else will do', **whereas the latter option, which involves a lower degree of interference, may be more readily justified**'. ( emphasis added).*

51. *Re P* confirmed that in a step-parent adoption, the approach taken in **Soderback v Sweden** [1999] 1 FLR 250 should be applied. There, the ECtHR distinguished between cases such as *Johansen v Norway* (Application No 17383/90) [1996] ECHR 31, which concerned the deprivation of a parent's rights in the context of compulsory and permanent placement of her child outside the family with a view to adoption, and a step-parent adoption [§31], and determined that the interference with Article 8

family life rights is of an altogether lower level of intervention to that which is typically involved where the proposed adoption is by non-family members:

[§62] ‘...*For the child, and for the child's welfare throughout his life, there will be a qualitative difference between adoption by strangers, with no continuing contact or legal relationship with any member of the birth family, on the one hand, and an adoption order which simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time. In European Convention terms, no adoption order will be justified in terms of its interference with family life rights unless it is 'necessary' and 'proportionate', but in assessing those factors the degree to which there is an interference will be relevant. In short, in the present case, the loss to A, and the loss to her father, of his legal status as her father who holds parental responsibility for her, interferes with their respective family life rights to a relatively modest degree*’.

[§63] ‘*The judge in the present case was correct to approach the interpretation of 'requires' in s 52(1)(b) of the ACA 2002 by reference to the 'connotation of imperative' that it has (in accordance with para [125] of Re P (Placement Orders: Parental Consent). But what is 'required' varies from case to case and is firmly grounded, by the very words of s 52(1)(b), upon an evaluation of the child's welfare throughout his life. The use of the phrase 'connotation of imperative' in Re P does not mean (see Re P, at para [127]) that there is some enhanced welfare test to be applied in cases of adoption*’.

52. In **Re L (a child step-parent adoption)** [2021] EWCA Civ 801 the Court of Appeal held that the combination of *Soderback* and *Re P* emphasise that there is an ‘important qualitative difference in the degree of interference with the article 8 rights of a child and any non-consenting parent as between so called stranger adoptions on the one hand and step parent adoptions on the other’. It is not an order of last resort and the ‘nothing else will do’ test found in *Re B (a child)* [2013] UKSC 33, [2013] 2 FLR 1075, at [104], [130], [198], [215] (*‘Re B’*) is not the correct test.
53. In this case, as part of the analysis, and of particular concern to the father, the legal position of an adoption order made here, in Country F falls to be considered. An expert report has been prepared by Professor T who received the assistance of Dr Y in finalising his report. From that report I take the following:
- i. There is no provision under the law of Country F for the adoption of adults;
  - ii. It is doubtful whether a foreign order for the adoption of an adult will have any form of recognition in Country F. Esmarelda's natural father would remain her legal father for the purpose of the law of Country F, and a court of Country F would have to decide what legal relations and, accordingly, any rights or obligations, Esmarelda and her natural father would have towards each other;
  - iii. Regardless of her parental status, the father can make provision in his will to benefit Esmarelda;



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- iv. A foreign adoption order, if recognized in Country F, would not impact Esmarelda's entitlement to Country F citizenship.

Consequently, it is likely that JJ will remain Esmarelda's legal father in Country F, whilst legal parentage in this jurisdiction is transferred to her stepfather.

54. This question of a differing effect of what has been described as a 'limping' order for adoption was considered by Black LJ in **Re N (Adoption: Jurisdiction)** [2016] 1 FLR 621 [§187])

*'it seems to me imperative that, when considering whether or not to make an adoption order, the court should consider what links the child has to other countries (perhaps especially, but not necessarily only, in terms of domicile or nationality), and should consider what risk there is that any adoption order that it makes may not be universally recognised and reflect upon the practical implications of this for the child. ...Quite apart from the express terms of the checklist which focus attention on the child's background, s 1 of the Act is quite wide enough to enable, indeed require, the court to consider and weigh in the equation matters such as the possibility of a 'limping' adoption order which, although fully effective in this country, might be ineffective in other countries that the child and his adopters may wish or need to visit. By way of practical example, suppose that the child and his adoptive parents return to the country of which he and his natural parents are/were nationals in order to explore his cultural roots; would the adoption order be recognised there and if not, what consequences could flow? This is not to say that an adoption order could not be made if it were to be demonstrated that it would not be recognised in a country which may be of importance for the child in future but it would be a factor that would need to be weighed in the balance, along with all the others, in deciding what order is going to be most conducive to the child's welfare throughout his life'.*

55. From the evidence before me I know that unusually for those acting for a subject child, the contrasting legal position is something which in this case has been explored, by careful discussion with Mr Niven-Phillips with Esmarelda as to her understanding and appreciation of it. She accepted – and in the circumstances of her age and understanding is in a position so to accept - the lack of clarity and was content to manage this, it did not cause her undue concern. Of overwhelming importance to her above all other consequences was the emotional and legal life-long connection to the applicant and for him to be recognised in this jurisdiction as her father. In the circumstances of this case that mitigates the obvious disadvantage there might well be considered otherwise to be to an order which would be of little or no effect in one jurisdiction whilst effective in another.

**Conclusion**

56. I am satisfied on a proper consideration of all of the evidence before me and as statute requires the matters set out in the ACA 2002 welfare checklist that Esmarelda's welfare requires the father's consent to be dispensed with.
57. The father has had infrequent and limited involvement in Esmarelda's life since the parties' separation even taking his account as against that of the Mother. Most particularly so once Esmarelda moved to England in 2016. Whilst the father and

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daughter relationship continued as a matter of law, there was limited reality to this for much of the latter part of Esmarelda's childhood. I accept the submission that the limited communication in the last two years gives no indication that their situation would change in the years to come.

58. The separation between Esmarelda and her father was consolidated, at least in geographical terms, by Esmarelda's permanent removal to England in 2016.
59. Although Esmarelda's father does have parental responsibility for her, there is no evidence before me that he has taken any steps to assert or discharge that responsibility for (at least) the last 6 years. Since Esmarelda is an adult an adoption order will have no practical impact on the father's parental responsibility for Esmarelda.
60. Esmarelda will continue to 'live with' – to the extent that young adults do - her mother. There is no severance of that birth tie; her psychological and legal relationship with her mother and maternal family will remain.
61. Esmarelda is not being adopted as an infant with no knowledge of her background and paternal family; she is aware of her origins and her paternity. It is of note to me and should have been of reassurance to the Father when he read it that she says of her father in her statement : *I have also never claimed I want him out of my life, but it's important to note that I have been living in the UK and QQ has been with me throughout all my secondary school, sixth form and now my university days. There is no hatred towards anyone, I have kept my father in the loop of the adoption by asking for his permission, but the reaction left me very disappointed.*
62. Esmarelda is not in contact with other members of her paternal family, her paternal grandparents are deceased; she does not have a relationship with her paternal half siblings.
63. The adoption will have no bearing on her Country F heritage, or nationality. The evidence before me is that Esmarelda is intending to retain her Country F citizenship when she applies for British citizenship in the future. The expert evidence I have is that the acquisition of British citizenship will neither extinguish nor jeopardise her Country F citizenship.
64. Significantly, the applicant is Esmarelda's psychological father; he considers her to be his daughter. They have a close and loving attachment. It is he who has shared the parental role with the mother, living together as a family since 2016. 'De facto' family ties have existed between the mother and applicant for many years, and between him and Esmarelda for many years. It is a settled family unit. The adoption will consolidate and formalise those ties.
65. Esmarelda has indicated a strong wish to be adopted. I must have regard to those wishes and feelings. Even in the unusual circumstances of this case I do not approach it on the basis that Esmarelda's views have decisive weight, but they have a weight that comes close to it. When Esmarelda says to this Court *the only thing that matters to me here is the legal binding document of proof that I have a whole family* and that *Adoption would mean that I feel like a complete part of the family* that echoes a depth of feeling expressed consistently throughout. I accept also it comes with an

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understanding of the immediate and long-term implications of an adoption order which the fact that Esmarelda is an adult carries with it.

66. There is of course when I consider the effect on Esmarelda throughout her life, particular significance to the life-long impact upon her relationship with her birth father and with her paternal half siblings. There is also however the life-long impact which there will be, for her of becoming legally, as well as in the other respects of which the applicant spoke to me from the witness box, the applicant's daughter. When the applicant spoke of his pride of Esmarelda embarking into adulthood, he was clearly speaking of the person he regards, in his heart, as his adult daughter. I agree that she should be his adult daughter legally also.
67. For all the above reasons I will dispense with the father's consent on the grounds that Esmarelda's welfare, throughout her life requires it. I will in due course make an adoption order.
68. Before making an adoption order, I am required to consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings (section 46(6) ACA 2002). That is a mandatory requirement which must be explicitly considered by the court (See King LJ in *Re L* §62). I explicitly consider it here. It should, as good practice, be dealt with as a specific issue, either in the judgment or in a recital to the order. In this unusual case, Esmarelda is already 18. Should she wish to pursue contact with her father as an adult she is able to do so. I do not regard it as necessary for compliance with s 46(6) ACA 2002 for that to appear on the face of any order but for the avoidance of doubt I have taken account of it here.
69. I would like to record my particular thanks to all Counsel and Solicitors who have with skill and expertise provided very great assistance in this complex and unusual case. That Ms Segal and Ms Dally did so pro bono and unstintingly is something for which I am especially grateful.
70. I will invite counsel to draw up and submit for approval an order as appropriate.