Neutral Citation Number: [2024] EWHC 2837 (Fam)

Case No: BT53/55 & 56

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002 ('ACA 2002')

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2024

Before :

THE HONOURABLE MR JUSTICE COBB

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Between :

Z	**Applicant**
- and -	
S	**Respondents**
-and-	
A and B (By their Children's Guardian)	

- -

Re A and B (Adoption: Section 83 ACA 2002)

- -

Amy Slingo (instructed by **Osbornes, Solicitors, LLP**) for the **Applicant**
The First Respondent was neither present nor represented.
Julia Feely (instructed by **Local Authority Solicitor**) for the **Adoption Agency**
Marcia Hyde (instructed by **Creighton's, Solicitors**) for the **Children's Guardian**

Hearing dates: 31 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

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.

The Honourable Mr Justice COBB :

Introduction

1. The primary question for determination in this case is what is meant by the phrase 'for the purposes of adoption' in section 83(1)(a) of the Adoption and Children Act 2002 ('ACA 2002'). On the particular facts arising here, it falls to me to consider whether an aunt who brought her teenage nieces to this country in 2022 pursuant to a Guardianship order obtained in the Family Court in Karachi, Pakistan, and who later applied for an adoption order in this country, brought them here 'for the purposes of adoption'.

2. The application before the court is dated 17 May 2024. Ms Z (hereafter 'the Applicant') seeks adoption orders in respect of her two nieces:, they are A, who is seventeen years old, and her younger sister, B, who is sixteen years old. The application is brought under sections 46 and 51(1) of the ACA 2002.

3. The mother of the two girls, Ms S, is the First Respondent to this application; for reasons more fully explained below, she has played a minimal role in the children's lives, and has not in fact seen them for approximately fourteen years. Her whereabouts are currently unknown, though she is believed to be in Pakistan. The father of the two girls, in whose care the children have been raised, died in June 2021.

4. The application for adoption orders is supported by the relevant Adoption Agency and by the Children's Guardian.

5. For the purposes of determining this application, I have read the bundle of statements; among the exhibits provided by the Applicant are documents from Pakistan in translation. I have read lengthy Annex A reports from the Adoption Agency and a report from the Children's Guardian. I heard brief oral evidence from the Applicant, in which she specifically addressed the context and circumstances in which she brought the children to this country in November 2022.

6. At the conclusion of the hearing, I announced that adoption orders would be made in relation to the two children and gave brief reasoning.

7. This judgment sets out my reasons in more detail.

Background

8. I set out here only an outline of the background which is relevant to my determination. In this section of the judgment, where I make findings of fact, I do so on the balance of probabilities in accordance with the approach laid out in the speeches delivered in *Re B* [2008] UKHL 35, especially at [2] and [13].

9. The children were born in Pakistan. They are the only two children of their married parents. The Applicant herself was born in Pakistan, and is a Pakistani national; she has now lived in England for over twenty years and is also a British Citizen. She is the paternal aunt of the children. She is a widow; she has no children of her own. The Applicant works full-time in a responsible job for a well-known national bank.

10. In October 2010, the children's parents executed a notarised deed in Pakistan by which they appointed the Applicant as the children's 'Legal Guardian'; the copy deed is in my papers in translation. The document confers on the Applicant, in the event that the parents be incapable of caring for the children at any time prior to the children's 21st birthdays, "all parental rights … and generally to act *in loco parentis* for us at all times".

11. The children's parents divorced in Pakistan in September 2012. Following the divorce, the children's mother (Ms S) briefly cared for A, but this arrangement quickly broke down and she returned A to the care of the paternal family. Soon thereafter, Ms S disappeared and has not been traced since; it is believed that she has remarried but her whereabouts (although she is believed to be still in Pakistan) remain unknown. B has no memory of her mother at all.

12. Over the course of children's childhoods, the Applicant has played a significant role in their lives, and has to some extent filled the emotional void for the children left by their mother. The Applicant maintained regular contact with the children, and visited them in Pakistan, sometimes several times a year. She has paid for their education costs throughout their childhood, from nursery through to secondary school.

13. The children's father died of renal failure, aged 48 years old, in Pakistan in June 2021. At that point, the children moved to live with the Applicant's elderly mother. The Applicant became worried about the children's welfare generally, and in particular their safety, given the area in which the paternal grandmother lived.

14. Circling back a short time, in 2020, at a time when the Applicant knew that the children's father was unwell, and had mounting worries about the children's future, she began to consider the possibility that she may want, or indeed need, to bring the children to this country under her permanent care. She accordingly contacted the Coram International Adoption Centre ('CIAC'), enquiring about the arrangements for adopting children then living abroad; she studied the CIAC website, but believed from her contact with them that their work was principally targeted to couples who were seeking to bring non-related (orphaned) children from abroad specifically for the purposes of adoption, and "this did not apply to me". At or about the same time, the Applicant also contacted her local authority with the same enquiry; nothing came of this either. Sometime later, the Applicant sought advice from immigration solicitors in England about bringing the children to this country; she was advised to obtain 'an adoption order' in Pakistan.

15. Thus, when it was possible for the Applicant to travel to Pakistan (covid-restrictions permitting), she flew there in the autumn of 2021, several weeks after the death of her brother. Once there, she says that she was advised by lawyers that an adoption order was not available to her in Pakistan, and she was advised instead to issue formal Guardianship proceedings, under the Guardians and Wards Act of 1890 (the statute under which I believe that a limited number of adoption orders are in fact made in

Pakistan) in the Karachi East Family Court. She did so, I find, with the intention of safeguarding the child's welfare in her care in the most complete and legally secure way available to her under the family laws of Pakistan.

16. Within the Guardianship proceedings, it is recorded that extensive efforts were made to locate the children's mother as a respondent to the application, without success. The Guardianship Order was granted, giving the Applicant full custody of the children; the Judge also gave the Applicant permission permanently to remove the children from the jurisdiction of Pakistan.

17. The Applicant refers in her written evidence to the fact that she believed that she had obtained the equivalent of "an adoption order" from the court in Pakistan. Her written statement filed in these proceedings includes the following:

> "… when I brought the children into the UK, I was under the impression that I had got their adoption orders and I would not need to apply for adoption in the UK. This is what I informed the social worker... in December 2022 when she asked me if I intend to mirror the adoption from Pakistan in the UK. In December 2022, when I applied for the UK passports, the passport office informed me that the Guardianship order is not a valid adoption document in the UK and I needed to make an application for adoption in the UK."

18. She added:

> "… it was my intention that the children should be adopted by me. I had genuinely thought that when I went through the process in Pakistan after having the initial advice, that I had followed the procedures. While it is correct that I did contact [CIAC] back in February 2020, by the time my brother had died and I had gone to Pakistan to see how the children and my mother were in November 2021, after having a turbulent and emotionally and mentally draining 20 months, I had forgotten that I had made that initial inquiry about the assessment…. I felt it is my responsibility to give [the children] love, home and a sense of belonging and protection which they enjoyed in the presence of their father and on his deathbed he could only trust me to do the same for them. I was so caught up about their safety and security, and finding ways to provide them emotional and mental peace, that I could not remember or inquire in depth about the assessment process before I brought the children to the UK... I regret that I had not understood this process properly, and I certainly did not mean to mislead or deliberately breach any laws in securing an adoption order for my nieces." (Emphasis by underlining added).

19. Picking up my summary of the history from §15 above, in her oral evidence she said this:

> "My [English] immigration solicitor advised me that I needed an adoption order in Pakistan. I asked the solicitor in Pakistan. I was told that there is no such order available, and that the Guardianship order would be the only one they could get for me. I then contacted the solicitors [in England], and he applied for the visa. He did not say that I needed any certificate of eligibility. … When the parents gave me the deed in 2010, I already thought I had the adoption order. … I did not think that I would need to engage in any legal process [once back in England with the children]… I thought I had everything I would need and there would be no issue. I thought I would need a British passport for them. Only then was I told by the passport office that the Guardianship order is not of the same status as an adoption order" (Words in [square brackets] added for clarity).

20. So it was that following the grant of the Guardianship order in November 2021, the Applicant set about making arrangements to bring the children to this country. She applied for visas under rule 297(i)(f) of the Immigration Rules; this type of visa is appropriate where: "one parent or a relative is present and settled here or being admitted for settlement, and there are "serious and compelling family or other considerations" which make the child's exclusion undesirable, and suitable arrangements have been made for the child's care" (emphasis by underlining added). It is notable that she did not apply for visas for the children under AD 39.1. – AD 49.2 of Appendix Adoption to the Immigration Rules; these provisions would apply if the children were being brought to the UK 'for adoption'. The Home Office granted the children their settlement visas under rule 297 in October 2022, and they travelled to the UK lawfully in the company of the Applicant in early-November 2022. The children now have permanent leave to remain. A is at college and B is in secondary school.

21. As the Applicant has told me, so it appears to be that, soon after her arrival with the children in the UK in November 2022 the Applicant contacted HM Passport Office enquiring about the process for obtaining British passports for the children; it was only then that she was advised that she needed to have an adoption order in respect of them in order to achieve this. Accordingly, she arranged to meet with a social worker in February 2023, and following that meeting, an adoption agency suitability assessment was commenced. The Applicant took legal advice, and on 11 August 2023, she applied to the Family Court in Barnet under Part 18 Family Procedure Rules 2010 for permission to issue an adoption application ahead of the prescribed time (the children had not had their home with her for a minimum of three years in the last five: see §25 below). This application was not in fact issued until 3 November 2023, but was promptly granted by the court on 14 November 2023. The application for an adoption order followed.

22. On 12 June 2024, within the adoption process, HHJ Karp gave directions for an Annex A report and directed Cafcass to appoint a Reporting Officer (later this was converted into a direction for a Cafcass-appointed Children's Guardian). The Judge directed that the Secretary of State for the Home Department should be notified of the

application, given that entry clearance had not been obtained for the purpose of adoption when A and B arrived in this country, and invited her to intervene should she wish to do so.

23. On 5 August 2024, the Annex A reports were filed by the Adoption Agency. Four days later, the Children's Guardian filed her report.

24. On 19 August 2024, and in accordance with PD14B Family Procedure Rules 2010, HHJ Karp sitting in the Family Court at Barnet, in liaison with the Family Presider for London, transferred this adoption application to be heard by a Family Division High Court Judge. This was expressed to be because of "the legal complications relating to the Applicant's intention on coming to the UK in respect of an application for adoption…".

Section 42 ACA 2002: Qualifying periods and leave

25. The relevant pre-application adoption requirements are set out in sections 42 to 44 of the ACA 2002. The requirement for the child to 'have [their] home' with the prospective adopter is set out in section 42; the required qualifying length of 'having a home' depends on the character of the placement. In the instant case, section 42(5) applies, which reads:

> "(5) … the condition is that the child must have had his home with the applicant or, in the case of an application by a couple, with one or both of them for not less than three years (whether continuous or not) during the period of five years preceding the application".

That section is supported by subsections (6) and (7) which provide:

> "(6) But subsections (4) and (5) do not prevent an application being made if the court gives leave to make it.
>
> (7) An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given—
>
> > (a) where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,
> >
> > (b) in any other case, to the local authority within whose area the home is".

26. It is plain that the requirements of section 42(5) ACA 2002 (above) were not met in this case; accordingly, HHJ Karp gave leave to the Applicant under subsection 42(6) ACA 2002 to make her adoption application at a hearing on 14 November 2023 (see §21 above).

27. It is incumbent on the applicant for an adoption order (in a non-agency case) to give notice to the relevant adoption agency in accordance with section 44 ACA 2002, which provides, inter alia, in sections 44(2)/(3) that:

> "(2) An adoption order may not be made in respect of the child unless the proposed adopters have given notice to the appropriate local authority of their intention to apply for the adoption order (referred to in this Act as a "notice of intention to adopt").
>
> (3) The notice must be given not more than two years, or less than three months, before the date on which the application for the adoption order is made."

28. Such notice triggers an "investigation of the matter" including "the suitability of the proposed adopters and any other matters relevant to the operation of section 1" and a requirement to submit to the court a report of the investigation (section 44(5)/(6)). This happened in the instant case on 29 November 2023.

Section 83 ACA 2002: "for the purposes of adoption"

29. The key statutory provision on which attention has been focused in the determination of this application is section 83 ACA 2002; this falls within Chapter 6 of the ACA 2002 'Adoptions with a Foreign Element'. The section is supported by the Adoption with a Foreign Element Regulations 2005. The section opens as follows:

> **"83 Restriction on bringing children in**
>
> (1) This section applies where a person who is habitually resident in the British Islands (the "British resident")—
>
> (a) brings, or causes another to bring, a child who is habitually resident outside the British Islands into the United Kingdom <u>for the purpose of adoption</u> by the British resident, or
>
> (b) at any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of [twelve] months ending with that time.
>
> The references to adoption, or to a child adopted, by the British resident include a reference to adoption, or to a child adopted, by the British resident and another person." (Emphasis by underlining added).

30. Significantly, section 83 ACA 2002 goes on to create a criminal offence if a person brings or causes to bring a child into the UK in non-compliance with the statutory requirements. It is the perceived non-compliance with this section, and the regulations which have been drawn under its authority (the Adoption with a Foreign Element Regulations 2005 ['AFER 2005']: SI 2005/392), which caused the judge at the Family Court at Barnet to transfer the application to this tier of court.

31. Let me deal with the specific terms of section 83 ACA 2002 as they apply to this case: there is no doubt that the Applicant is a British resident; she has brought two children who are or were at the time habitually resident outside the British Isles into the United Kingdom. She now wishes to adopt them. But crucially, did she bring the children to this country "for the purpose of adoption"?

32. There is no statutory guidance on what is meant by "for the purpose of adoption" in section 83(1)(a) of the ACA 2002. The word 'adoption' in this context refers, in my judgment, to the process of obtaining an adoption order through the English Courts; this appears to be supported by the explanatory notes to the legislation which uses an alternative phrase "with the intention of adopting" (emphasis added). Such an interpretation is consistent with the 2024 Home Office Guidance on Adopted Children (published under the title: 'Assessing applications from adopted children seeking to enter the UK or children coming to the UK for adoption under Appendix Adoption') ('the 2024 Guidance') which substitutes the statutory language with the words "for the purpose of being adopted" (emphasis added).

33. This interpretation is further supported by the fact that:

    i) The regulations which are made under section 83(4)-(7) ACA 2002, namely the AFER 2005 spell out in Part 1, Chapter 1 (regulations 3-9) the procedures which need to be complied with in order to achieve a lawful and recognisable adoption order in this country once children are brought here, including the need for prior assessment of the applicant(s);

    ii) section 84 ACA 2002 (which also falls within the same chapter of the ACA 2002), explicitly deals with the reverse scenario (i.e., what the court must do if children are being taken out of the UK for adoption), and is clearer in its language, in that it refers to the scenario where people: "intend to adopt a child under the law of a country or territory outside the British Islands" (section 84(1) ACA 2002).

34. For completeness (given that counsel and I briefly considered this possibility during submissions at the hearing) the phrase 'for the purposes of adoption' does *not* mean 'for the purposes of living in an adoptive home'. Were this latter interpretation to apply it would capture cases where adoption orders are lawfully obtained abroad, and are recognised automatically in this country (i.e., 1993 Hague Convention Adoption orders which are specifically not included – per section 83(2), and Overseas Adoption orders).

35. What about phrase 'for the purpose of…'? This phrase should, in my view, be given its ordinary meaning. It conveys the reason or intent behind an action or decision; the phrase designates an action with a specific objective. Of course, very often people act with more than one 'purpose', but I regard it as neither appropriate nor necessary to import the word 'sole' or 'dominant' before 'purpose'; generally, it will be clear from the evidence in a case involving children being brought from abroad what the 'purpose' is of bringing children into this country. It will be for that child to become – through English court process – an adopted, and therefore full and legally secure, member of the family bringing them here. As it happens, even if I did infer 'sole' or 'dominant' into the statute it would make no difference to the conclusion in this case.

36. So let me turn to the facts. I have considered carefully the reason and intent behind the Applicant's decision to bring the children to this country in 2021, when they were left without a parent to care for them in Pakistan. On the facts as I find them to be, the Applicant brought the children to this country 'for the purpose' of providing them with a permanent home; as she put it herself, it was "to give [the children] love, home and a sense of belonging": see §18 above. This step was taken in fulfilment of the obligations which had been placed upon the Applicant (as she saw it) by the children's parents in 2010, by the creation of the Guardianship deed; the authority vested in her by this document was confirmed and reinforced by the Guardianship order which the Applicant obtained in the Family Court in Pakistan in November 2021.

37. I accept that the Applicant genuinely believed that the order which she had obtained in Karachi was the equivalent of an adoption order; she understood that the order gave her the highest available level of responsibility for, and authority in respect of, the children. Her evidence in this regard is entirely plausible; international family law, and the vesting of parental rights under different legal regimes, is a complex area. Some adoption orders obtained abroad plainly do attract automatic recognition by the English Courts (see section 66(1) of the ACA 2002); the Home Office even recognises some 'de facto' adoptions achieved abroad (see p.19 of the 2024 Guidance). Unsurprisingly, it is acknowledged in the 2024 Guidance that circumstances may exist "where it is not clear if a child's situation can count as lawful adoption. In these circumstances the adoptive parents should seek legal advice as to the status of the child" (p.6), which is precisely what the Applicant ultimately did here. The Applicant further told me, crucially, that she did not believe that she would need to make an application to adopt the children once she had arrived in this jurisdiction with them; she thought she had all that she would need to exercise full responsibility for them. As I referenced above, she discovered the need to do so only when HM Passport Office informed her that the Guardianship order granted in the Family Court in Karachi did not endow her with the legal status which she had believed she had acquired there.

38. On the basis of my factual finding (see §36 above), it follows that there has in my judgment been no breach of section 83 ACA 2002; the Applicant did not bring the children to this country 'for the purpose of adoption', and the provisions of AFER 2005 are not engaged. It follows that this application can be dealt with in accordance with the regime which applies to ordinary non-agency adoptions.

Section 83 ACA 2002: What if this section did in fact apply?

39. I informed the parties when making the final orders on 31 October 2024, that if I were wrong in my interpretation of section 83 ACA 2002 (above), or in applying the law to these particular facts, there would have been a legitimate route through section 83 ACA 2002 and the AFER 2005 which would have permitted me to make the adoption orders nonetheless.

40. Thus, if I had been of the view that the Applicant had brought the children here 'for the purposes of adoption', the AFER 2005 would have been engaged. Those regulations require, inter alia, a United Kingdom adoption agency to assess the suitability of persons wishing to adopt (regulation 3); the regulations require the prospective adopter to obtain an eligibility certificate from the Secretary of State for

Education (confirming that the person has been assessed and approved as eligible and suitable to be an adoptive parent) (regulation 4); the regulations further require the prospective adopter to take various steps to demonstrate the security and integrity of their plans for adoption (obtaining reports from the relevant foreign authority, visiting the child in a discrete visit in advance of the visit in which the prospective adopter then brings the child back). These regulations were plainly not complied with in the instant case, and if the bringing of these children into the United Kingdom had been 'for the purposes of their adoption' this would in all probability have been punishable under section 83 of the ACA 2002.

41. That said, the breaches of the AFER 2005 would not in my judgment have been grievous, and would have limited, if any, adverse consequences on these particular facts. The regulations were not, I believe, designed to capture a case such as this, but are rather targeted at potentially unsuitable carers seeking to bring unrelated infants to this country to create a family by way of adoption. Although the Applicant failed to apply to the Adoption Agency for an assessment of her suitability to adopt the children (regulation 3) prior to bringing the children to the UK, she has nonetheless subsequently been very favourably assessed since her return. She has co-operated fully with the Adoption Agency in providing the information it required to undertake such an assessment (regulation 3). Although she failed to provide the Adoption Agency with the notification and information set out in regulation 4(2)(b) and (d) prior to and after visiting the child in the state of origin, I am satisfied that there has been no prejudice or compromise to the overall assessment process. Although the Applicant did not obtain the certificate of eligibility from the Secretary of State for Education (regulation 4(2)(a)(i)/(ii) AFER 2005) she nonetheless applied properly and in a timely way to the Home Office for entry visas for the children under rule 297 of the Immigration Rules. The Applicant failed to give notice to the relevant local authority within 14 days of the children's arrival in the UK of her intention to adopt them (regulation 4(4)), but she did give notice to the authority of the children's arrival within about four weeks, by no later than 5 December 2022, and gave notice of her intention to adopt as soon as she had been given leave to make the application by HHJ Karp.

42. In other respects it is fair to point out that the Applicant had complied with the requirements of the AFER 2005: she had visited the children in their state of origin (on multiple occasions), and physically accompanied them when they travelled here on 6 November 2022.

43. Could an adoption application proceed despite non-compliance with the requirements of the AFER 2005? Exceptionally, in my judgment, it could do so, where to refuse the application would be materially to deny the Article 8 ECHR rights of the children and the Applicant.

44. I had to consider similar issues in *Re TY (Preliminaries to Intercountry Adoption)* [2019] EWHC 2979 (Fam). At [21] of my judgment in that case I considered a number of authorities which addressed the court's approach to outcome where due process had not been followed. The cases included: *Re X (Surrogacy: time limit)* [2014] EWHC 3135 (Fam), [2015] 2 WLR 745, [2015] 1 FLR 349; *KB & RJ v RT* [2016] EWHC 760 (Fam); and *Re A & B (No.2 Parental Order)* [2015] EWHC 2080 (Fam). [2016] 2 FLR 446 and *Re A & Others (HFEA 2008)* [2015] EWHC 2602,

[2016] 1 WLR 1325, [2017] 1 FLR 366 at [59]/[60]. I extracted the following propositions in *Re TY* which I once again consider to be relevant here:

i) The focus of the court's analysis should be upon the consequence of the non-compliance as opposed to the imperative wording of the provision (*Re X* at [37]); "the emphasis ought to be on the consequences of non-compliance" (per Lord Steyn in *Regina v Soneji and another* [2005] UKHL 49, [2006] 1 AC 340, at [23]);

ii) If there is a breach of a statutory procedural requirement, the modern approach is to look at the underlying purpose of the requirement, whether departure from it contravenes the letter of the statute and if so, whether it renders it a nullity; (*Re X* at [39]/[41]); a "purposive" interpretation should be adopted (*Re X* at [39]);

iii) The consequences of making or not making the order (or in this case of allowing the application to proceed) should be considered; this would be particularly pertinent if the consequences could be lifelong and irreversible (*Re X* at [54]);

iv) The Human Rights Act 1998 ('HRA 1998') requires an interpretation which gives effect to the rights enshrined therein (*Re X* at [44]);

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

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

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

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

46. The conclusions I reached in *Re TY* in respect of the application of the HRA 1998 in this type of situation were reassuringly validated by the Supreme Court less than one week later, by its judgment in *RR v Secretary of State for Work & Pensions* [2019] UKSC 52 specifically at [27], [28], [29], [30] and [32]. The Supreme Court held that it is not unconstitutional for a public authority, court or tribunal to disapply a provision of subordinate legislation which would otherwise result in acting incompatibly with a Convention right, where this is necessary in order to comply with the Human Rights Act 1998. In delivering the judgment of the court in *RR*, Lady

Hale referenced *In Re P (& o'rs)* [2008] UKHL 38 (sub nom *In re G (Adoption: Unmarried Couple)* [2009] AC 173) in which at [116] she had said that:

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

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

> "There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear".

47. In light of all of this, I am satisfied that I would have had the power to disapply the AFER 2005, given their likely interference and incompatibility with the significant and established Article 8 rights vested in the Applicant and the children under the ECHR.

The Secretary of State for the Home Department

48. In accordance with the directions of HHJ Karp, at an early directions hearing in this application, notice was given to the Secretary of State for the Home Department, with a request for her to consider whether she wished to intervene in the application. Copies of the relevant documents were supplied.

49. By e-mail dated 18 September 2024 from the Home Office, it was confirmed that the Secretary of State did not wish or intend to intervene.

Welfare of the subject children

50. In reaching my decision, the welfare of A and B throughout their lives are my "paramount consideration". I am enjoined to have regard to the matters contained in section 1(4) ACA 2002. Of those factors, the following seem particularly relevant:

    i) The children are clear that they wish to be adopted by the Applicant, and at their ages, and stages of development, they have relevant "age and understanding" materially to inform my decision (section 1(4)(a));

    ii) The children will not 'cease' to be a member of their original family by becoming adopted people (section 1(4)(c)); indeed their place in their original family will be secured by this order;

    iii) The children have been effectively orphaned in Pakistan; this is part of the relevant "background" and "characteristics" which it is relevant for me to

consider (section 1(4)(d));

iv) The children have long-standing relationships with the Applicant who has been a quasi-maternal figure in their lives for years (section 1(4)(f)); there are no family relationships which will be lost by this adoption; it is also clear that both parents wished the Applicant to fulfil the role of legal Guardian for the children, as evidenced by the deed entered into in 2010.

51. It is unnecessary for me to rehearse long tracts of the helpful and detailed welfare-focused reports which I have received from the social worker and the Children's Guardian. The essence of their recommendations can be found in the report of the Children's Guardian in this short paragraph:

> "The reality for [A] and [B] is that they have experienced considerable loss already in their lives and although they are children nearing independence, they want to continue to live with Ms [Z] and want the security of having a legal parent for the remainder of their lives. This can only be met via an Adoption Order being granted in favour of Ms [Z]".

Consent of the children's mother

52. It is necessary for me to consider the position of the children's mother; I do not have her formal consent to the making of the order sought in this case. Section 47 ACA 2002 makes clear that an adoption order "may not be made if the child has a parent" unless that parent's "consent should be dispensed with" (section 47(2)(c) ACA 2002). Other statutory scenarios surrounding consent are not relevant in considering this particular case.

53. Section 52 of the ACA 2002 deals with parental consent. The relevant parts of this section are as follows:

> (1) The court cannot dispense with the consent of any parent or guardian 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 or guardian cannot be found or [lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent], or
>
> (b) the welfare of the child requires the consent to be dispensed with.

'Consent' means "consent given unconditionally and with full understanding of what is involved…" (section 52(5) ACA 2002).

54. In the instant case, I am in a position to consider dispensation of consent under either of the grounds in section 52(1) ACA 2002. I choose to proceed under section 52(1)(b) as I am satisfied, given the extremely limited role which the mother has played in the children's lives, and taking account of all of their current circumstances, that their welfare requires that her agreement be dispensed with.

Conclusion

55. Drawing the threads of this case together, I am satisfied that:

    i) The Applicant brought the children to this country in November 2022 for the purposes of providing them with a secure and permanent home;

    ii) The Applicant did so, in fulfilment of the obligations imposed upon her by the children's parents who wished her to act *in loco parentis* (see §10 above) for the children;

    iii) At the time she brought the children into the country the Applicant was operating under the honest and genuine misapprehension that she had taken all the necessary legal steps required of her in Pakistan to secure an order akin to adoption of the girls, which she believed would be recognised as such in the UK; she was in total ignorance of the existence or applicability section 83 ACA 2002 and/or the AFER 2005;

    iv) Only when the Applicant had brought the children here was she advised of the need to apply for an adoption order in order to secure the children's legal status;

    v) There has therefore been no breach of section 83 ACA 2002 or the AFER 2005;

    vi) The adoption application attracts the unqualified support of the Adoption Agency and the Children's Guardian;

    vii) The children wish to be adopted by the Applicant;

    viii) Adoption would reinforce as a matter of law what the children have come to know, over the last two years, as their lived reality.

56. I am satisfied that adoption orders would be proportionate orders on these facts; I have considered whether other orders may suffice but I am satisfied that only adoption would meet the needs of the case. It is important, in my judgment, that the Applicant should have full and unqualified parental responsibility for the children and be a 'parent' to them in every sense of that word – legally and factually.

57. I am further satisfied that adoption is in the best interests of these two children, and that the consent of the mother can and should be dispensed with on that basis.

58. This is a momentous and transformative decision for the Applicant and for these children. By my order, A and B will now be "treated in law as if born as the child[ren] of the … adopter" (section 67 ACA 2002). I am satisfied that this is not only what they all wish for, it will also be greatly to the children's long term benefit.

59. That is my judgment.