IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SITTING AT LUTON

Case No: FD22P00448
Neutral Citation [2022] EWHC 3602 (Fam)

Courtroom No. 1

Luton Justice Centre
Floors 4 & 5
Arndale House
The Mall
Luton
LU1 2EN

Friday, 28th October 2022

Before:
THE HONOURABLE MR JUSTICE NEWTON

R E:

D

DR O MOMOH and MS A HOLM (Solicitor) appeared on behalf of the Applicant

JUDGMENT
(Approved)

MR JUSTICE NEWTON:

1. At the start of this judgment, I should record that I am extremely indebted to Dr Momoh for her very considerable assistance in this case. The principles are not straightforward, although my conclusions are clear.
2. This case concerns an application under English law for the recognition of the legal parent/child relationship between the applicants and their two children I and E. They were born respectively on 13 March 2005, so he is 17, and E, who was born on 17 December 2007, so she is, therefore, 15. Their relationship with their parents are recognised under legal guardianship orders made in Calcutta, in India, in 2007 and 2010 respectively.
3. The application first came before me on 18 August 2020, I directed further evidence of narrative statements, an expert's report, the Secretary of State for the Home Department was notified. The Secretary of State, through the government office, has indicated on 16 September that the Secretary of State does not intend to intervene, and "will leave it to the Family Court to determine the outcome of the adoption application on its merits".
4. Further notice was given to them of this hearing, and they have not appeared.
5. I and E were made the subject of Guardianship orders pursuant to section 10 of the Guardian's and Ward's Act 1890, it is old legislation, to parents and guardians who, for all intents and purposes, were habitually resident and domicile in India at that time.
6. At the time, despite a fairly recent change in the law in India, the applicants were advised that the legal climate was such that they should only apply for legal guardianship orders, and, as non-Hindus, were not entitled to rely on the simple and straightforward process for adoption for Hindus under the Hindu Adoptions and Maintenance Act 1956, a law that self-evidently differentiated, in a discriminatory way between Hindus and non-Hindus.
7. As is clear from the expert evidence, although the law was changed in 2000, and further changes occurred in 2015 that sought to address the discrimination, the process remained essentially skewed and self-evidently, inequitable.
8. I am not, in any way, commenting on the legal system in India, and the applicants do not seek to cast any aspersions one way or the other. I simply refer to the fact that the legislation and the interpretation of the legislation was such that the outcome was different for different sections of the community.
9. However, it seems to me that that distinction, particularly having regard to the circumstances on the ground is such that it would be difficult not to conclude that it constituted an unwarranted interference with this family's right to family life under Article 8.
10. Recognition under English law is not straightforward, E and I's guardianship orders, occurred in India. The applicants, cannot directly apply for recognition under The Adoption (Recognition of Overseas Adoptions) Order 2013, as they do not satisfy the criteria. India is not on the overseas list, or list of designated countries relevant to the periods to which I and E's respective orders were made.
11. In addition, in any event, pursuant to the Adoption and Children Act 2002, section 83, adoptions in India made before 3 January 2014 are not recognised in the United Kingdom. Thus, it is not open for the orders in respect of the two children to be registered in the Adopted Children Register and nor are the applicants able to obtain a certificate of eligibility for a foreign adoptive child.
12. Therefore, I must determine:
    i. Were the legal guardianship orders obtained lawfully in India, a foreign jurisdiction?

ii. Does the concept of legal guardianship for non-Hindus in that jurisdiction substantially conform with the English concept of adoption?

iii. Can the Court make the declaration that the legal guardianship order in this case substantially conform with the English concept of adoption?

iv. Finally, are there any public policy considerations that should mitigate against recognition?

THE LAW / LEGAL PRINCIPLES

13. Section 66(1) (Chapter 4) of the Adoption and Children Act 2002 provides that:

(1) In this Chapter "adoption" means—

14. Section 57 of the Family Law Act 1986 provides that

(1) Any person whose status as an adopted child of any person depends on whether he has been adopted by that person by either –

(a) a Convention adoption, or an overseas adoption, within the meaning of the Adoption and Children Act 2002, or

(b) an adoption recognised by the law of England and Wales and effected under the law of any country outside the British Islands, may apply to the High Court or the family court for one (or for one or, in the alternative, the other) of the declarations mentioned in subsection (2) below.

(2) The said declarations are –

(a) a declaration that the applicant is for the purposes of section 39 of the Adoption Act 1976 or section 67 of the Adoption and Children Act 2002 the adopted child of that person;

(b) a declaration that the applicant is not for the purposes of that section the adopted child of that person.

(3) a Court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, the applicant –

(a) is domiciled in England and Wales on the date of the application, or

(b) has been habitually resident in England and Wales throughout the period of one year ending with that date."

15. ***Re N (A Child)*** **[2016] EWHC 3085** the decision of Sir James Munby P. who sets out in detail an analysis of the law relating to the recognition of foreign adoptions, reiterating that ***Re Valentines Settlement*** **[1965] Ch 831** remains good law and is the only four criteria required in determining the recognition at common law of a foreign adoption order. ***Re V (A Child) (Recognition of Foreign Adoption)*** **[2017] EWHC 1733 (Fam) (also known as W v The Secretary of State for the Home Department [2017] EWHC 1733 (Fam)** before Pauffley J further reflected on the established principles and standing of ***Re Valentines***. In ***Re V*** Pauffley J acceded to the application for recognition of a Nigerian adoption order, in respect of 'V', a two-year-old adoptive son of Mr and Mrs W.

16. ***Re Valentines*** the four criteria:

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

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

iii. The foreign adoption must in substance have the same essential characteristics as an English adoption. … Did the concept of adoption in the

foreign jurisdiction substantially conform with the English concept of adoption;

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

17. However, of note is the case of ***Re G (Children)*** **[2014] EWHC 2605 (Fam)** where Mr Justice Cobb reflected on subsequent jurisprudence that has refined the *Re Valentine's* Settlement criteria to omit the domicile factor, wherein para [21] of ***Re G*** provides that:

> 21. The subsequent jurisprudence has refined the test at common law to three essential questions:
> i) Was the adoption obtained wholly lawfully in the foreign jurisdiction?
> ii) If so, did the concept of adoption in that jurisdiction substantially conform with the English concept? And
> iii) If so, was there any public policy consideration that should mitigate against recognition?

18. In ***QS v RS & Anor*** **[2016] EWHC 2470 (Fam)** MacDonald J warned against the strict application of *Re Valentine's Settlement* where it would constitute a clear interference with the parents and child's Article 8 rights to family life. See also the cases of ***X v The Secretary of State for the Home Department*** **[2021] EWHC 355 (Fam),** in the issue of habitual residence (Theis J); and the European Court of Human Rights case of ***Wagner v Luxembourg*** **[2007] ECHR 76240/01** which, so far as standing in our court is concerned, echoes the observations of MacDonald J in **QS v RS (No 3) (Recognition of Foreign Adoption) [2016] EWHC 2470 (Fam)** in relation to Article 8.

19. I do not decide the issue of domicile. I note the case of *Mark v Mark* [2005] UK HL, and also the comments of Pauffley J in the case of *Re B* [2013] 2FLR 1075, where she cited a passage from Dicey, the 15th Edition of *The Conflict of Laws*, that it must be a fixed intention to reside in the relevant country, not for a limited period or a particular purpose, but must be general and indefinite in the future contemplation and directed exclusively towards one country. It obviously applies in this case, and in any event it seems to me that the position has moved on.

20. Therefore, the first issue is the issue of adopting or adoption, and it seems to me that the context in which these orders were made is one which I should take into account.

21. I was born on 13 March 2005, a relinquished baby. He was placed in the care of Adoption in Charge, a charity in Calcutta, and by order of the District Judge in Darjeeling on 11 June 2007 the parents became I's legal guardians, certified by Deed of Adoption dated 28 September 2007 at Siliguri.

22. By virtue of that Deed of Adoption, the applicants became the adoptive parents of I, regarded as adoption, and vesting all rights and privileges in the parents. I was the adoptee and was to be seen as the natural born son of the applicants.

23. In addition, as the expert has made clear in his report, the guardianship order made on 11 June 2007 in respect of I has been lawfully obtained, following the procedures laid down by the provisions of the Guardians and Wards Act 1890. Therefore, on those facts, I was legally adopted.

24. E was born on 7 December 2007 in Kalimpong. She too was a relinquished baby. She was placed in a children's home in Calcutta, and by order of the Judge of the Family Court in Calcutta, on 24 February 2010, the parents became the legal guardian of E.

25. Pursuant to the affidavit in the proceedings of the mother on 7 July 2010 endorsed by the local magistrate, E was regarded as having been adopted pursuant to the earlier order of 24 February 2010. Thus, after her adoption she, in fact, was renamed with an order directing that the record of a birth certificate in the applicants' names.

26. In addition, again, as is clear from the expert's report, the order made on 24 February 2010 by the District Court was lawfully obtained, it followed the procedures laid down by the provisions of the Guardians and Wards Act 1890.

27. Therefore, the concept of legal guardianship for non-Hindus in India, in this case, substantially conformed with the English concept of adoption, and, thus, it is argued, and I agree, that a declaration to that effect is possible.

28. Relying on the expert evidence of Mr Malhotra, I also come to this conclusion, because, to support the position, he sets out a number of aspects which I take into account as additional support.

> "1) Adoptions under the Hindu Adoptions and Maintenance Act for Hindus admissible to male and female Hindus, and if married with the consent of the spouse.
>
> 2) The Act is only applicable to Hindus, Buddhists, Jains and Sikhs.
>
> 3) Muslims, Christians and Parsi do not have any Act or law in India that governs adoption proceedings. However, the Guardians and Wards Act 1990 comes to the aid of non-Hindu couples as an adoption, for adoption of a child by a process of guardianship proceedings. It allows guardianship and, thus, makes the child a ward of the Guardians and the applicant couple as guardians of the ward in question in India.
>
> The Act, GWA, assists other religions, Christians, Muslims, Parsis and Jews in adoptions through a process of guardianship, since no provisions have been enacted or made under their personal laws to adopt children. Hence, guardianship has been resorted to by people of those faiths in India as an alternative to adoption, which was not otherwise available.
>
> The Act authorises the Court to appoint a Guardian for the person or property, or both of a minor if it is satisfied that it is necessary for the welfare of the child. It clarifies that in determining what is in the welfare of the minor, it should consider, effectively, a welfare checklist and how closely related the proposed Guardian is to the minor, and the wishes, if any, of deceased parents, or any existing or previous relation of the proposed Guardian with the personal property. And by virtue of the legislation and the passing of separate other orders of the orders in 2007 and 2010 for these two children, it can be concluded that all the rights, duties, obligations, privileges and powers have been conferred on the applicants".

29. Furthermore, finally

> "All parent direct rights and consequences which flow from legal guardianship orders of both these children accrue to the applicants only. The missionaries of the charities where they were placed at the custodians of the children, prior to being placed with the applicants, as the natural parents has, for all intents and purposes, been surrendered and relinquished their rights as natural parents".

30. Therefore, it seems to me that it was not open for certain sectors of the community to adopt in India. In addition, even though once the law had changed, it was not until 2015 that it could be relied on by non-Hindus.
31. In principle the legal guardianship orders of I and E bear all the characteristics, as I find, of an English adoption by virtue of both interpretation, and analysis, both of the expert evidence and of the facts and circumstances of the legal guardianship orders.
32. As the expert so shortly put it, "The order dated, for example, 11 June 2007 has attained finality and I has been in the care, custody and control of the applicants since then, legally made under the legislation".
33. I am therefore satisfied, firstly, by way of legislative interpretation; and, secondly, by a basis of the nature of the relationship between the applicants and their child.
34. In relation to the deed of adoption, there is here, rather curiously, a deed of adoption in relation to I. A deed of adoption is a document in relation to the adoption of a child, which is registered purportedly under the Registration Act 1908, it is a legal document wherein all the rights and responsibilities, along with affiliation, from the biological parents are transferred to adoptive parents, and the adopted child is given the rights, privileges and duties of a child and heir by the adoptive family. In addition, according to the expert, Mr Malhotra, upon the granting of the deed, there is a presumption in law that can be inferred that the guardianship may be factually assumed to be an adoption.
35. In addition, further, that keeping in view, the best interests, welfare and future life prospects of the child, I, and from the decision of the District Judge, it can be inferred on the facts and circumstances of this case only that the legal guardianship of I entails all the rights, duties, functions, responsibilities as arising in adoption.
36. Furthermore, even had I any doubt on the evidence, in relation to the legal guardianship orders, which I do not, I would, in any event, say that the deed of adoption points to a parent/child relationship analogous to an adoption, where all the rights and privileges, and all obligations are vested in the applicants and in the child, and that it is not necessary, therefore, to take it any further.
37. There is, of course, no deed of adoption available for E. However, in my judgment, that should not prejudice the effect for her and of the applicants of the legal guardianship order.
38. It seems to me, looking at the absence of deed in relation to E, the legal guardianship order provides that the effect of the order is to appoint a guardian for the proper upliftment and welfare of the said minor, and permission to take the child from the jurisdiction.
39. In addition, notwithstanding what I have said earlier, her circumstances are entirely analogous. If the only thing that separates her process is the lack of a Court direction to obtain a deed of adoption, and having regard to the principles, which were applied both for I and for her, that is to say, the obtaining of a deed of adoption, it seems to me that in all other respects the process is entirely similar and entirely analogous, vesting the same rights and privileges on the applicant parents.
40. Furthermore, counsel has, in addition, cited a short passage from the 14th Edition of Dicey that:

> "If the foreign adoption was designed to provide some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbably that it would be recognised in England. But apart from exceptional cases, like those, it is submitted the Court would be slow to refuse recognition of a foreign adoption on the grounds of public policy, merely because the requirements of adoption of foreign law differ from those of English policy".

41. The principles are the same. In relation to public policy, as *Re V (A Child)(Recognition of Foreign Adoption)* [2017] EWHC 1733 (Fam) made very clear, it is only in the rarest circumstances that that should be invoked in order to deny recognition. Furthermore, it is clear that in recognising the order as I do, there are no public policy issues in this case at all.

42. Leaving all those issues aside, which are not straightforward, even if I was not comprehensively persuaded by the way in which the case has been so attractively put by counsel, I would nonetheless declare that the guardianships are, effectively, adoptions, because of the principles which arise as a result of the family's right to family life under Article 8, for these reasons.

1) Family life exists between the children and their parents, for the purposes of Article 8.

2) The Indian guardianship orders were lawfully constituted and created a situation corresponding to family life between the parents and each child akin to a permanent legal relationship.

3) The children have lived with the parents for, effectively, the whole of their lives, apart from the beginning, and there are *de facto* family ties between the parents and both children.

4) It is in both children's best interests, and in light of the expert report on the nature of the orders obtained, and conferring right analogous to birth parents, it seems to me, the papers echo, in every sense, the adoption of these children. The Court would find it impossible to disregard the permanent legal status, which was created so long ago in India.

5) The application of the common law rule in *Re Valentine's Settlement* [1965] Ch 831 is, in particular of the circumstances of this case, a like-for-like recognition, which would breach any Article 8 provisions of the parents and both of the children individually and collectively.

43. In addition, finally, the Court can be satisfied this is not a case where the parents have remotely tried to exploit any inter-country adoption or have set out to mislead either the Indian authorities or those here.

44. Therefore, it is without any hesitation that I declare that the legal guardianship orders for both children in India made respectively in June 2007 and February 2010 are recognised in accordance with the common law of England and Wales.

45. I declare that for all intents and purposes those orders bear the essential characteristics of an English adoption order to the applicants, and they are recognised as the adoptive parents of these children. It has all the essential characteristics of an English adoption order.

46. I shall direct that, for the purposes of section seven, the fifth section of 57 of the Family Law Act 1986, of the Adoption and Children Act 2002 these children are the adopted children of the applicants.

47. I shall order a transcript of this judgment to be obtained at public expense.

48. In addition, I hope very much that the family will be able to be reunited as soon as possible.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.