Neutral Citation Number: [2024] EWHC 2855 (Fam)

Case No: FD24P00137

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 November 2024

Before :

Mr Justice Trowell

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Between :

KA	**First Applicant**
- and -	
FA	**Second Applicant**
- and –	
B (through his Children's Guardian Allison Baker)	**Respondent**
- and –	
The Secretary of State for the Home Department	**Intervenor**

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Jack Owen (instructed by Obaseki Solicitors) for the First and Second Applicant

Dorothea Gartland KC (instructed by Cafcass Legal) for the Respondent

Luke Tattersall (instructed by Government Legal Department) for the Intervenor

Hearing date: 22 October 2024

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Judgment Approved by the court

Mr Justice Trowell :

1. This matter was listed before me on the joint application of KA and FA, asking me to recognise in common law the adoption order of the Family Court of Lagos, Nigeria on 4 December 2023 of the child, who I shall refer to as B.

2. The applicants are represented by Jack Owen.

3. The child, through his Guardian, Allison Baker, is represented by Dorothea Garland KC. The Guardian supports the application.

4. The Secretary of State for the Home Department is an intervening party. She is represented by Luke Tattersall. She is neutral on the application.

5. The matter was listed before me on the 22 October 2024 and on that occasion I heard oral evidence from the applicants. A point arose as a consequence of the evidence which led to me requesting further assistance from counsel, that is above and beyond the oral submissions and written position statements that had been provided in advance. That was provided by further written submissions. I am grateful to them for that help.

6. The request from me for further assistance meant that the natural course of the case, which would have been an oral judgment that afternoon was disrupted and I have given this judgment subsequently and in writing. The parties I hope will forgive me if I take the uncontentious parts of this case shortly.

Summary Background

7. The child, B, is now 16.

8. He was found on the streets of Lagos in late December 2012 and taken to a children's home. In 2016 the applicants, who were unable to have children, were introduced to the children's home. In 2017 they were introduced to B and wanted to look after him as part of their family. KA applied for and obtained a Guardianship Order from the Family Court of Lagos.

9. The applicants hoped that would enable B to come and live with them in London. It did not. He could not get leave to live in this country. B moved out of the children's

home to live with KA's nephew, funded by them. The nephew lives in one of two apartments (one above the other) they own in Nigeria. They have visited him 3 or 4 times a year, when they stay in the other apartment. Further, they pay for him to attend a boarding school in Nigeria. It is a state boarding school. B cannot have a mobile phone at school but he goes to the nephew each weekend and speaks to them on the phone from there.

10. In 2019 they realised that to enable B to come to this country they would need to adopt him and in February 2020 they made an application to the Family Court in Lagos. The process, which had several stages and required reports, was never going to be immediate, but it was massively delayed by the Covid epidemic, such that it was not until December 2023 that an adoption order was made. This application followed in April 2024.

11. KA is 71. She was born in Nigeria and came to this country in 1994 as a student and returned in 1997.

12. FA is 78. He first came to this country in 2003.

13. The parties were married in Nigeria in 2000. At that time KA was aged about 47 and FA was aged about 54.

14. They have lived together in this country since 2003. They are citizens of both Britain and Nigeria.

15. They often travel back to Nigeria where they retain a property and a bank account, and many members of their families live.

The Law

16. The law in relation to the common law recognition of an overseas divorce has been comprehensively reviewed by Munby P in *In re N (A Child) (Secretary of State for the Home Department intervening)* [2016] EWHC 3085 (Fam). In that case he reasserts the primacy of the test set out by the Court of Appeal in *In re Valentine's Settlement* [1965] Ch 226 over the relaxation of that test by a number of High Court Judges in the light of developments in the law since *re Valentine's Settlement*, in particular the Adoption and Children Act 2002 and the impact of Article 8 of the European

Convention on Human Rights (the right to respect for private and family life), brought into force by the Human Rights Act 1998.

17. His analysis is powerful and although as a matter of strict precedence I am no more bound by it than the High Court decisions with which Munby P disagrees it sets out the law in a way which the parties, sensibly, consider I should follow. That is that to recognise a foreign adoption at common law the four conditions set out *In re Valentine's Settlement* must be met, namely:

    a. *The adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption*
    b. *The child must have been legally adopted in accordance with the requirements of the foreign law*
    c. *The concept of adoption in the foreign jurisdiction must have the same essential characteristics in substance as an English adoption; and*
    d. *There is no public policy reason for refusing recognition.*

18. It is worth noting however that Munby P does not, as of course he could not, disregard the impact of Article 8. At paragraph 138 he specifically endorses the narrow application of that article by MacDonald J in *S v S (No 3) (Foreign Adoption Order: Recognition)* 2017 Fam 167 so as to relax in that case the strict requirements of the *In re Valentine's Settlement* test (while making clear that he disagreed with the broader application of Article 8 by Peter Jackson J). Munby P says this:

> 138. MacDonald J concluded this part of his judgment by making clear, at para 104, that:
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> "my conclusion does not amount to a decision that the rule in *In re Valentine's Settlement [1965] Ch 831* is incompatible with article 8 of the Convention *per se*. Rather, it amounts simply to a decision that the application of that common law rule in the very particular circumstances of this case would breach the article 8 rights of the parents and T."
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> 139. I respectfully agree with MacDonald J's analysis and with his formulation of the relevant principle. I put it that way because, for reasons which will be apparent, I have some difficulty with that part of Peter Jackson J's analysis set out in *A County Council v M (No 4) (Foreign Adoption: Refusal of Recognition) [2014] 1 FLR 881* , para 76.

19. Further, it should be noted that following Munby P's decision, MacDonald J has again departed from a strict application of the test *In re Valentine's Settlement* in *KN and BN and RN and TN and the Secretary of State for the Home Department* [2023] EWHC 712 (Fam). MacDonald J again considers the departure appropriate because of what would otherwise be a breach, in the particular circumstances of that case, of Article 8 by the strict application of the test set out *In re Valentine's Settlement*.

20. At first I had understood (wrongly) that it was being advanced there was a second test that I need to apply, namely one arising from section 9 of the Children and Adoption Act 2006 whereby the Secretary of State for Education has the power to declare that special restrictions apply to the bringing into the United Kingdom children to be adopted here from specific countries or bringing into the United Kingdom children who have been adopted overseas from those same specific countries. Those countries, by Order, include Nigeria. There is published the reasons why restrictions are placed on Nigeria. These are (I summarise):

    a. Difficulties of confirming the background and adoptability of children;

    b. Unreliable documentation;

    c. Concerns about corruption in the Nigerian adoption system; and

    d. Weaknesses in checks in relation to adoption applications from adopters who are habitually resident in the UK.

    These areas of concern give rise to significant child safeguarding concerns.

21. It was also drawn to my attention that a request can be made under the Adoption with a Foreign Element (Special Regulations on Adoptions from Abroad) Regulations 2008 to treat a case as an exception from the special restrictions. The additional matters to be taken into account are (again I summarise):

    a. The circumstances leading to the child becoming available for adoption, including whether any competent authority in the State of origin has made a decision in relation to the adoption or availability for adoption of the child
    b. The relationship the child has with the prospective adopters

c. The child's particular needs and the capacity of the prospective adopters to mee those needs.
d. The reasons why the state was placed on the restricted list.

22. I put to counsel during the course of argument that I was not the authority which was determining whether B could come to this country and that therefore these were not tests for me. Indeed, I could not, it seemed to me and was accepted by all counsel, dictate the decision of the immigration authorities. What I suggested, and was agreed, was that these points were matters which would inform the fourth limb of the *In re Valentine's Settlement* test, namely public policy. Given agreement, this point was not fully argued, nor, was the other point that might be taken here, namely that according to Munby P the public policy arguments are to have a limited function.

The facts of this case

23. I have benefitted in this case from a thoughtful report from Ms Baker, B's Guardian. She draws to my attention that given the applicants' ages there might be a suspicion that they were wanting to bring B here to help look after them, rather than them look after him. She finds in her professional judgment that is not their motivation. They want to be his parents and they have been trying to bring him here for some time because they want to raise him. As she puts it: 'my considered opinion is that [their] …motivation for adopting B and wanting to bring him to the UK is rooted in a genuine motivation to afford him a family life here with them.' She concludes by telling me that their application is likely to be consistent with B's wishes and feeling (a point made good by her two remote meetings with him) and his wider future best interests.

24. There were two potential downsides to their application, as Ms Baker saw it, (i) the size of their flat and (ii) the impact on B's education. Questions on each of those topics were put to each of the applicants and they gave good answers. They would apply to the council for a larger flat, and if that was not successful they would move out of London to rent somewhere privately. (They had some funds to allow them to do that.) As to education, a friend of theirs was a teacher. She was advising them what would be best. B was at the equivalent of the first year of his GCSEs. If possible they would move him into a school allowing him to follow the same subjects. If not, then he might be put back a year and start the GCSE course from the start here.

25. I had the benefit of an Opinion on Nigerian Law by Mr Badejo, a Barrister in England and Wales and a Solicitor of the Supreme Court of Nigeria. He reported that the Nigerian adoption was in accordance with the law in Lagos and that the essential characteristics of Nigerian adoption are the same as the essential characteristics of an English adoption.

26. He reported that there were only 2 documents of which he had not had sight: a probation report from the adoption, which had been subsequently located and was shown to me and proved unexciting, and a suitability report from the Guardianship proceedings in 2017. As to the latter, I was shown that attempts were made to locate it. It was not a document ever shown to the applicants but sent directly to the court in Lagos. I find that given the Guardianship had been overtaken by the Adoption that was not material.

27. The applicants had prepared a joint statement which went through the four headings set out in *In re Valentine's Settlement* and gave oral evidence.

28. FA went first. He confirmed his statement. I put questions to him in relation to his domicile, given the length of time that he had been in this country. He gave me answers which conflicted with his written evidence. Indeed to Mr Owen he confirmed that he considered England his home. To me he said he was not intending to return to live in Nigeria or to be buried there. He said he feels like an Englishman not like a Nigerian living in England.

29. It was put to me that he was confused when giving his evidence. He did not strike me as confused. His answers were consistent and clear in their effect. It was put to me that, given he gave very different evidence in writing, I was faced with a conflict and should prefer the written evidence. I reject that. The written evidence was prepared expressly to meet certain tests. The written evidence was joint with KA. She, as I will set out, has different views on these questions and I consider his voice in that joint statement was drowned out by hers, and her voice was heard because it helpfully met the relevant tests.

30. I do note however that FA struck me as an honest witness with a genuine desire to bring B to England as part of his family.

31. KA also struck me as honest. It struck me that she wanted to bring B here for large hearted, familial reasons. She gave the opposite answers to the questions on domicile to those of her husband. I have considered further whether her oral and written evidence on domicile should be treated as suspicious given what FA's oral evidence on domicile was, and the difference between what he said and the joint statement. I still find her oral and written evidence to be truthful and see no reason why two people who each come from one country and live in another should not have a different response to the question as to which is their 'home'. The legal doctrine of the wife's dependent domicile has long since been abolished.

Application of the law to the facts

32. I shall not rehearse here the law and principles surrounding the issue of domicile. I record that there was set out for me paragraph 53 of Theis J's decision in *ELO v CLO (Recognition of a Nigerian Adoption Order)* [2017] EWHC 3574 (Fam).

33. It is plain on the evidence of the parties that FA is domiciled in this country (it is his domicile of choice) and KA is domiciled in Nigeria (she has retained her domicile of origin). I have no reason to believe that FA has changed his domicile from the time of the adoption. So at the time of the adoption, I find, he was not domiciled in Nigeria.

34. Requirements (b) and (c) of the *In re Valentine's Settlement* test are met to my satisfaction having read the report of Mr Badejo.

35. The public policy test here is met even allowing for the points that I need to consider arising from the Child and Adoption Act 2022. From the papers put before me I can see (but I make clear that immigration matters are not being determined by me) that B was abandoned and attempts were made to find his mother that were unsuccessful; that the material documentation from the Nigerian proceedings has been produced; that Ms Baker has considered the adopters and notwithstanding their age considers the recognition of the adoption in B's best interests. Turning to the matters which might give rise to an exception: the circumstances of the adoption are ones which demonstrate generosity and kindness; the relationship between B and the applicants is one of geographically distant parents, his 'biological parents' as I am told B said; and, though the needs of B and the capacity of the applicants to meet those needs is dramatically

different from the 'Hallmark' image of a small baby with young parents, with the advice of Ms Baker I am content with it.

36. That leaves however the problem that FA is not domiciled in Nigeria.

37. I could just recognise the adoption in relation to KA. That however is not what the applicants want. They have been married since 2000. They have wanted a child together. B was to be that child. To recognise the adoption only in relation to KA will mean that FA will not be recognised as B's father. The issue is not only emotional but will be financial and legal, particularly on his death, as Munby P reminds us.

38. Article 8 of the European Convention on Human Rights provides that:

> **Article 8 Right to respect for private and family life**
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> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevent of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

39. This was relied on by Hedley J, in a case criticised by Munby P, *Re R (Recognition of an Indian Adoption)* [2012] EWHC 2596, to recognise an adoption in relation to both parents in a similar situation to that arising here. Munby P's criticisms are however not of the substance of the decision but the wide scope of the recasting of the recognition test which Hedley J set out. I note further that MacDonald J has in similar circumstances relied on Article 8 to justify the recognition of the adoption of 'siblings' where the strict application of the *In re Valentine' Settlement* test would have led to the adoption of one being recognised but not the other, *KN and BN and RN and TN and Secretary of State for the Home Department* referred to above.

40. Mr Tattersall draws to my attention that B is in Nigeria and is not therefore covered by the territorial scope of Article 8, whereas both the applicants are within this jurisdiction

and are covered by its scope. I accept this and will consider only an interference with the applicants' Article 8 rights.

41. I find the following:

a. Family life exists between the applicants and between the applicants and B. The applicants have been married since 2000. The applicants and B have seen each other as parents and child since, at least the adoption order in Lagos.

b. A refusal to recognise the adoption of B by one of the applicants will have an emotionally and legally damaging consequences for all three.

c. A recognition of the adoption in relation to KA and not for FA would be a disproportionate interference with that family life, most particularly for FA, which is not justified by any of the matters set out in Article 8(2).

d. There is *de facto,* if not *de jure,* no available alternative route to recognise the adoption. A fresh application for adoption in this country is not a viable alternative: B is already 16 years old he will soon be too old to adopt; FA is already 78 years old, he may well be considered too old now for an adoption in this country.

42. In the narrow circumstances here prevailing, in particular where one spouse of the two who have adopted the child has obtained a domicile of choice and the other has retained their domicile of origin, which they once both had, I hold that the strict application of the test in *In re Valentine's Settlement* does not respect this married couple's long standing family life, nor their family life with B. I note that it is not surprising that at the time *In re Valentine's Settlement* was before the courts the possibility of a married couple with different domiciles was not considered because the *Domicile and Matrimonial Proceedings Act* 1973, which did away with the wife's dependent domicile, was at least 8 years in the future. I do not however need to hold that there must in all cases be a relaxation of the rule *In re Valentine's Settlement* to accommodate the situation where spouses who have jointly adopted a child have different domiciles. That will depend on the facts of the particular case being considered, but I do find that it is appropriate for me to recognise this Nigerian adoption in relation to both FA and KA.

Mr Justice Trowell