Neutral Citation Number: [2019] EWHC 2979 (Fam)

Case No: ZC19Z00177

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

**Before**:

**THE HONOURABLE MR JUSTICE COBB**

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**Re TY (Preliminaries to intercountry adoption)**

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**Kathryn Cronin** (instructed by **Freemans**) for the Applicant
**Artis Kakonge** (instructed by **Local Authority Solicitor**) for the Respondent

Hearing dates: 31.10.19

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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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 TY and members of his 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 subject of this application for an adoption order is TY. He is 18 years old, and was born and raised in Jamaica. The applicant is Ms CM, who is, by birth, his maternal aunt. The adoption application was issued on 29 July 2019, three days before TY's 18th birthday.

2. This application was issued in the Central Family Court. It was referred to me under *PD14B Family Procedure Rules 2010* ('*FPR 2010*') given the applicant's apparent non-compliance with the requirements of the pre-adoption provisions of the *Adoption and Children Act 2002* ("the *ACA 2002*") and the *Adoption with a Foreign Element Regulations 2005* ("the *AFER 2005*"). I gave case management directions in the case on 13 August 2019. Cafcass High Court was notified of the issues in this case, but considered that it could offer no useful role given TY's age. The Home Office was not formally notified of this application given that (a) TY is indisputably lawfully in this country (see the Upper Tribunal decision at [9] below), and (b) even if an adoption order is ultimately made, TY will not automatically acquire British Citizenship.

3. Ms Cronin, on behalf of Ms CM, invites me to give directions to allow the adoption application to proceed notwithstanding the failure of her client to comply with all pre-adoption requirements. Ms Kakonge, for the respondent Local Authority does not oppose the progress of the adoption application. Importantly, she accepts on her client's behalf, that the investigations and duties of the Local Authority have not been compromised or prejudiced in any way by the non-compliance. The Local Authority is satisfied that TY appears to be well-settled with Ms CM. That said, it is necessary for a court to be required to consider carefully any application, particularly one as significant as adoption, which appears, in its progress to or through the court, to contravene the clear requirements imposed by statute.

4. The specific questions which arise for determination are:

    i) Can the application proceed notwithstanding that Ms CM failed to comply with the requirement to notify the Local Authority of TY's arrival within the jurisdiction within two weeks (per *regulation 4(4) AFER 2005*), and did so only after eight weeks?

    ii) Can the application proceed notwithstanding that Ms CM issued the application (on 29 July 2019) less than 3 months after notifying the Local Authority (on 8 May 2019) of her intention to adopt (*s44(3)* of the *ACA 2002*)?

    iii) Can it be said that TY 'had his home' with Ms CM (the 'living together' requirements) for the relevant period prior to the making of the adoption application (see *section 42(5)* of the *ACA 2002*, as applied to these facts by *regulations 4(4)* and *(9) AFER 2005*)?

5. It had originally been the Local Authority's intention to raise a fourth point, namely that Ms CM's communication to the authority on 8 May 2019 was not in a form which constituted 'notice' of intention to adopt. I have seen the electronic pro forma

completed by Ms CM; I have seen the information which she supplied. Ms Kakonge sensibly conceded at the hearing that the electronic form completed by Ms CM was not 'straightforward', was not suited to this activity (the giving of notice of intention to adopt) and 'could have been clearer'. That the information provided by Ms CM was therefore, in my finding, 'ambiguous' and imprecise was not entirely her fault, and the Respondent did not pursue this point.

*The factual background*

6. TY was raised for his first 8 years by his mother in Jamaica; he is the youngest of her five children. After a long illness, TY's mother died in 2010. Ms CM, who lives in London, had supported TY and the family over many years, and, following TY's mother's death, undertook to TY's family that she would care for and indeed adopt TY. The filed evidence reveals that Ms CM has stepped up her involvement in TY's life, and certainly since 2010 has arranged his daily care, fully financially supporting him and guiding, mentoring and sharing his activities and concerns. Although physically living apart for most of this time, Ms CM told me that she initially spoke with TY three or four times a week, and as social media facilitated communication, they were in daily contact. I have seen examples of their daily WhatsApp communications, and both of their witness statements attest to their close loving relationship. TY says that he feels like a 'brother' to Ms CM's adult sons. They in turn are very supportive of the plan for TY to be a full member of their family.

7. Ms CM initiated adoption proceedings in Jamaica in 2011 when TY was 10 years old. This process took 3 years, due, in part, to delays in securing the consent of TY's father (which was ultimately provided in January 2013), and to the Jamaican Child Development Agency's belated decision that Ms CM should be assessed as an adopter by a UK accredited agency. Ms CM was indeed assessed and approved as a suitable adopter on the Local Authority's behalf by 'Parents and Children Together' (hereafter 'PACT') and was issued with a Certificate of Eligibility by the Department for Education – as required by *section 83* of *ACA 2002* – on 4 March 2014. The Jamaican adoption order was finally made on 16 December 2014. TY was then 13 years old.

8. Had this adoption order in Jamaica been made one year or more earlier, it would have been a designated 'overseas adoption' (see *section 66(1)(d)* and *section 87 ACA 2002* and *Adoptions (Designation of Overseas Adoptions) 1973* (SI 19/1973) ('*the 1973 Order*'), and therefore capable of recognition as a full adoption in England and Wales. However, the *1973 Order* was revoked by the the *Adoption (Recognition of Overseas Adoptions) Order 2013* (SI 1801/2013[1]) which came into force on 4 January 2014 (eleven months before TY's adoption order); under the *2013 Order*, Jamaica ceased to be one of the listed or designated countries. To complete the picture, TY's adoption was not a 'Convention' adoption; that is to say, Jamaica is not one of the (currently) 101 contracting parties to the *Hague Convention on Protection of Children and Co-operation with respect to Intercountry Adoption 1993*. Therefore, the adoption of TY by his aunt in Jamaica is actually of minimal (if any) legal consequence in these proceedings, as it is not recognised and has no legal effect here.

[1] Regulation 2: "An adoption of a child is specified as an overseas adoption if it is an adoption effected under the law of a country or territory listed in the Schedule after the coming into force of this Order and is not a Convention adoption". Jamaica is not listed in the Schedule.

9. Ms CM submitted TY's application for entry clearance as a child to be adopted in the UK on 17 April 2015 (TY was still 13 years old). The application was refused on 14 October 2015, and the refusal was upheld by the First Tier Immigration Tribunal in a determination dated 27 June 2017 (TY was, by now, 16). TY's appeal against the First Tier Tribunal decision was allowed by the Upper Tribunal in a determination dated 14 June 2018 (TY was 16, nearly 17) which found the First Tier judge, the Home Office presenting officer and TY's then counsel all erred in their reading of the immigration rules and their understanding of the family law arrangements sought to be incorporated as part of the rules. The Upper Tribunal found that TY satisfied the requirements of the immigration rules on entry clearance for adoptive children and also allowed the appeal on human rights grounds. The determination was reported: see: *TY (Overseas Adoptions - Certificates of Eligibility*) [2018] UKUT 197 (IAC) see in particular [32-33]; [46-47]; [52-60]).

10. Thereafter, despite Ms CM's repeated requests to complete the visa process, the Home Office took some 7 months to issue TY with a visa permitting his entry for settlement as an adoptive child. TY was still in Jamaica. In December 2018, Ms CM's younger son travelled out to be with TY. On 22 February 2019, Ms CM herself travelled to Jamaica to join TY.

11. The application and appeal process had taken some 3 years and 9 months to be completed. To recap, TY was aged 11 when the adoption process in Jamaica was commenced, was 13 when his entry clearance application was submitted and aged 17 and 5 months when his visa was issued. Ms CM complied with all the Jamaican adoption and immigration procedures. I am satisfied that she made repeat efforts to expedite these processes. TY's visa was issued in January 2019. He travelled to the UK in the company of Ms CM (as required under *regulation 4(3)* of the *AFER 2005*[2]) arriving on 12 March 2019.

12. In order to comply with *regulation 4(4) AFER 2005*, Ms CM should have notified the Local Authority of TY's arrival in this country within 14 days of arrival (i.e. by 26 March 2019). She did not do so. She had recalled that her PACT social worker had advised her to notify the Local Authority when TY arrived in the country, but not of any timescale. She ultimately notified the authority (by completing a pro forma electronic form) on 8 May 2019. Ms CM's notification was referred to the adoption team. The Local Authority's adoption team manager responded by email dated 3 June 2019 advising Ms CM that: "There is no current role for the Adoption and Post Permanency Team". Ms CM was confused by this response and assumed that she did not, after all, need to adopt TY in this country or indeed take any further action. She then contacted an immigration solicitor to check on TY's immigration status when he attained the age of 18; the immigration solicitor referred her to Freemans for family law advice. Ms CM visited that firm on 24 July (N.B. nine days before TY's 18th birthday). Only then did she learn of the pre-adoption requirements and the need to adopt TY here. An application for adoption was hastily prepared and lodged the following day, and formally issued a few days later.

13. During this process, Ms CM has had periodic contact with the Local Authority. She had first contacted the adoption team on 22 November 2012 to enquire about adopting TY. At that time, she was referred to PACT to whom the Local Authority was then

[2] "The prospective adopter must accompany the child on entering the United Kingdom."

commissioning its intercountry adoption work. Thereafter all her communications concerning the adoption were with PACT. In the report of PACT's final assessment visit with Ms CM on 10 December 2014, the social worker recorded that she had advised Ms CM to be specific in TY's visa application that his entry to the UK was 'for the purposes of adoption'. The report concluded 'PACT will keep in close contact with [Ms CM] until [TY] comes back into the country to discuss that procedure'. That discussion on post-arrival pre-adoption procedures never took place, as PACT ceased to undertake the adoption work for the Local Authority some time in 2016.

*The applicable law and these facts: general*

14. Any application for adoption must be made before the person to be adopted attains the age of 18 (*section 49(4) ACA 2002*). The order may be made after that date but before the subject's 19th birthday (*section 47(9)* ibid.). In this case, we are in that final year within which an adoption order is still possible.

15. The pre-application adoption requirements are set out in *sections 42* to *44* of the *ACA 2002*, which, in an intercountry adoption application (as here), should be read with *section 83* of the *ACA 2002* and *Part 2* of the *AFER 2005*. *Section 83* applies where a person who is habitually resident in the British Islands brings "a child who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption by the British resident" (*section 83(1)*); *section 83(5)/(6)* enable the enactment of regulations, which are, for present purposes, the *AFER 2005*.

16. The language of the statute and the regulations in these respects contains a mix of the mandatory and directory:

    i) "an adoption order may not be made …unless the proposed adopters have given notice" (*section 44(2)*);

    ii) "the notice must be given not … less than three months before the date on which the application for the adoption order is made" (*section 44(3)*);

    iii) "the prospective adopter must within the period of 14 days…. [give notice of the arrival of the child into the UK]" (*regulation 4(4) AFER 2005*);

    iv) "An application for an adoption order may not be made unless—… (b) the condition in whichever is applicable of subsections (3) to (5) applies" (*section 42(1)*) and "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" (*section 42(5)*).

    In each instance I have underlined the operative word above for emphasis. No sanction is suggested for non-compliance of the provisions of *section 44* (unlike the position in relation to *section 83*, where *section 83(7)* imposes a criminal penalty). Interestingly *regulation 9* of the *AFER 2005 does* provide for the situation where a party has not complied with the conditions set by *section 83(5)* (i.e. *regulation 3* and *regulation 4* of the *AFER 2005*), notwithstanding that it appears mandatory, by

introducing to the defaulting applicant an additional qualifying period within which the child must live with the proposed adopters before an application can be made.

17. *Regulation 3* and *Regulation 4* of the *AFER 2005* set out a number of requirements which apply before, during, and after the proposed adopter brings or causes a child to be brought into the UK. I paraphrase them here. Of the requirements which are imposed *prior* to the resettlement of the child, a "person *intending* to bring" a child into the UK "must apply in writing to an adoption agency for an assessment of his suitability to adopt a child; and give the adoption agency any information it may require for the purpose of the assessment" (*regulation 3*). Also *prior* to bringing the child into this jurisdiction, the proposed applicant must obtain a certificate from the Secretary of State at the Department for Education, confirming that the applicant has been properly assessed; the proposed applicant must visit the child abroad, and report on that visit (both before and afterwards). All these requirements (which appear mandatory) were fulfilled by Ms CM here.

18. *Regulation 4(3)* requires the proposed applicant to accompany the child to the UK. Ms CM did so: see [11] above.

*The applicable law and these facts: notice periods*

19. *Regulation 4(4)* contains the requirement on the prospective adopter to notify the local authority of the child's arrival in the country within 14 days of arrival, and of the applicant's intention to apply for an adoption order in accordance with *section 44(2)* of the *ACA 2002*. This notification triggers the range of "functions" on a local authority which are set out in *regulation 5*. The essential functions include ensuring that the child is registered with a medical practitioner, to ensure that the child is visited within one week and weekly thereafter for the first four weeks, and for the local authority to hold a review after four weeks. The visiting, and the obligation to review further, is then scheduled by the regulation (*regulation 5(1)(f)(i)/(ii)*) to take place at intervals of four months and ten months after the child's arrival in the UK.

20. Separately, and in any event, the applicant is required to give a "notice of intention to adopt" to the local authority (*section 44(2)*), and this must be given not less than 3 months before the date on which the application to adopt is made. This provokes an investigation by the authority (*section 44(5)/(6)*) which should "include the suitability of the proposed adopters" and any other matter relevant to *section 1* of the *ACA 2002*.

21. As to the notice provisions, as a matter of fact, Ms CM gave notice to the Local Authority of TY's arrival in this country and of her intention to apply for an adoption order (*regulation 4(4) AFER 2005*), albeit that she did so 6 weeks later than she should have done. This self-same notice was (by 9 days) short of the required "three months" notice to the Local Authority of her intention to adopt TY (*section 44(3) ACA 2002*). In considering the failures to adhere to these time-limits, Ms Cronin has urged me to take a purposive view of the statute, and to respect TY's and Ms CM's human rights. She has referred to a number of authorities including *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. I further drew attention in argument to Sir James Munby P's judgment in *Re A & Others (HFEA 2008)* [2015] EWHC 2602,

[2016] 1 WLR 1325, [2017] 1 FLR 366 at [59]/[60]. From these authorities, I feel able to extract the following propositions:

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* 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]).

*The applicable law and these facts: 'have had his home with'*

22. I have drawn attention to *section 42(1)/(5)* above, namely the further requirement that the child should have "had his home"[3] with the applicant for a specified period prior to the application; there are different qualifying periods depending on the nature of the application[4], but for present purposes *section 42(5)* is relevant. This section provides that "the child must have had his home with the applicant … for not less than three years (whether continuous or not) during the period of five years preceding the application". The rationale for this is to ensure that the child is well-established with the applicant, and further (per *section 42(7)*) to provide sufficient opportunities to the local authority in whose area the home is to "see the child with the applicant… in the home environment".

23. For an intercountry adoption, that requirement is modified by *regulation 9 AFER 2005*. If the conditions required by *section 83(5)* have been met, the 3-year requirement in *section 42(5)* shall be replaced by a *6 months* requirement. If the conditions required by *section 83(5)* have *not* been met, then the 3-year requirement is replaced by a *12 months* requirement. On the facts of this case, Ms CM has entirely complied with *regulation 3* (obtaining the assessment of suitability: the report from

[3] The phrase which is to be found in *section 42(3)/(4)/(5) ACA 2002*
[4] Different criteria are set whether this is a step-parent adoption or a foster parent adoption for instance

PACT) and all but the notice requirement in *regulation 4 AFER 2005*; with respect to her one default, she did comply albeit late. Taking the picture as a whole, I am satisfied that there is sufficient compliance with the conditions required by *section 83(5)* (i.e. *regulation 3* and *regulation 4* of *AFER 2005*) that I should proceed on the basis that she *has* in fact complied, and that the 3 year 'had his home with' requirement can accordingly be reduced to 6 months. Put another way, Ms CM has complied with all *material* requirements of the *AFER* (by which I mean obtaining the assessment of suitability report, certificate from the Secretary of State, visiting the child abroad, and accompanying the child to this jurisdiction), and the central purpose of the regulations is therefore met.

24. I turn to whether TY has in fact "had his home with" the applicant for 6 months preceding the application. It is obvious on the facts that TY has not *physically* lived with Ms CM for the whole of the period from 29 January 2019 to 29 July 2019; they have shared a home (in two countries) for only a part of that period. Can the phrase "had his home with" be sufficiently widely interpreted as to capture the situation which obtained here? Ms Cronin drew my attention to the analogous provisions of *section 54(4)(a)* of the *Human Fertilisation and Embryology Act 2008* which requires that "the child's home must be with the applicants" at the time of the application for a parental order, and to a number of authorities including: *KB & RJ v RE* [2016] EWHC 760 (Fam); *Re Z (Foreign Surrogacy)* [2015] EWFC 90; *Re X (A child: Adoption No.2)* [2014] EWHC 4813 (Fam); *Re SL (Adoption: Home in Jurisdiction)* [2004] EWHC 1283 (Fam), [2005] 1 FLR 118; *Wagner & JMWL v Luxembourg* (*Application 76240/01*) [2007] ECHR 1213; *ECC v M* [2008] EWHC 332 (Fam). From the authorities to which I have been referred, I draw the following propositions:

i) The question of where a child has his / her home is a question of fact (*ECC v M* at [67]):

ii) The phrase 'must have had his home' has been and should be interpreted "flexibly" (*KB & RJ* at [41]);

iii) A child can have his/her home with a parent notwithstanding that for extended periods the child and the parent may be in different homes, and indeed the child may be away at boarding school; important to an assessment of 'having a home' is whether the child and applicant have an 'integrated' relationship, whether the parent and child see themselves in that relationship, and the "concern and care" shown by the parent for the child (*Re X (Adoption No.2*) at [34] and [36]);

iv) A child can "have his home" with the applicant even where they are effectively in separate countries (*KB & RJ* at [40]);

v) It is legitimate to consider the purpose of the requirement to have his home which is "to test the strength of the applicant's commitment to the child, and whether the 'match' between the child and the applicant is secure, those matters being assessed empirically by the need to demonstrate that the child's placement with the applicant in her 'home' has survived at least [12 months]" (*Re SL* at [22]);

vi) It will be relevant to consider whether the 'parent' has "arranged and provided" the home for the child (in that case, as in this, in a different country) even if not physically with the child for the whole material time (*Re Z*[5] at [57]);

vii) There is a human rights aspect to consider; family life within the meaning of the *European Convention on Human Rights* can of course be achieved by a child with his adoptive parents (*Wagner* at [121]).

25. I should add that if the requirement for the child to 'have his home with' the applicant in *section 42(5)* is "not met", then the person may not give notice of intention to adopt "unless he has the court's leave to apply for an adoption order" (*section 44(4)*). I turn to this again briefly below (see [38]).

26. The power to give leave to an applicant to apply for an adoption order, where the 'had his home' requirement is not met, is contained in *section 42(6)*. It is apparent that 'leave' may be given at any time of the proceedings including at the final hearing: see Bennett J in *ASB & KBS v MQS (Secretary of State for the Home Department Intervening)* [2009] EWHC 2491 (Fam) at [46], [2010] 1 FLR 748.

*Conclusions*

27. I discuss the first and second issues together, namely Ms CM's failure to give notice to the Local Authority within 2 weeks of TY's arrival in the jurisdiction, and less than 3 months prior to making the application.

28. I have considered with care whether I can or should allow the adoption application to proceed notwithstanding this failure of the applicant to give proper notice to the Local Authority under statute, specifically:

> "… having regard to and in the light of the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties." (Munby P in Re X at [52])

29. The purpose of the requirement to notify the local authority within two weeks of a child's arrival is to enable social work checks to be made, in the early days a placement in this country, to ensure that arrangements for his/her care are satisfactory; after all, the person caring for him will almost certainly not have parental responsibility, and will probably and to all intents and purposes be a private foster carer. The functions imposed on a local authority in these circumstances are, as I mentioned earlier ([19] above), set out in *regulation 5* of the *AFER 2005;* most significant among them is the requirement for routine weekly visiting in the early days, and the offering of advice. In this case, it is obvious that the moment has passed; TY has now been in this jurisdiction for nearly nine months. Additionally, as it happens, TY was never caught by the private fostering arrangements (per *Part IX*

[5] In *Re Z* the children were not in the same country as the Applicants when the application for parental orders was made: see [89]

*Children Act 1989*) as he was already 16 years old[6] when he arrived in the UK, and is in any event a relative of Ms CM. The underlying purpose of this requirement could therefore be said to have even less relevance.

30. The purpose of the requirement to give no less than three months' notice of the intention to adopt is to enable the local authority to commence their investigation of the application, assess the parties, and be in a position to offer advice to the court when the matter is placed before it for directions (per *section 44(5)/(6)*) (see [20] above). Ms Kakonge advises me that the respondent Local Authority is now ready and able to undertake this assessment, and further submits that this assessment (in Annex A form) can be completed in less than the 12 weeks conventionally sought. She points out that the Local Authority is not starting this work with a blank canvas; as mentioned earlier ([7]) it commissioned PACT to complete an assessment of Ms CM in 2014 so much of the background investigation has been done. This assessment supported Ms CM's application to adopt TY in Jamaica.

31. Parliament cannot really have intended that the application for an adoption order, with all its transformative[7] characteristics would have to fail *in limine* and barred forever simply because of the failure of the applicant to comply strictly with this notice requirement (or indeed the earlier notice requirement) in the legislation. An adoption order, after all,

> "… has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible" (Sir James Munby P in *Re X* at [54])

Parliament surely intended a "sensible result"[8]. To rule that the adoption application should not be permitted to proceed on the basis of this non-compliance with what appears to be a mandatory requirement would not be a "sensible result".

32. Insofar as I need to find further support for this approach, it is surely to be found in one of two places:

i) By reference to *regulation 9* of the *AFER 2005* which plainly contemplates that there may in fact be non-compliance with *regulation 3* and *regulation 4*, and the *AFER 2005* makes provision for this; in this case I am satisfied that there was very substantial compliance[9];

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[6] *Section 66 Children Act 1989*: a privately fostered child is one who is younger than 16, and is cared for otherwise than by a parent, relative or someone with PR.

[7] To borrow Theis J's word in *A & another v P and Others* [2011] EWHC 1738 (Fam), endorsed by Sir James Munby P in *Re X* at [54]

[8] *Re X* at [42]/[55], where Sir James Munby P cites Sir Stanley Burnton in *Newbold and Others v Coal Authority* [2013] EWCA Civ 584

[9] Reference Lord Steyn in *R v Soneji & another* [2005] UKHL 49

ii) By recognising and enforcing the rights of TY and Ms CM for a family life under *Article 8* of the *European Convention.* 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.

Taking all of these matters into account, I am therefore able to conclude that the applicant's failure to comply with the notice provisions is not fatal to her application.

33. I return to the third question posed in [4](iii) above: namely, can it be said that TY 'had his home' with Ms CM for 6 months prior to the making of the adoption application on 29 July 2019?

34. It is clear from the authorities relied on by Ms Cronin discussed above ([24]) that the courts have taken a reasonably flexible approach to the term 'having his home with'. It will inevitably turn on the specific facts. Relevant among those facts will be whether Ms CM and TY have an 'integrated' relationship, and whether they saw themselves in a parent/child relationship; I believe they did. In this regard, the court notes the "concern and care" shown by Ms CM towards TY over a number of years; it is clear that she "arranged and provided" the daily routine for TY while he lived with his ailing grandmother (see [35](vii) below).

35. In addition to the points raised in [34] above, on the facts of this case, and taking the whole of the six-month period into account:

i) Ms CM and TY were, in Jamaican law, mother and son, she having adopted him in Jamaica in December 2014;

ii) Ms CM and TY did actually live together physically in the same home from 22 February 2019 to 12 March 2019 in Jamaica, and from 12 March 2019 to 29 July 2019 in England, a period altogether of 22 weeks (4 weeks short of the required 26);

iii) During January 2019, Miss CM's younger son visited TY in Jamaica and spent time as a family with him; they have a strong sibling-like bond;

iv) Throughout the period when Ms CM and TY were not together (January/February), they maintained daily contact with each other by phone, skype and social media;

v) Their physical separation across countries was enforced not by choice; during the whole of the period from 2014, Ms CM was trying to achieve TY's migration to this country;

vi) Throughout the relevant period, TY was entitled to be living in this country; Ms CM was simply waiting for the Home Office to issue his visa following the successful appeal to the Upper Tribunal;

vii) Although TY's day-to-day care was (when not provided for by Ms CM) theoretically provided by his grandmother, the evidence reveals that she was in fact largely incapable of caring for TY; she had suffered a stroke and was said to be "not cognisant or coherent enough to care for, monitor or supervise" TY. This reinforced the critical role that Ms CM played in TY's upbringing, decision-making, supervising, offering emotional care for TY, albeit that this was done for much of the time remotely.

36. Drawing the threads of [34] and [35] together, I am in the circumstances, able to conclude that in the whole of the 6 months immediately prior to the making of the application, TY did 'have his home' with Ms CM for the purposes of *section 42* of the *ACA 2002* and *regulation 9* of the *AFER 2005*.

37. I must add that had I not reached this conclusion on the facts, I would have been minded to grant Ms CM permission ("leave") to make the application exercising the wide discretionary powers available to me under *section 42(6)* (see [26] above). In exercising discretion, I would have had regard to:

i) Ms CM's commitment over approximately 9 years in pursuing adoption for TY;

ii) That Ms CM is TY's adoptive mother in Jamaican law;

iii) That an adoption order here will not serve to extinguish parental rights, as TY's mother is dead, and father is (according to police information) presumed dead;

iv) That the delays in achieving this adoption in Jamaica, and TY's migration to this country, have been significant, and have been largely if not entirely out of Ms CM's control;

v) That in 2014 Ms CM satisfied the Jamaican Court that it is in TY's best interests that he be adopted by her; this was based in part by a positive assessment undertaken by the Respondent Local Authority.

38. The residual issue with which I would have had to grapple in those circumstances is how I could/should have dealt with *section 44(4) ACA 2002*; this plainly contemplates that no notice of intention to adopt can be given by the applicant until *after* 'leave' has been granted to the applicant to apply for an adoption order. Thus, if I were in the position of only granting 'leave' today, then notice would only have been given later today. This would have required a further review of the case law rehearsed at [21] above, and a determination as to whether the formal requirements could effectively be dispensed with.

39. As I mentioned earlier, the Local Authority has not materially opposed the outcome contended for by Ms CM. It has rightly not questioned Ms CM's good faith, and has properly acknowledged that she was seeking to navigate these difficult waters once TY was in this country without the benefit of legal advice, and without support from the adoption agency which had assessed her. The Local Authority further indicated through counsel that on the information provided it has no reason to question that the current arrangement for TY's care by Ms CM is meeting his needs. The Local

Authority has also confirmed that it is not prejudiced or compromised in its ability to undertake its statutory assessment and investigatory functions now. By contrast, TY and Ms CM would be irremediably prejudiced if the application were not allowed to proceed.

40. In conclusion, I take the view that, as Sir James Munby P said in *Re A & others (HFEA 2008)* [2015] (see [21] above), that the opportunity for the court in this country to consider adoption for TY by Ms CM, particularly where it has been granted in another jurisdiction, should not be denied by "the triumph of form over substance", and that I should allow the adoption application to proceed notwithstanding these instances of statutory non-compliance.

41. I will ask the parties to submit a draft directions order, in order to case manage the application now to a final hearing. It will be necessary for the Local Authority to undertake the Annex A[10] assessment and prepare a report. I shall then list the case for a final hearing.

42. That is my judgment.

[10] *PD14C FPR 2010*