



Neutral Citation Number: [2019] EWHC 2190 (Fam)

Case No: FD18P00486

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2019

Before:

MRS JUSTICE THEIS

Between:

ZH	<u>Applicant</u>
- and -	
HS	<u>1st Respondent</u>
- and -	
MO	<u>2nd Respondent</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>3rd Respondent</u>
- and -	
TS	
(by her Children’s Guardian Desmond Wheway)	<u>4th Respondent</u>

Ms Deirdre Fottrell Q. C. & Ms Kathryn Cronin (instructed by **Freemans**) for the **Applicants**
Ms Maggie Jones & Mr Tom Wilson (instructed by **Goodman Ray**) for the **1st & 2nd Respondents**
SSHD did not attend for the 3rd Respondent
Ms Barbara Connolly Q.C. & Ms Mai-Ling Savage (instructed by **Osbornes**) for the **4th Respondent**
Ms Chaudhry (instructed by **London Borough of Redbridge**) attended the hearings

Hearing dates: 25th, 26th, 27th February & 5th March 2019

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.

.....
MRS JUSTICE THEIS

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

Mrs Justice Theis DBE:

Introduction

1. This is an application to revoke an adoption order made on 12 October 2016 in relation to T, now aged 4 years. She was adopted by her paternal aunt and uncle, HS and MO.
2. The application to revoke is made by T's birth mother, ZH, who became separated from T when trying to secure entry to this country. ZH arrived here 2 years later and issued this application.
3. The respondents to the application are HS, MO, and T, through her Children's Guardian. T's birth father, AS, was discharged as a party due to difficulties in serving him as he remained in Somalia. Ms Hollmann, ZH's solicitor, has filed a statement which sets out her contact with him, whereby he confirmed his agreement to ZH's application and his lack of knowledge of or consent to T's adoption.
4. The Secretary of State for the Home Department ('SSHD') was served with this application. He applied to become a party and filed detailed written submissions on 30 August 2018, attended the directions hearing on 4 October and has been served with all the evidence and written submissions. He did not attend this final hearing, although filed updated written submissions.
5. HS, MO and the Children's Guardian support the application to revoke. The SSHD expresses no view on the merits of the application other than to set out '*concerns surrounding the events that lead to [T's] arrival in the UK and her adoption...*'. The SSHD invites the court to consider the application to revoke the adoption order with anxious scrutiny and has confirmed that if T's adoption is revoked that will not affect her British citizenship, which she would retain. ZH has applied for asylum, this was refused on 7 January 2019 and that decision has been appealed. ZH has been granted a renewable term of 30 months leave to remain as T's parent.
6. Ms Chaudhry appeared on behalf of the London Borough of Redbridge (the local authority) as it was known there may be some criticism of the Annex A report.
7. This application has highlighted the need to ensure correct procedures are followed in adoption applications.
8. An adoption order is transformative for a child; it recasts in a lifelong way that child's status with his or her birth parents and the person(s) that apply for such an order. This is demonstrated by the provisions of s 67 Adoption and Children Act 2002 (ACA 2002) that following such an order '*An adopted person is to be treated in law as if born as the child of the adopters or adopter*' (s 67 (1)).
9. The statutory requirements and safeguards, as well as the procedure set out in Part 14 Family Procedure Rules 2010 ('FPR 2010'), are there to ensure these important and transformative orders are made only when it is necessary to do so.

10. In this case adoption was, in my judgment, a disproportionate order for what was required, was not an order that met the lifelong welfare needs of this child and was made following a flawed process, replete with errors and omissions.
11. All parties agree the court should take the highly unusual and exceptional step of exercising the court's inherent jurisdiction and revoke the adoption order.
12. The parties also agree, following careful assessments that have been undertaken during these proceedings, T should be placed in ZH's care.
13. Before turning to consider the detail of the case, there are two wider issues I would like to draw attention to:
 - (1) First, to emphasise the need for courts to carefully scrutinise applications for adoption, each court should have a robust system in place to ensure the gateway requirements are met that enable the application to be issued. That requirement for scrutiny is heightened in non-agency adoptions, particularly those made by parties who do not have the benefit of legal advice or representation. The Family Procedure Rules Committee (FPRC) may wish to give consideration to any amendments to the adoption application form to ensure that in non-agency applications it provides adequately for
 - (i) written confirmation of prior notice to the local authority (s 44 (2) ACA 2002; s 144 ACA 2002 requires any notice to be in writing);
 - (ii) evidence of the requirement of the leave of the court having been obtained if the application is being made when the child has lived with the applicants for less than 3 years (s 42 (6) ACA 2002), and
 - (iii) highlighting in some way the requirement in r 14.3 FPR 2010 that the local authority is an automatic respondent in a non-agency adoption where notice under s 44 ACA 2002 is required to be given.
 - (2) Second, to highlight the obligation on local authorities, who are required by the FPR 2010 to prepare a report on the suitability of the adopters to adopt (the Annex A report). This obligation is more onerous in non-agency adoption applications and should, in my judgment, always involve some legal advice. Any report directed must cover the matters specified in PD14C, which sets out a comprehensive list of what the report is required to address. Such a report needs to be prepared within a robust framework in the local authority that will provide effective scrutiny of that report (both legal and social work) so as to consider whether it contains the relevant information as required by the FPR 2010 and PD14C. Such a framework should provide, at the very least, for the report to be signed off by the team manager, as well as active supervision during the preparation of the report and consideration whether any further directions need to be sought from the court. The local authority in this case accept the wholesale

failure by them to undertake the necessary enquiries as were required of them by PD14C. They were, in my judgment, right to do so. It was an institutional failure where no framework was in place to ensure these important reports, that affect the legal status of children, are prepared in accordance with the FPR 2010 and PD14C. TS, the team manager, has confirmed in her most recent statement the changes in practice at the local authority. I will direct that the Head of Service at the local authority shall write to the court setting out the revised procedures that have been put in place relating to the preparation of Annex A reports.

14. Before turning to consider the background, I would like to express the courts gratitude to the legal representatives for the excellent skeleton arguments. HS and MO have had the benefit of experienced representation through Miss Jones, Mr Wilson and Miss Dally who have all acted pro bono, for which the court is extremely grateful.

Relevant Background

15. The applicant, ZH, is a Somali national who has sought asylum here. On her account, she made arrangements through an agent to come to Europe with her daughter, T. She has 8 other children and in 2014 she had to flee the area she had lived in Somalia due to the political unrest there. At that time, she was pregnant with T and now does not know where the rest of her children are, it is thought they are in her mother's care. Her husband, AS, the father of her children remains in Somalia.
16. ZH claimed asylum for herself and T in Holland in 2015, which was refused.
17. Later in 2015, through an agent, ZH sought to enter the UK with T. T travelled with an agent who had been given the address of family members who lived in the UK. ZH was detained by the Dutch authorities and removed to Kenya. As a result of ZH becoming separated from T the agent contacted the family here, HS and MO, T's paternal aunt and uncle and delivered T to them at the end of October.
18. HS and MO have been in the UK since about 2001, were married here in 2004 and have three children, 14, 13 and 12 years.
19. HS and MO were advised to notify the local authority (London Borough of Redbridge) that T had been placed in their care, which they did on 6 November 2015. T was made the subject of a police protection order and placed with foster carers whilst the local authority conducted their own enquiries.
20. Solicitors HS and MO instructed notified the Home Office they were caring for T and they were advised to claim asylum for her, which they did. HS and MO attended a screening interview with the Home Office on 9 November.
21. As a result of a referral by social services to the police HS and MO were interviewed on 10 November.
22. On 2 December 2015 the Hamar District Court in Mogadishu received confirmation from two persons resident in Merca that T is the daughter of ZH and AS, and she is one of 9 children born to her parents. The names and birthdates of the children were provided and confirmation that T is now the responsibility of HS, her paternal aunt and her father agreed to this transfer of custody without coercion and while he was

mentally and physically sound. On the basis of this evidence the Court authenticated T's birth certificate and the custody transfer as correct and '*according to the rulings of Islam*' and Somali law.

23. By letter dated 11 December 2015 and signed by HS, CM of the Child Protection and Assessment Team and her supervising senior practitioner, the local authority confirmed that DNA evidence showed T to be HS's niece, that they were satisfied with the care she had given to T and that they had '*lengthy discussions*' with T's father who confirmed the family arrangement under which HS will care for T. On this basis the letter confirmed the local authority agreement for HS to resume the care of T.
24. According to HS and MO when they went to collect T on 11 December they were told by the social worker they would need to see a lawyer and get something from the court to make the arrangement legal. They tried to get a lawyer but were informed no public funding would be available and they said they were unable to pay for a lawyer. They sought advice from the Citizens Advice Bureau. In their statement they describe how one of the advisers there showed them a form online and at a second appointment one of the advisers helped them complete the form. Although MO speaks English, HS has required an interpreter during this hearing.
25. They took the form to the Family Court at Romford and paid the application fee.
26. The file was received by East London Family Court and on 19 July 2016 HHJ Purkiss directed the application was transferred to Pauffley J with the first hearing listed on 1 August.
27. At the hearing on 1 August 2016 HS and MO attended in person. No other parties were present or represented. The court order records that the '*child's mother is said to be missing and her father is said to be supportive of the application to adopt*' and notes that DNA testing establishes HS is a blood relative of the child. The court directions included the local authority to file a rule 14.11 report by 26 September 2016, that it must cover the matters specified in Annex A to PD14C of the Family Proceedings Rules 2010, the SSHD to be notified of the application and be given the opportunity to intervene and should notify the local authority and the court by 30 September of their position. It then provided '*The proceedings are listed for further hearing when the court will consider whether a guardian should be appointed on 11 October 2016*'. In their statement in these proceedings HS and MO said they explained at that hearing their reason for making the application is that everywhere they go they are asked for court papers about the arrangement for T to live with them and they have applied to make the arrangement legal.
28. On 18 August the local authority received notification of the assessment direction made by the court.
29. The Annex A report was prepared and submitted to the court prior to the hearing on 12 October 2016. HS and MO attended the hearing in person without an interpreter. No other parties were present or represented. It is clear they had not seen the rule 14.11 report, given that (as is stated below) the author of the Annex A report visited them on 17 October with the purpose of going through it with them. The court file

records the hearing as being relatively short and an adoption order was made. Pauffley J gave a judgment, the transcript of that has been obtained.

30. The local authority records note that the author of the Annex A report visited HS and MO on 17 October with the intention of going through the report with them. The file note of that meeting records that HS & MO told the author of the Annex A report that the adoption order has been made.
31. According to ZH she remained in Kenya for about 2 years, mostly in Mombasa where she was able to make contact with her husband, AS. She reports this was when she found out T was being cared for by HS and MO. She said it was during this contact she was informed her other children and her mother had fled Somalia by boat, but the father was unable to go with them. ZH returned to Nairobi and from there flew to the UK.
32. ZH arrived in the UK unlawfully on 4 October 2017 and was taken to a mosque where she was collected by her sister, B, who lives here. B was unaware of T being here or that she was living with HS. When they contacted HS she initially thought she could not let them see T, HS and MO contacted the local authority who advised that it should be supervised. HS, B and ZH attended a solicitors' office and signed a declaration on 17 January 2018 where HS and MO confirmed they were the adopted parents of T, ZH was the natural mother and HS and MO had no objections to ZH having supervised contact with T.
33. This application to revoke was issued on 12 July 2018 and came before this court for directions on 31 July, 10 August, 4 October 2018 and 8 February 2019. ZH, HS and MO all filed statements and there was disclosure from the court file and the local authority. No party sought to cross examine any witness, consequently the hearing proceeded on submissions.
34. All parties support ZH's application to revoke the adoption order. During the course of this hearing a composite list has been compiled of what is agreed are the procedural flaws in the process that took place prior to the adoption order being made.

Relevant Legal Framework

35. The parties agree on the relevant legal framework.
36. The Adoption and Children Act 2002 provides that an application for an adoption order may not be made unless the conditions in s 42(5) are met or waived pursuant to s 42(6). In the circumstances of this case these gateway requirements mean that if the child had been living with the applicants for less than 3 years, the application could not be made without first having obtained the leave of the court (s 42(6)). In addition, there is a mandatory requirement on the applicants to have given notice to the local authority in the area they live not more than two years and not less than three months prior to their application to adopt (s 44 (3)).
37. The procedure once an adoption application is issued is governed by Part 14 FPR 2010 and the relevant Practice Directions (PDs). As set out below, a significant number of the relevant procedures set out in Part 14 were not followed.

38. The need to follow adoption procedures was emphasised by Munby P and Black LJ in *N (Children: Adoption Jurisdiction) [2015] EWCA Civ 1112* where they stated that English adoption law is founded on the following principles and practices, helpfully summarised by Miss Fottrell Q.C. and Miss Cronin in their excellent written submissions as follows:
- (1) In English law adoption results from an administrative act in judicial form. It is the court's order which alters the status of the child. Adoption is statutory and the court, when called upon to make an adoption order, has jurisdiction to do so only if the English statutory conditions are fulfilled. (at [102]; [176])
 - (2) *“It cannot be emphasised too much that the court in such a case i.e .of a foreign child must give the most careful consideration, as must the children's guardian and all the other professional witnesses, in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background. Moreover, it must always be remembered that, in the context of such factors, the checklist demands consideration of the likely effect on the child throughout her life of having ceased to be a member of her original family. Mere lip service to such matters is not enough. The approach, both of the witnesses and of the judge, must be rigorous, analytical and properly reasoned, never forgetting that adoption is permissible only as a "last resort" and only if a comprehensive analysis of the child's circumstances in every aspect – including the child's national, cultural, linguistic, ethnic and religious background – leads the court to the conclusion that the overriding requirements of the child's welfare justify adoption.”* ([105])
 - (3) The judgment consistently emphasises the gravity of the decision which the court has to make in adoption cases *“and the pressing need for care and rigour in the process.”* (at 107)
 - (4) *“The ... child's natural parents ... are a vital part of the adoption process under the Act because no adoption order can be made unless they consent or their consent is dispensed with...Putting it another way, English law is the applicable law in determining the adoption application, and that includes the provisions of section 52 of the 2002 Act as to dispensing with parental consent. What the English court cannot do, however, is to assume without more that its determination will bind other jurisdictions. They will make their own determination as to the status of the natural parents vis-à-vis the child and of the child vis-à-vis the adopters and the natural parents and it is for that reason that, although foreign connections do not prevent the English court from having jurisdiction and power to grant an adoption order, they are potentially very material in its determination of how to exercise that power.’* (per Black LJ at [181])
39. The application to revoke the adoption order is made under the inherent jurisdiction. It can be achieved either by an appeal, or under the court’s inherent jurisdiction.

40. Wall LJ made clear in *Webster V Norfolk CC and Others* [2009] EWCA Civ 59 (where a revocation was sought via an appeal) ‘Adoption orders which have been lawfully and properly made will only be set aside in highly exceptional circumstances.’ ([149]).
41. In relation to the relevant principles in an application to revoke under the courts inherent jurisdiction Miss Fottrell QC and Miss Cronin on behalf of ZH submit the court needs to go no further than the principles summarised by Munby P *In re O (A Child) (Human Fertilisation and Embryology Act: Adoption Revocation)* [2016] EWHC 2273 at [26] where he draws attention to a few key propositions summarised by Miss Fottrell and Miss Cronin as follows:
- (1) Under the inherent jurisdiction, the High Court can, in an appropriate case, revoke an adoption order in exceptional circumstances. Munby P commended the evaluations of exceptional circumstances by Bodey J in *Re W (Inherent Jurisdiction: Permission Application: Revocation and Adoption Order)* [2013] EWHC 1957 (Fam) and Pauffley J in *PK v Mr and Mrs K* [2015] EWHC 2316 (Fam). Bodey J declined to revoke the order where such procedure would necessitate alerting the birth parents to the failed adoption because of the effect of this on the troubled adopted child. Pauffley J revoked the adoption in *PK* where the child had been mistreated by her adopters and had been reunited with her birth family and wanted to reinstate her birth name and identity.
 - (2) The effect of revoking an adoption order is to restore the *status quo ante*: see *Re W (Adoption Order: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535 at paras [11]-[12].
 - (3) However, “The law sets a very high bar against any challenge to an adoption order. An adoption order once lawfully and properly made can be set aside “only in highly exceptional and very particular circumstances”: *Re C (Adoption Proceedings: Change of Circumstances)* [2013] EWCA Civ 431 at para [44]. As Pauffley J said in *PK v K* [2015] EWHC 2316 (Fam) i[14] ‘public policy considerations ordinarily militate against revoking properly made adoption orders and rightly so’.
 - (4) An adoption order regularly made, that is, an adoption order made in circumstances where there was no procedural irregularity, no breach of natural justice and no fraud, cannot be set aside either on the ground of mere mistake (*In re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239) or even if there has been a miscarriage of justice (*Webster v Norfolk County Council and the Children (by their Children's Guardian)* [2009] EWCA Civ 59).
 - (5) The fact that the circumstances are highly exceptional does not of itself justify revoking an adoption order (see *Webster (ibid)*).
42. Sir Thomas Bingham MR in *In re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239, page 251 stated:

“The act of adoption has always been regarded in this country as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. It effects a change intended to be permanent and concerning three parties. The first of these are the natural parents of the adopted person, who by adoption divest themselves of all rights and responsibilities in relation to that person. The second party is the adoptive parents, who assume the rights and responsibilities of parents in relation to the adopted person. And the third party is the subject of the adoption, who ceases in law to be the child of his or her natural parents and becomes the child of the adoptive parents.”

43. In the context where the authorities have repeatedly made clear that it is only in exceptional and very particular circumstances that the court will permit the order to be revoked the critical considerations for the court are:

- (1) Was the adoption order lawfully and properly made?
- (2) The effect of revocation on the affected child.

Substantive and Procedural flaws

44. In detailing the procedural flaws below no-one has suggested that HS and MO acted other than in good faith. They did not receive any advice from a family specialist and appeared unaware of other orders that could be made. There is no evidence any professional discussed or raised the option of other orders with them and throughout this process they were not seen with the assistance of interpreters.

45. The flaws can be summarised as follows:

- (1) **Section 42 (5) ACA 2002 – length of time the child has lived with the prospective adopters**

When they issued their application on 29 June 2016 T had only been living with HS and MO since 11 December 2015. S 42 requires the child to have lived with the prospective adopters for at least 3 years, or a court has granted them leave to make the adoption application pursuant to s 42(6). No such leave was obtained so HS and MO were ineligible to make the application. The application form set out the date when T came to live with them. It was not picked up by the court when the application was issued or by the local authority court when they prepared their Annex A report. PD14C section B part 2 (a) requires the social worker to provide particulars of the person with whom the child has had her home.

- (2) **Section 44 (3) ACA 2002 – requirement of notice to be given to local authority of intention to adopt**

S 44 (3) requires HS and MO to give notice of their intention to adopt T not more than two years and not less than three months prior to their

adoption application, unless they have the leave of the court to do so (s 44 (4)). In the adoption application it is stated that HS and MO gave notice to the local authority of their intention to adopt on 6 November 2015. This is clearly not correct, as this was the date HS and MO notified the local authority that they had T in their care. This was not picked up by the local authority during the preparation of the Annex A report. In any event HS and MO were ineligible to give the local authority notice of their intention to adopt T as she had not been living with them for 3 years and they had not been given leave to make the application. S 44(2) provides that an adoption order may not be made unless the adopters have given notice of their intention to adopt to the local authority. This should have been picked up in the Annex A report as PD14C Section D (b) requires the Annex A report to note the date when the local authority was notified under s44. All that is noted in this part of the report is that HS and MO had made a private application to the court on 19.7.16 with no reference to the fact that no notice had been given as required by s 44.

(3) **Section 52 (1) ACA 2002 Consent – father**

S 52 (5) provides consent to adoption means consent given unconditionally and with full understanding of what is involved. The adoption order was made on the basis that the father consented to it. FPR 14.10 (2) requires any consent to be given in the form prescribed in PD5A or '*a form of like effect or otherwise as the court directs*'. No prescribed consent was provided, and no alternative direction was made. FPR r 14.10 (6) requires any consent executed outside of the UK to be witnessed by a person authorised by law to administer an oath, a British consular officer or a notary public. No such consent was provided. The only contemporaneous record of a conversation between the local authority and the father is on 30 November 2015, seven months prior to the adoption application. There is no record of any conversation about adoption. It is recorded that the father said on 30 November the mother was lost in transit, that it was not safe for T to return to Somalia and that he wanted her to continue in the care of his sister. It is a matter of very great concern that this conversation is translated into the Annex A report, some 9 months later, as the father '*fully supports*' an adoption order when there is simply no record of any such conversation. The report records that the author has been '*told*' that the father understands the implications of the adoption order by HS and MO and places some reliance on that. It appears that the author erroneously equated the father's consent to T being placed in his sister's care 9 months earlier as his consent to adoption. This is a significant and fundamental error in the Annex A report. It was based on this error that Pauffley J stated in her judgment that the father had given his consent to HS and MO being T's adoptive parents.

(4) **Section 52 (1) ACA 2002 Consent – mother**

For the adoption order to be made the mother either needed to consent to the adoption or have her consent dispensed with (s 52 (1)). If she

could not be found that had to be considered and determined by the court as required by s 52 (1). The mother was not a party (as she should have been under FPR rule 14.3) and no consideration was given by the local authority or the court as to her position other than the recital on the 1 August 2016 order.

(5) Part 14 FPR 2010

The procedural flaws can be summarised as follows:

- (i) FPR 14.3 provides that both parents, the local authority and T should all have been respondents to the adoption application. In contravention of this rule none of them were identified as parties to the application. Rule 14.8 (1) (b) provides another opportunity for the court to consider whether the child or any other person should be a party to the proceedings, that was not done. If the local authority and T had been parties, they would have been required to attend hearings and the procedural defects in this application would very likely have been addressed.
- (ii) Neither parent was served with the notice of the adoption application. This is contrary to FPR rr 14.3 and 14.4. There is no record in the court orders of service having been dispensed with.
- (iii) At the first hearing the court failed to give any directions in relation to tracing of either parent, as required by FPR r 14.8 (1) (e). The only reference to the parents is the preamble on the order on 1 August 2016 that the mother was said to be missing and the father was supportive of the application to adopt.
- (iv) The court did not join T and appoint a Children's Guardian as required by FPR r 14.6 (1)(iii) and r 16.3 (1) to ensure her interests were safeguarded. This was an issue referred to in the 1 August 2016 order which stated the court would consider at the next hearing whether a Guardian should be appointed. There is no reference to that having been done at the hearing on 12 October. The court is required by FPR 14.6 (1) (iii) to consider this issue.
- (v) The adoption application did not give notice that the adoptive parents were inviting the court to dispense with one or both parents consent, and no subsequent written notice was given, contrary to FPR r 14.9 (2) (a). As a result, the court did not direct a statement of facts, as required by FPR r 14.9 (2) (b).
- (vi) FPR r 14.6 (6) (2) (a) (i) provides that where a child is not placed for adoption by an adoption agency, the court officer will ask either the Service (Cafcass) or the Assembly to file any relevant form of consent to an adoption. That was not done.

- (vii) FPR r 14.6 (1)(iv) requires specific directions should be made where a notice under r 14.9 (2) (request to dispense with consent) is made. Although there was no such request, it was clear on the face of the application form that it would be necessary to dispense with the mother's consent.
- (viii) There is no record to suggest that either parent or the local authority was given notice of the final hearing, as required by FPR r 14.15. There was nothing in the order dated 1 August 2016 that indicated the hearing on 12 October 2016 was going to be a final hearing. The 1 August order said 11 October was going to be a 'further hearing', there is no record of how the date changed from 11 to 12 October. At the date of that hearing the local authority had not gone through the Annex A report with HS and MO. There is a file note in the local authority records of the author of the report visiting HS and MO for this purpose and being informed the adoption order had been made. This did not prompt the local authority to take any further action.

(6) **FPR 2010 Practice Direction 14C - The Annex A report**

PD14C sets out detailed provisions as to what should be included in this report. The Annex A report in this case was defective in the following ways:

- (i) None of the enquiries are referred to as being undertaken with the assistance of an interpreter. HS is described as being able to '*speak English*' yet she required an interpreter for these proceedings.
- (ii) Section B Part 1 (m) requires a summary written by the agency's medical adviser of the child's health history, his **current** state of health and any need for health care which is anticipated, and date of the most recent medical examination (emphasis added). The Annex A report refers to a medical assessment being undertaken on 18 December 2015. In fact, the document attached relates to an examination on 11 December 2015, 7 months prior to the adoption application and was part of the local authority's 47 investigation when HS and MO informed the local authority T was in their care. No other updated medical assessment was undertaken.
- (iii) The requirement in Section C Part 1 (l) for a summary written by the agency's medical adviser concerning HS and MO's health was not done. The Annex A report states HS and MO are awaiting appointments for the medical assessments to be undertaken.
- (iv) The requirement in Section C Part 1 (r) for confirmation that HS and MO had not been convicted or cautioned for any offences was outstanding.

- (v) The requirement in Section D (b) for the date when notice of intention to adopt was given in accordance with s 44 ACA 2002 was not complied with. The Annex A report records '*On 19 July 2016 the applicants made a private application directly to the court for an adoption order*', thereby failing to highlight that no notice had been given to the local authority in accordance with s 44.
- (vi) The requirement in Section E to deal with (a) '*The relative merits of adoption and other orders with an assessment of whether the child's long-term interests would be best met by an adoption order or by other orders (such as residence and special guardianship orders)*' was ignored. The Annex A report simply fails to address this issue and gives no analysis of the other orders that could be made.
- (vii) The report is signed by the social worker author, it is not signed by TS her team manager and there is no record in the local authority recordings of the author having any discussion with TS about the Annex A report, the extent of her enquiries or her recommendations.

Discussion and decision

- 46. Having considered the errors listed above, both concerning the substantive law relating to adoptions in ACA 2002 and the procedure as set out in Part 14 FPR 2010, in my judgment the adoption order must be revoked. Many of the errors outlined above go to the very root of the adoption process; in particular notice to the birth family and consent.
- 47. The adoption application should never have been issued by the court, the application failed to meet two of the gateway requirements in terms of the length of time the child had been with HS and MO and the fact that prior notice had not been given to the local authority.
- 48. Even though it was issued the process thereafter was fundamentally flawed, both in terms of the court procedure and the content of the Annex A report.
- 49. Despite the detailed provisions in PD14C which set out what the report should contain, in many respects there was simply a failure to engage with what was required. The social worker author records at the start of her report that she started working for the adoption and fostering team on 1 August 2016. This may well have been her first report. What was so concerning about the report was the apparent failure to deal with the issue of parental consent. It equated the father's agreement 9 months previously to his sister caring for T to consent to adoption, without any caveats or any indication in the report that she had not spoken directly to the father. In relation to the mother she simply failed to consider what was required in terms of any steps that could be taken to locate her. The report failed to provide any assessment of the relative merits of adoption and other orders either in her report or in her discussions with HS and MO. No consideration is given to the distortion in family relationships that would be brought about if an adoption order was made, or the

availability of other orders that would give HS and MO parental responsibility without the need to change to change T's status with her birth parents. As I have set out this was, in my judgment, an institutional failure by this local authority. The author of the Annex A report was very recently appointed to the adoption team, was not supervised or, as far as this court is aware, given any guidance or training relating to writing these reports.

50. The court failed to identify the omissions to comply with the requirements in the ACA 2002 or Part 14 FPR 2010. Whilst this can in part be explained by reliance on the flawed Annex A report there was a failure to join the child and appoint a Children's Guardian, engage with the issue of the mother's consent and despite the Annex A report recording that the medical assessments of HS and MO were outstanding, as well as the DBS checks, the court proceeded to make a final order. In addition, there was no prior notice that the hearing on 12 October 2016 would be a final hearing.
51. The errors outlined above taint the entire process and I am satisfied the adoption order was not lawfully or properly made and should be revoked.

Postscript

52. Following the conclusion of the hearing, the Head of Service at the London Borough of Redbridge filed a statement setting out the revised procedure that now operates there regarding non-agency placements. This document has been agreed by all the parties in this case. I have set it out below in full, as it may benefit other local authorities when considering what procedures operate in their area.

PROCEDURE FOR UNDERTAKING NON-AGENCY ADOPTIONS LONDON BOROUGH OF REDBRIDGE

Introduction

This procedure applies to applications in relation to adoptive placements that have not been arranged by a local authority or registered adoption agency, other than children brought into the UK for the purposes of adoption.

This will include adoption applications by step-parents, relatives, private foster carers or local authority foster carers who have not sought or obtained the local authority's approval for the placement becoming an adoptive placement.

The Adoption and Children Act (ACA) 2002 (and the Statutory Guidance of July 2013) and the Adoption Agencies Regulations 2005 clearly set out the rules by which a person or persons can make a non-agency adoption application and the Local Authority's responsibilities in such a situation. They are set out below for ease of reference.

It is an offence for any person to arrange for the adoption of a child without the involvement of a local authority or registered adoption agency unless the child is related to the applicant or has been living with the applicant for the required period. If you have any suspicions please refer this to your manager and or legal for discussions.

"Non-agency adoption" includes all those categories of adoption where the adoption agency and the adoption panel do not play a part in the placement of the child for adoption. These are:

- Parents' Adoption.

- Partner adoptions (formally known as step-parent adoption – where the partner (married, civil or cohabiting) applies to adopt the child to share parenting with the birth parent).
- Anyone who has had care of the child (for any 3-year period in the past 5 years).
- Local Authority foster parent(s) (usually) proceeding without the support of the social care.

All non-agency adoptions have similar characteristics and there is a basic format comprising enquiry, notice of intention to apply to adopt, provision of information, assessment and preparation of the Annex A report for court. Depending, however, on the type of non-agency adoption, there may be extra elements included in the process and work.

This guidance sets out the London Borough of Redbridge's procedure for dealing with such situations.

Contents:

- 1. Initial Contact**
- 2. Notice of Intention to Adopt – Procedure**
- 3. Assessment**
- 4. Report**
- 5. Sharing the Report with the Family**
- 6. Non-Agency Adoption Application to the Court**

1. Initial Contact

1.1 This is where the prospective adopter, a resident of the local authority area or in the case of a person living abroad, the local authority area in which they last had their home¹, contacts the local authority in writing to give notice of their intention to make an application for an adoption order in relation to a non-agency adoption. The matter should be referred to the Child Protection and Assessment Team and legal services should be notified. On receipt of written notice of intention to adopt, the appropriate team should discuss with the prospective adopters the following issues:

- 1.2 **Eligibility** – the prospective adopters must be:
- i. Age – At least one of a couple, or the single adopter, must be 21 years of age.

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Where prospective adopters are resident abroad, but still entitled to apply for an adoption order, regulation 3 of the Local Authority (Adoption) (Miscellaneous Provisions) Regulations 2005 sets out how the appropriate local authority is to be identified. In principle this is the local authority where they last had their home, but where each partner of a couple lived in different local authority areas in England, and they have never had a home together in England, they may choose which of the two relevant authorities they wish to give notice.

- ii. Habitual residence – Both prospective adopters in case of a couple or the single adopter must have been habitually resident in the UK for the preceding year; or
- iii. Domicile – At least one of the couple or the single adopter must be domiciled in the British Isles. Domicile is a complex legal issue and if the prospective adopter (or both in case of a couple) has not also been habitually resident in the UK for at least one year and is relying solely on domicile, legal advice should be sought.
- iv. Age of child – the child must be under 18 years at the point of application for the order.

AND the prospective adopters must have lived with the child for:

- v. Parents – 10 weeks prior to application
- vi. Step-parents – for 6 months prior to application
- vii. Foster carers – for a year prior to application
- viii. Others – for three years in the preceding 5 years (this situation may fall into ‘Private Fostering’ regulations, see below).
- ix. Where vii) and viii) are concerned earlier applications for adoption can be commenced with leave of the Court. The leave of the Court must be obtained prior to any notice of intention to apply to adopt being formally given to the local authority. The local authority should see a copy of the court order giving leave to apply for an adoption order before the required residence period and this should be retained on the local authority file.

1.3 Section 42(3) - (5) of the ACA sets out the minimum period for which the child must have had their home with the prospective adopter before they may apply to the court (as above). The notice of intention to adopt can only be given once the child has lived with the prospective adopter(s) for the minimum period, or the prospective adopter(s) have obtained the leave of the court (see notice of intention to adopt below). Note, once notice of intention to adopt is given, protection is offered against removal of the child under sections 36-40 of the ACA and legal advice should be sought if this is contemplated (see also notice of intention to adopt below).

1.4 **Foster carers:**

A non-agency adoption usually only occurs when the Local Authority do not agree with the foster carers’ intention to adopt a child (although in some cases the Local Authority may agree but this may be the preferred course of action – seek legal advice in either of these circumstances) and in which case, when the notice of intention to adopt is given, the Local Authority can only remove the child from the placement in very specific circumstances. Legal advice must be sought in such cases.

1.5 Private Fostering Arrangements:

Wider family members and other people who have been caring for a child under private fostering arrangements for at least three years may make an adoption application if they have given the required notice to the local authority. In these circumstances, provided the Children (Private Arrangements for Fostering) Regulations 2005 have been complied with, the child and the local authority, who will have been visiting regularly, will already know family.

If there has been a failure to comply with the private fostering regulations it will be necessary to refer the matter to the private fostering team for them to consider what action should be taken. Failure to notify (with or without subsequently being convicted of an offence under section 70 of the 1989 Act) is something that should be taken into account when considering the suitability of those persons to adopt.

1.6 If the family do come under the private fostering regulations, but are not known to the Local Authority, they should be referred to the private fostering team immediately, and assessment and monitoring processes complied with, even if this is alongside an adoption process.

1.7 Record Keeping:

Upon receipt of contact, a file should be opened for each prospective adopter and the child/ren, and detailed records of all communications kept. The child's file should be the lead file where all communications are documented with the adult files linked under the appropriate relationship. In addition, the social worker should keep a track of all tasks and dates completed in the Social Work Checklist for Non-Agency Adoptions.

2. Notice of Intention to Adopt – Procedure

2.1 The prospective adopters are required to give at least 3 months' notice (and not more than 2 years prior to application) in writing, before they make a formal application for an Adoption Order. (If they have leave of the court to make this application early, leave must be granted prior to giving notice of intention to adopt).

2.2 Sections 36-40 of the ACA (removal of children in non-agency cases) contain detailed provisions restricting the right of a birth parent and others to remove a child from the care of people who have applied, or in some cases have given notice of intention to apply, for an adoption order. These do not prevent the removal of the child under child protection provisions.

2.3 The notice regarding adoption may come from either the prospective adopters or the solicitor acting for the prospective adopters. The notice needs to be in writing. In cases where an adoption is likely to be contested or the whereabouts of the

legal birth parent(s) is unknown, the prospective adopters should be advised to engage a solicitor.

- 2.4 Once notice of intention to adopt has been received by the local authority and the initial contact stage has been completed, the case should then be allocated to a suitably qualified Social Worker to ‘investigate’ and prepare a report.
- 2.5 The Restriction on the Preparation of Adoption Reports Regulations 2005 states that the court report must be written by an:
- Employed social worker with at least 3 years post qualifying experience in child-care social work, including direct experience of adoption work; or
 - Supervised by a social worker who does; or
 - An independent social worker with this experience; or
 - A student social worker supervised by a social worker with this experience.

Please note that s94 of the ACA 2002 makes it an offence if the above is not complied with.

- 2.6 Upon allocation the Social Worker will arrange an initial visit to the prospective adopters. During this visit, the Social Worker will take with them the following;
- blank medical adoption assessment forms (for each prospective adopter and each child) to be completed by GP (and attached to the adoption application form). The costs of the medical assessments for the prospective adopters and child will need to be borne by the prospective adopters and they should be aware of this at the outset. Other than for step-parent adoptions, prospective adopters are required to attach to the adoption application the Medical Assessments of the prospective adopters and the child.²
 - blank/electronic DBS forms to be completed during the visit,
 - In the event that the applicant(s) have spent significant time abroad, the Local Authority should also consider whether foreign police checks/certificates of good behaviour can and should be obtained or are already available.
 - a blank Annex A form to be left with the prospective adopters for information about the areas covered in the assessment,
 - a list of local family solicitors should they wish to approach them, and
 - a blank adoption application form for their ease of reference.
- 2.7 During this visit the Social Worker should gather as much information about the birth parents (and anyone else with PR) as is known to the prospective adopters. This should include any known contact information, personal details and last

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Except where the proposed adopter is the child's parent or partner of the child's parent, they will need to provide a medical report in accordance with Rule 14.12.

known addresses. This will allow the Social Worker to begin attempting to trace and contact any hard to find birth parents.

3. Assessment

3.1 The assessment of the family should help them think about the effects of an adoption order on themselves, the child, and all members of the birth and adopting families. They should be able to describe to the Social Worker the full legal effects of the making of an adoption order and be able to explain why they prefer this order over all other options.

- a. It will be necessary to ascertain whether the prospective adopter has informed the birth parent(s) (or other parent) of their intention. If they have not done so, the social worker will need to explain the contribution from the (other) birth parent(s) that will be needed, and discuss with the prospective adopter(s) whether they wish themselves to inform the birth parent(s) before the social worker makes contact with them.

The Social Worker may need to consider:

- i. Using an interpreter – even where people have a reasonable fluency in English, their understanding of the legal options to enable them to care for a child may be limited, and their understanding of the lifelong impact on a child may be difficult to explore.
- ii. If there is likely to be difficulty in tracing the birth parent(s) attempts to do so need to be commenced as early as possible and the local authority's legal team need to be contacted for advice and assistance. The social worker should explain to the prospective adopter(s) the need to provide as much detail as possible about the birth parents at the point of notification. Using the DWP and other investigative organisations to assist in locating birth parents, such as Children and Families Across Borders, the Red Cross, ICACU etc
- iii. Legal representation – where a family are not entitled to and cannot afford legal representation or advice it is even more crucial that the Local Authority legal team consider the details of the case and the information given to the courts, so that statutory requirements are complied with.

b. In addition, the Social Worker should:

- i. See each prospective adopter and the child (if of the appropriate age) separately at least once, to ascertain wishes and feelings and any issue of coercion.

- ii. See the child within the family and assess how well they are assimilated and relate to each of the prospective adopters.
- iii. See other family members including children in the adoptive family/ birth family to ascertain their wishes and feelings.
- iv. Keep all communications and exchanges logged on the case file
- v. Review the DBS information as soon as it is received. An agency may not consider a prospective adopter suitable to adopt a child if they or any adult member of their household has been convicted of a specified offence committed at 18 or over, or has received a police caution in respect of a specified offence which they admitted at the time the caution was given. In such circumstances the agency must notify the prospective adopter in writing, with reasons, without delay.³
- vi. Meet referees face to face and away from the family home.
- vii. Ensure the family information about how the child came to live with them is clear and backed up with evidence.
- viii. Meet with any birth parents or those with PR for the child who will lose it. Any parent, guardian or special guardian of the child with PR will have to give consent to the adoption or have their consent dispensed with. (The latter will require the court to be satisfied that there is good reason to do this; that either the parent cannot be found, is incapable of giving consent or the welfare of the child requires for their consent to be dispensed with). Note: it is the role of the Parental Reporter (Family Procedure Rules r16.32) within the adoption proceedings and not the Local Authority to record parental consent in England and Wales, unless the Rules of the Court provide otherwise or otherwise directed.
- ix. Ensure any discussions with (other) birth parents or family members clarify these people's full understanding of the effects of adoption on the child.

4. Report

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- i. ³ 3.28. A "specified offence" means:
 - ii. an offence against a child(1);
 - iii. an offence specified in AAR, Part 1 of Schedule 3;
 - iv. an offence contrary to section 170 of the Customs and Excise Management Act 1979. This relates to goods which are prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (prohibitions and restrictions relating to pornography) where the prohibited goods included indecent photographs of children under the age of 16; or
 - v. any other offence involving bodily injury to a child, other than an offence of common assault or battery.
(1) Within the meaning of section 26(1) of the Criminal Justice and Court Services Act 2000. However, it does not include an offence that is contrary to section 9 of the Sexual Offences Act 2003 (sexual activity with a child) where the offender was under the age of 20 and the child was aged 13 or over at the time the offence was committed.

- 4.1. Practice Direction 14C of the Family Procedure Rules sets out the Annex A report, a link to the same is below.

The report is required to cover:

- i. As for agency adoptions, this report is one that must only be prepared by a person who meets the requirements of the ARR. Where Annex A uses the term ‘the adoption agency’ this refers to the local authority in non-agency cases, although there are some pieces of information requested that will not be applicable in non-agency cases.
- ii. Any issues of confidentiality. In many non-agency cases the identity of the prospective adopter will be known to the birth parent. Nevertheless, there will be cases where even though the birth parent is aware of the identity of the prospective adopter there may be good reason for not disclosing information as to the current whereabouts of the child, so care will still be needed in the way the report is set out.
- iii. A full description of all the attempts made to contact the birth parents to ascertain their views in relation to the proposed adoption.
- iv. Views and wishes of the wider family – including wider birth family involvement in the child’s life where their legal status will change, i.e. birth grandparents on the non-adopting parent’s side.
- v. Medicals for prospective adopters and child at the adopters’ expense, using the CoramBAAF medical forms. The agency’s medical advisor’s comments to be quoted in the report. Whilst step-parent and parent adoptions do not require medical assessments, you are required to comment on any medical information that is important and has been raised in the assessment.
- vi. 3 Referees must be nominated, one family member and two non-family members – people who know the couple and family well and have known them over some time. The details of the references should be kept confidential from the adopters and summarised in the report with the full write-up attached as an annexe to the report. All referees should be met by the assessing Social Worker and any written information discussed.
- vii. A summary of the actions of the adoption agency – this should cover all tasks undertaken by the whole of the Local Authority; efforts at seeking consent, enquiries and medicals, support and advice offered to any family members.

viii. A full consideration of all the recommendations, taking into account all possible orders available to the Court.

4.2. This report should be reviewed in good time by the appropriate manager and reviewed by the legal representative involved to ensure all necessary requirements are met. When finalised, the report should be signed off by both the Social Worker and Team Manager.

5. Sharing the report with the family

5.1 The prospective adopters should have a chance to view the assessment, in case any factual information is incorrect, and so they understand the recommendations you are making regarding the suitability of the adopters, the order, and the contact arrangements for the child. This should take place before final sign off, so that any factual changes can be made. The final report is confidential.

6. Non- Agency Adoption Application to the Court

6.1. After 3 months the prospective adopters can apply to the court. The court will then send out to the local authority the issued application, attached Medical Questionnaire and direction to submit the report, usually within 6 – 8 weeks. If this application is not made, the original notice of intention to apply for an adoption order to the Local Authority expires after 2 years

6.2. Contact the legal department with the written notice of intention to apply to adopt and issued application with all attached documents and report for a Legal Advisor to be appointed to support the Social Worker in ensuring all the appropriate legal requirements have been met to undertake the assessment and present this to court. The allocated solicitor should review the process so far, discuss the facts of the case with the allocated Social Worker, to identify any complexities, and advise accordingly to ensure all legal requirements are met.

6.3. The Completed Medical reports should be forwarded to the Medical Adviser for comment in the Annex A report. Should the application be missing the Medical Reports highlight this with legal as this may cause delay to the filing of the Annex A report. Where Medical Reports are missing contact Prospective Adopters as soon as possible to rectify. Note that the medical reports should not be more than three months old at the time of the application.

6.4. If more time is required to prepare the report, the Social Worker should ask the legal representative to submit this request to court as soon as this need is identified.

- 6.5. The Court will not automatically appoint a children's guardian in non – agency adoptions. The Family Procedure Rules 14.3 sets out the circumstances in which a child is automatically a respondent party. Most relevant to non-agency adoptions is where the prospective adopter is a relative of the child. Where a Children's Guardian is appointed the social worker should contact the appointed guardian and exchange contact details. If it appears that a Children's Guardian has not been appointed, where the child is an automatic party, the local authority legal representatives should raise this with the court at the earliest opportunity.
 - 6.6. FPR 14.3 provides that birth parents with parental responsibility, guardian or special guardian, and the local authority where notice of intention to adopt has been given are automatically respondents to the adoption.
 - 6.7. In cases where none of the other parties are represented, the local authority may consider ensuring that a legal representative on their behalf is also in attendance at all court hearings to assist the Judge.
 - 6.8. In cases where the birth parents are to be notified of the application under the Rules or by Court order, it is good practice for the social worker to ensure that the birth parent(s) are informed about court hearings in the matter. Judge's frequently request social workers to undertake such a task in Non-Agency adoptions and to provide evidence to the Court to confirm that this has been done or that all reasonable efforts to do so have been made. This has particular importance in cases where the parent is overseas. Where the applicant(s) have applied for a serial number to preserve anonymity, the information that can be shared with relevant birth parent may be very limited or subject to the court's directions. If there are objections to such notification, the matter should be referred back to the Court for further consideration.
 - 6.9. Once the Adoption Order is granted a copy of the same should be placed on the Child/rens file.
7. **Further sources of information**
Adoption Agencies Regulation 2005
<http://www.legislation.gov.uk/uksi/2005/389/contents/made>
Statutory Guidance on Adoptions July 2013
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270100/adoption_statutory_guidance_2013.pdf
The Adoption and Children Act 2002
<http://www.legislation.gov.uk/ukpga/2002/38/contents>
Details of the Annex A requirements
https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_14c