Neutral Citation Number: [2020] EWHC 1829 (Fam)

Case No: FD19P00365

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2020

Before:

MRS JUSTICE THEIS

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Between:

Z	**Applicant(s)**
- and -	
Y	
(a child, by their Guardian Ms Lynn Magson)	**Respondent**
- and -	
SSHD	**Intervenor**

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Mr Andrew Powell (instructed by **Brethertons**) for the **Applicant(s)**
Mr Christopher Osborne (instructed by **Cafcass Legal**) for the **Respondent**
Ms Claire van Overdijk (instructed by **SSHD**) for the **Intervenor**

Hearing dates: 14th February 2020 and 30th April 2020
Judgment: 20th May 2020

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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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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.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii.
The date and time for hand-down is deemed to be 10.30AM on 20th May 2020.

Mrs Justice Theis DBE:

Introduction

1. This is an application for recognition of an adoption order made in Iran. The application is made by the adoptive parent. The respondent is the child, through their Children's Guardian and the Secretary of State for the Home Department (SSHD) is an intervenor.

2. The application is opposed by the SSHD as she submits the Iranian adoption order does not have the same essential characteristics as an adoption order made in this jurisdiction. The Children's Guardian is neutral.

3. The respondent child has thrived in the placement since being adopted. Before dealing with the detail I would like to echo the part of the submissions on behalf of the Children's Guardian that paid tribute to the enormous progress the child has made in the placement. The evidence demonstrates the great benefits to the child's physical and psychological welfare from the stability of the placement.

4. The court is extremely grateful for the detailed written skeleton arguments, supplemented by focussed and persuasive advocacy from all the advocates.

Legal framework

5. The Adoption and Children Act 2002 (ACA) s 66(1) provides the definition of 'adoption' to include *'an adoption recognised by the law of England and Wales, and effected under the law of any other country'*. The ACA does not prescribe the circumstances in which such adoptions would be recognised but includes, in the absence of any other mechanism, recognition at common law.

6. If recognised here the foreign adoption is treated by s 67 ACA as of equivalent effect to an English adoption order.

7. Iran has not ratified the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions and it is not included in the 'overseas adoption' list in The Adoption (Recognition of Overseas Adoptions) Order 2013/1801. A declaration under s 57 Family Law Act 1986 is not possible, as the child was not domiciled in the UK at the time of the application or habitually resident for one year, as required by s 57 (3).

8. The route to recognition at common law is founded on the criteria set out in *Re Valentine's Settlement* which have recently been considered by the former President, Sir James Munby P, in *Re N (a child) [2016] EWHC 3085 (Fam)* when he referred to those criteria as being '*good law and binding'*.

9. Those criteria can be summarised as follows:

   (1) The adoptive parent(s) must have been domiciled in the foreign country at the time of the foreign adoption.
   (2) The child must have been legally adopted in accordance with the requirements of the foreign law.

(3) The foreign adoption had to have the same essential characteristics as an English adoption, and
(4) There must be no reason in public policy for refusing recognition.

10. Taking each of the criteria in turn. In relation to (1), the relevant legal principles regarding domicile are well established. An individual has a domicile of origin from birth which will remain their domicile unless and until they abandon that and acquire a domicile of choice in another jurisdiction. Scarman J (as he then was) in *Re Fuld [1967] E All ER 318* emphasised that there must be clear evidence that an individual's domicile of choice has been displaced.

11. In *Barlow Clowes International Ltd (In Liquidation) & Ors v Henwood* [2008] EWCA Civ 577**,** the Court summarised a number of the principles of the law on domicile described in *Dicey, Morris and Collins on The Conflict of Laws* as follows at paragraph 8:

"The following principles of law, which are derived from Dicey, Morris and Collins on The Conflict of Laws (2006) are not in issue:

(i) "A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).
(ii) No person can be without a domicile (Dicey, page 126).
(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).
(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).
(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).
(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to 138).
(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to 143).
(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to 151).
(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to 153).
(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."

12. The issue of domicile is a question of fact in each case.

13. As to (2), whether the requirements of foreign law have been met, the court is required to consider whether the adoption order was obtained wholly lawfully in the foreign jurisdiction. Is there proof that the child had been legally adopted in

accordance with the requirements of the foreign law? This is essentially a question of evidence, usually requiring expert evidence in relation to the foreign jurisdiction.

14. Turning to (3) Munby P in *Re N* endorsed the views of Hedley J in *In re T and M (Adoption) [2011] 1 FLR 1487* at paragraph 13:

'The first question is clear enough and has to be determined on the individual facts of each case. The second question relates to the concept of adoption for the word itself can bear many shades of meaning from the idea of complete substitution of adopted family for natural family at one end of the spectrum through to an idea much more closely akin to our concept of Special Guardianship. Clearly the English court should not be recognising (and thus giving effect to) a foreign adoption unless what was conferred by that order is substantially the same as would be conferred by an English order. The third question relates to matters that would be repugnant to our jurisdiction as, for example, if what in reality was involved was the buying and selling of children irrespective of their actual welfare needs.'

15. Further Munby P at [92] confirmed that the correct approach in comparing the two systems "is confined to *concept* and not *process*, *substance* rather than *safeguards*." This point is further elaborated later in the judgment at [129] in the context of the former President's discussion of the role of best interests of the child in the recognition process:

'In my judgment, and with all respect to those who take a different view, there is no justification for importing these two additional criteria- best interests and similarity in process- into the principles laid down by the Court of Appeal in re Valentine's Settlement. I am not suggesting that they are irrelevant, but each, in my judgment, is properly to be considered, and considered only, as an aspect of public policy, not as a separate requirement.'

16. Finally, in relation to (4) and the question of public policy it was made clear in *Re N* that this is limited to the exceptional cases as outlined at paragraph [129].

17. In his submissions Mr Powell outlines what he says are some modification of the criteria, including:

(1) Recognition of the foreign adoption must be in the child's best interests (per Jackson J (as he then was) in *A County Council v M (No 4) (Foreign Adoption: Refusal of Recognition) [2014] 1 FLR 881 para [61]* and MacDonald J in *QS v RS [2016] EWHC 2470 (Fam) para [77])*

(2) The adoption process in the foreign country must have been *'substantially'* the same as would have applied in England at the time (*A County Council v M (ibid) para [61]* and *QS v RS (ibid) para [77])*

18. The SSHD submits any attempts to relax or import additions to any of the *Re Valentine Settlement* criteria were rejected by Munby P in *Re N*, in particular

(1) Any relaxation of the domicile requirement so that it suffices if the adoptive parents were habitually residence in the foreign country at the time of the adoption *(Re N [124]*;

(2) Any requirement that affording recognition is in the best interests of the child *(Re N [127)*;

(3) Any requirement that the adoption process in the other country must be *'substantially the same as would have been applied in England at that time' (Re N [128])*

19. In *Re N* Munby P stressed the position that there should be no importing of additional criteria or relaxation of the criteria approved by the Court of Appeal, stating at paragraphs 129 and 130:

'129. In my judgment, and with all respect to those who take a different view, there is no justification for importing these two additional criteria – best interests and similarity in process – into the principles laid down by the Court of Appeal in Re Valentine's Settlement. I am not suggesting that they are irrelevant, but each, in my judgment, is properly to be considered, and considered only, as an aspect of public policy, not as a separate requirement. This distinction, which may appear somewhat pedantic, is in fact very important. For public policy in this context has a strictly limited function and is, in my judgment, properly confined to particularly egregious cases, as explained, compellingly and correctly, in the passage from Dicey, Morris & Collins, The Conflict of Laws, ed 15, 2012, para 20-133. I have already set it out, but it requires to be repeated (with emphasis added):

"If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to a foreign adoption on the grounds of public policy merely because the requirements for adoption in the foreign law differ from those of the English law. Here again the distinction between recognizing the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself."

130. In my judgment, and with all respect to those of my brethren who have taken a different view,

i) Re Valentine's Settlement remains good law and binding upon judges at first instance unless and until the Court of Appeal decrees otherwise.

ii) Accordingly, recognition at common law of a foreign adoption, whether the question arises in a court or elsewhere, depends upon, and only upon, the four criteria identified in Re Valentine's Settlement and set out in paragraphs 74 and 122 above.

iii) Public policy in this context operates in the limited and narrow manner described in Dicey, Morris & Collins.'

20. Article 8 ECHR provides:

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

21. Article 8(1) sets out the right to private and family life, and Article 8(2) the requirements that any restrictions on this right must meet. In the adoption context, it is acknowledged that both the Article 8 rights of prospective parents and children must be considered.

22. Before Article 8 rights are engaged, there must be some form of family life (*Marckx v Belgium (1979) 2 EHRR 330*). Whether there is "family life" depends on the circumstances of each case and will depend on the "*real existence in practice of close personal ties*" (*Lebbink v the Netherlands [2004] 2 FLR 463*). The Convention does not guarantee the right to adopt (*X v Belgium and the Netherlands 7 DR 75*).

23. The Article 8 issue in relation to recognition of foreign adoptions was first considered within this jurisdiction in *A County Council v M,* where Jackson J was not persuaded that the decision of the ECHR in *Wagner* and *JMWL v Luxembourg* could be read so broadly as effectively to sweep away all procedural rules in favour of a more liberal approach to recognition that would allow each case to be decided on a case-by-case basis. At [69] the court stated as follows:

"It is at least arguable that there is good reason why standards for recognition should not be relaxed where approved procedures have not been followed in the case of an adoption from a country that is neither a signatory to the Hague Convention nor a designated country. The world has indeed changed since 1965, and with it the world of intercountry adoption. The ease of international travel has made adoption from overseas more available, with all its benefits and possible pitfalls. The Hague Convention and the overseas adoption procedure are mechanisms that increase confidence that standards are maintained. The same confidence cannot always be felt in relation to adoptions effected in countries that are not Convention signatories, and the importance for child welfare of following approved procedures in these cases is consequently the greater."

24. The more recent decision of *QS v RS* provides further guidance:

a. the "*actual examination of the situation*" should occur without descending into a case-by-case system (citing *Wagner v Luxembourg* CE: ECHR: 2007:0628JUD007624001) (para 91);

b. after satisfying itself that "*family life*" exists, the state must act in a manner calculated to enable that tie to be developed, and establish legal safeguards that render the child's integration into their family possible;

c. justificatory conduct must take account of the "*social reality of the situation*";

d. best interests are paramount, and any legal status validly created abroad corresponding to family life is unlikely to be disregarded;

e. otherwise, non-recognition could amount to an interference with Article 8.

25. As a result, MacDonald J in *QS v RS* held that "*the strict application of the common law status conditions*" (in that case to domicile and habitual residence) could be an (and in this case was an) "*interference in the Article 8 rights of the parents and child which would be neither necessary or proportionate…where family life exist[s] between the parents and child for the purposes of Article 8 the court could not reasonably refuse to recognise their actual situation.*" Further, recognition of the adoption was "*manifestly in the child's best interests*" and refusal would leave her without a permanent legal relationship with those she considered to be her parents. It would be "*contrary to public policy to apply [adoption rules] in a way which resulted in the breach of the fundamental rights of the parties…*"

26. However, it should be noted that MacDonald J at paragraph [100] was clear that in coming to this conclusion he was not stating that the rule in *Re Valentine's Settlement* is in any way incompatible with Article 8 of the ECHR *per se*, rather, his decision was simply that the *application* of that common law rule in the *very particular circumstances of that case* would breach the Article 8 rights of the parents and the child concerned.

27. Ms van Overdijk submits Article 8 must be approached with care on a case by case basis, and a key consideration will be whether, in refusing recognition of a foreign adoption order, the applicant (s) is denied a remedy in relation to any prospective breach of the applicant's Article 8 rights. This, critically, was the position in *QS v RS* as MacDonald J concluded the difficulties in that case were *'not capable of being remedied by the adoption of T being adopted by each of her parents under the domestic law of adoption'.*

The evidence

28. I have read two statements in support of the application, which set out the relevant background.

29. The jointly instructed expert on Iranian law, Dr Y, confirmed in the report that adoption is recognised by Iranian laws. The relevant provisions provide that the Welfare Organisation is the government body that oversees adoption cases and Article 6 lists the requirements applicant(s) must meet. Article 8 provides the criteria for children to be eligible for adoption. Applicants are required to submit their requests to the Welfare Organisation, where they are examined to see if they meet the requirements. If they do, they are added to the waiting list to receive a child. When a child is identified who is considered suitable the Welfare Organisation prepare a report and send it along with documents in support of the application to a court for issuing a temporary adoption order. The court considers the legal requirements, the report and formal assessment from the Welfare Organisation and issues an order for a trial period of six months. Following the trial period the court considers the Welfare Organisation's assessment plus conditions provided for by Articles 14 (applicants to assign part of their assets/property to the adopted child, amount to be determined by the court for the purpose to protect and support the adopted child financially in case of losing his/her adoptive parents) and 15 (reassurances by the applicants to provide necessary long term commitment to provide for the child).

30. When the final adoption order is issued the court will send the details to the National Organisation for Civil Registration to officially add the name of the child in the adoptive parent's ID documents. The National Organisation for Civil Registration must issue a new birth certificate with the details of the adoptive parent(s) for the child. Following this, the adoptive parent(s) can apply for a passport for their adopted child, although this needs the approval from the Welfare Organisation and the Prosecutor, as does any plan to take the child out of Iran.

31. Having considered the papers in this case Dr Y concludes the *'legal and professional opinion that the applicant subject of this report has adopted the child according to Iranian law…all the legal process for the adoption has been carried out according to relevant Iranian laws and regulations. The applicant requested the adoption from the Welfare Organisation, a child was identified and accepted by the applicant, the Welfare Organisation sent its report and applicant's documents to the court, the court issued the six-month trial adoption order, the trial period was passed successfully, the adoption order was finalised, the birth-certificate was issued, and the passport was obtained for the child.'*

32. Dr Y sets out that *'Adoptive parents have similar rights and responsibilities as the biological parents of the child. Adoptive parents take full responsibility for all the child's upbringing expenses including education, welfare and healthcare. This commitment should continue even after the death of the adoptive parents until there is a new adoptive parent'.* Continuing *'In general, adoptive parents are responsible to supervise the child and to manage the financial affairs of the child unless the court has set other arrangements. However, the adoptive parents are not natural guardians, but rather they are appointed as guardians by the court order. This right can be taken from them by the court order…'* under the circumstances in Article 25.

33. In the report, Dr Y sets out the circumstances under Article 25, when the adoption order can be revoked by the court upon the request of the Prosecutor and the Welfare organisation. They are (1) if any of the conditions in Article 6 (requirements applicants are required to meet to adopt) are breached; (2) if the parents formally request the cancelation of the adoption due to misbehaviour of the child; (3) providing an agreement reached between the adoptive parents and the adopted child when he/she grows up; and (4) if the real parents or the child's paternal grandfather come forward and they prove that they have met all the legal requirement to take the responsibility of the child.

Submissions

34. In their updated written submissions, the parties helpfully summarised the issues between them.

35. There is no issue that (2) and (4) of the criteria are met, namely, all parties accept the expert evidence that the adoption order was validly made in accordance with the law in Iran and there are no public policy issues.

36. In relation to (1) the issue of domicile the SSHD confirms that if the court accepts the oral evidence, they do not take any issue in relation to that issue.

37. The parties' submissions focussed on (3), whether the Iranian adoption had the same essential characteristics as an English adoption.

38. Mr Powell submitted it did. He relied on the Iranian court judgment giving *'permanent custody and adoption'* of the child with emphasis '*on the fact that the duties and responsibilities of the adopter such as protecting, educating, maintenance cost and reputation are the same as the parents of the child…'.*

39. In the report Dr Y observed that:

'The final order of adoption can be revoked by the court upon the request of the Prosecutor and the Welfare organisation under certain circumstances stated in Article 25 as following:

A. If any of the conditions stated in article 6 are breached;

B. If the parents formally request the cancelation for the adoption due to misbehaviour of the child;

C. Providing an agreement reached between the adoptive parents and the adopted child when he/she grows up;

D. If the real parents or the child's paternal grandfather come forward and they prove that they have meet all the legal requirement to take the responsibility of the child

And that

'Adoptive parents have similar rights and responsibilities as the biological parents of the child. Adoptive parents take full responsibility for all the child's upbringing expenses including education, welfare and healthcare. This commitment should continue even after the death of the adoptive parent until there is a new adoptive parent'. Continuing later in the report to state *'in the case of adoption, the adoptive parents are responsible for the upbringing of the child. These rights and responsibilities are reserved for adopted parents unless biological parents win a suit to reclaim their child and the court revokes the adoption order'.*

40. In response to further questions Dr Y said there were *'limited cases'* of an adoption order being revoked, noting that '*the process of adoption is very complicated and time consuming, therefore, it gives enough time for the real parents to decide whether they want to abandon their child'.* Dr Y considered it unlikely in the current case that the biological mother would return, as these types of cases are very uncommon and *'for her to prevail in regaining her biological child, her life circumstances would have likely needed to change greatly. So, my assessment is that revocation of the adoption order is extremely unlikely'.*

41. In a subsequent email, Dr Y acknowledged it was not legally possible to extinguish the legal relationship between the adopted child and a biological father, but that the adoption order *'does extinguish the legal relationship between the adopted child and the biological parents so that the biological parents would have to revoke the order to reclaim their rights'*

42. In the final reply about the issue as to whether the adoption order extinguishes the legal relationship between the child and birth parents, Dr Y observed:

"However, the adoptive parents are not natural guardians, but rather they are appointed as guardians by the court order. This right can be taken from them by the court order under the circumstances which have been described in the report. But this right cannot be taken away from the father. This is the reason that I said legally it is not possible to extinguish the legal relationship between the adopted child and biological father. The mother is not considered as the natural guardian by Iranian law. However, in the case of adoption the issue of guardianship is not the matter to be discussed. After the approval of the adoption the adoptive parents are appointed as guardians by the court order and they are responsible for the upbringing of the child. If the biological parents become known after the adoption and have any claims they should go to the court as I explained before."

43. Mr Powell submits this evidence demonstrates the Iranian adoption bears all the essential characteristics of an English adoption order. It creates a permanent status between the child and the adopter(s) with them being responsible for the child's upbringing; adoptive parent(s) are named on the birth certificate (as in this case) with only limited circumstances when revocation can take place. He submits the circumstances in which the Iranian adoption order can be revoked are not dissimilar to the circumstances in this jurisdiction, where an adoption order is not immune from challenge. He relies on Dr Y stating that the likelihood of a successful application to revoke the Iranian adoption order is not just unlikely but is described by Dr Y as *'extremely unlikely'*. Whilst he accepts it is not possible to extinguish the legal relationship between the child and the birth father the adopter is appointed as a guardian and is responsible for the upbringing of the child. In the report Dr Y notes *'in practice the vast majority of adoptive parents have all the rights and responsibilities of a guardian'*. And that *'While the adoptive parents are not natural guardians, they are appointed as guardians by the court order'*.

44. In relation to Article 8 the court first needs to consider if the rights are established in the particular circumstances of the case, second to look at any action by the State that interferes with those rights and then, third, if there is such an interference whether it can be justified.

45. Mr Powell submits the evidence establishes that Article 8 rights exists from the very positive reports in the court bundle. The evidence demonstrates the child's social reality in their adoptive family and, as a result, Article 8 rights of the adoptive parent(s) and the child are engaged.

46. There is interference with those rights if the declaration is not made, as the Article 8 rights include not only family life but also the right to a private life, which includes the child's identity (See Munby P *Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam)* paragraph 61). Mr Powell submits that interference cannot be justified as there is no other route that would guarantee those rights and many of the features outlined by MacDonald J in paragraph 102 in *QS v RS* apply here, as a result, the court can and should intervene to protect those rights. In particular, Mr Powell relies on the following features:

(1) The adoptive parent has British citizenship, the child does not, so there is currently a mis-match between their respective status which the granting of a declaration will go some way to remedy. Mr Powell accepts if the declaration is made British citizenship does not follow. It would only arise through an application under s 3 British Nationality Act 1981, which is considered by the SSHD.

(2) The child's social reality is important and the need to reflect the child's de-facto reality with the legal reality. If the declaration is not granted the adoptive parent will not be recognised as a legal parent in the jurisdiction where they have citizenship, even though that is the social reality for this family.

(3) Such a course does not offend the criteria in *Re Valentines Settlement* as they were designed to ensure adoption would not be harmful to the adopted child. The harm being that an English court would be recognising an adoption when it is not. That, submits Mr Powell, is not the case here and the process has been properly followed in Iran.

(4) To follow any alternative remedy would be a disruption to family life as it would require habitual residence being established here for a year, as that is one of the gateway conditions for issuing adoption proceedings here (s 49 (3) ACA). This could amount to a further interference with family life as it may require the child to be separated from their adoptive family.

(5) The adoption application in Iran was made in good faith.

47. For those reasons he submits the court needs to consider the common law principles encapsulated in the *Re Valentines Settlement* criteria through an Article 8 lens to provide an outcome that is fair and just in the circumstances of this case. This does not amount to a conclusion that the criteria in *Re Valentine's Settlement* are incompatible with Article 8 per se, it amounts to a decision that the application of that rule in the particular circumstances of this case would breach the Article 8 rights of this family unit. Munby P approved that formulation in *Re N* at paragraph 139.

48. Ms van Overdijk, on behalf of the SSHD, submits there are two distinctive features of the Iranian adoption order which mean it does not have the same characteristics as an English adoption order.

(1) the Iranian adoption order does not sever the child's relationship the child's biological parents, and

(2) the threshold for revoking the order is significantly lower than that under English law.

49. She relies on the fact that the expert has confirmed it is not possible to extinguish the legal relationship between the adopted child and the biological father, which is fundamentally different than the effect of the English adoption order which, according to s 67 (1) ACA, the adopted child '*is to be treated in law as if born as the child of the adopters or adopter'*.

50. In support of her submission that the threshold for revocation is lower she relies on the part of the report that deals with Article 25 of the 'Law on Protection of Children with Guardians or Unfit Guardians' which provides the basis the adoption order can be revoked. Article 25 gives the right to do so if any of the following conditions are met:

(1) If any of the conditions stated in article 6 are breached, which are the list of eligible requirements for a person to apply to adopt. When the list of matters in Article 6 are considered, including such matters as financial means and sound character, the grounds for revoking the order are relatively low.

(2) If there was a formal request from the adoptive parent(s) for the cancellation of the adoption due to misbehaviour of the child; again, that intimates a relatively low threshold for revocation than would be the position in this jurisdiction.

(3) Providing an agreement is reached between the applicants and the child when the child grows up.

(4) If the child's biological parents or biological paternal grandfather come forward and they prove that they have met all the legal requirements to take the responsibility of the child. Dr Y states in these situations *'the court examines the situation before making any decision. However, based on note 1 to Article 8, the court considers the competence and fitness of the biological parents rather than the situation of the child with the adoptive parents. If there is no serious threat to the child's wellbeing to be with the real parents and if they are competent, the court revokes the adoption order.'* She suggests that operates more as a presumption in favour of the biological parents rather than a hurdle, which, in part, reflects the fact that the status of the biological father cannot be severed. The fact that there may be only limited cases does not, she submits, detract from this fundamental difference in approach, as compared to the position in this jurisdiction.

51. Ms van Overdijk summarises the effect of Article 25 is to transfer parental rights and responsibilities to the adoptive parents to the exclusion of the child's biological parents, unless the biological parents or paternal grandfather seek to exercise their legal rights and responsibilities, in which case they have an express right to seek revocation of the adoption providing they can prove they have met all the requirements to care for the child. In addition, if the adoptive parent(s) fails to meet any of the requirements of Article 6 the order can be revoked.

52. Ms van Overdijk contrasts the power under Article 25 with the threshold for revoking an adoption order in English law, which she submits is significantly higher, such that it is generally only allowed where there has been a breach of natural justice. In *Re C (A child) [2013] EWCA 431 Civ* the Court of Appeal at paragraph 44 confirmed *'The law sets a very high bar against any challenge to an adoption order. An adoption once lawfully and properly made can be set aside "only in highly exceptional and very particular circumstances".* And they should stand even though the natural parents may have suffered a *"serious injustice"* although revocation would be justified where there has been a fundamental breach of natural justice or in limited highly exceptional circumstances, such as in *PK v Mr K [2015] EWHC 2316 (Fam)* where Pauffley J revoked an adoption order in circumstances where the child had

been the subject of serious physical assaults by the adoptive parents, who had relinquished responsibility for the child and did not oppose the applications and the child she had been re-united with her biological mother for a period of time.

53. Ms van Overdijk submits this court needs to proceed cautiously in considering the effect of allowing the application and making the declaration sought. If granted, it would permit the child to be treated as if they were a child who had been adopted here. Significantly this would mean that the effect of that would have two important distinguishing features when compared to the effect of the order in Iran:

(1) It would sever the legal ties with the biological parents, which the Iranian adoption order expressly does not in relation to the biological father and paternal grandfather. As a result, it would give the adoptive parent(s) additional rights in this jurisdiction that they would not have by virtue of the order in Iran.

(2) If the biological father or grandfather wish to challenge the order, as they are entitled to under Article 25, they would have to come to the UK but would not be able to do so due to the legal effect of an adoption here.

54. Turning to consider the position regarding Article 8 Ms van Overdijk makes the following submissions:

(1) What Jackson J set out in *ACC v M* at paragraph 69 remains the correct analysis of the legal position:

"In my judgment, the ratio of Re Valentine's Settlement, as expressed by Hedley J, remains binding on this court for these reasons:
(1) Re Valentine's Settlement is a decision of the Court of Appeal of longstanding that has been repeatedly followed at first instance and remains binding authority on a trial court.
(2) The Human Rights Act 1998 aside, arguments based on the legal developments since Re Valentine's Settlement were considered and synthesised by Hedley J in Re R (Recognition of Indian Adoption). It is not necessary to go further than he did in acknowledging those changes.
(3) It is at least arguable that there is good reason why standards for recognition should not be relaxed where approved procedures have not been followed in the case of an adoption from a country that is neither a signatory to the Hague Convention nor a designated country. The world has indeed changed since 1965, and with it the world of intercountry adoption. The ease of international travel has made adoption from overseas more available, with all its benefits and possible pitfalls. The Hague Convention and the overseas adoption procedure are mechanisms that increase confidence that standards are maintained. The same confidence cannot always be felt in relation to adoptions effected in countries that are not Convention signatories, and the importance for child welfare of following approved procedures in these cases is consequently the greater.
(4) If the result of applying the principle contained in Re Valentine's Settlement is that recognition cannot be afforded, the option of making a domestic application to adopt may be available in appropriate cases."

(2) MacDonald J's decision of *QS v RS* can be distinguished on two grounds. First, that the issue in that case was the question of domicile rather than the

characteristics of the adoption order, as here. This requires a different approach as in this case to permit the application via Article 8 would be to afford the status of an adoption at a different standard than that would be applied in the foreign jurisdiction in the way set out at paragraph 59 above. Second, in *QS v RS* there was a heavy emphasis on the best interests of the child, adding in effect at paragraph 77 an additional limb to the common law test. His analysis through the Article 8 prism was to import best interests into the balance. Munby P in *Re N* at paragraph 127 stated that s 1 ACA *'has nothing to do with the question of whether a foreign adoption should be recognised'.*

(3) She does not take issue with the fact that family life is established in this case where there are plans to come and live in this jurisdiction. She submits this is different than the position in *QS v RS* where both the adoptive parents and the child were British citizens and sought recognition in the jurisdiction where they each were citizens.

(4) There is an alternative remedy here, which was not available in *QS v RS.* An application for a domestic adoption could be made by the adoptive parents(s) once habitual residence has been established here for twelve months. Whilst she accepts that may be inconvenient, that is not the test when considering whether there has been an unlawful interference with the Article 8 rights of the adoptive parent(s) and the child. It may be difficult but that does not mean that there is not an alternative route for the Article 8 rights to be met. The evidence sets out that the applicant(s) plans to live in this jurisdiction with the child. This accords with what Munby P stated at paragraph 150 in *Re N.* In her skeleton argument Ms van Overdijk sets out the route for entry clearance, via an application under the relevant Immigration Rules (HC 395) at paragraph 310 (vi)(a), which requires confirmation of the validity of the foreign adoption order, which will include consideration by the SSHD of the relevant Article 8 rights within the context of the immigration framework. It would be wrong in principle, she submits, for Article 8 is the circumstances of this case to be used by this to circumvent the route for the applicant and child to come here via operation of the immigration rules.

55. In his submissions Mr Osborne has outlined the relevant considerations in a helpful table in his written submissions. Whilst acknowledging this case turns on interpretation of the black letter law, he reminds the court of the evidence of the significant progress the child has made in the placement, which is not in issue.

56. He recognises in relation to Article 8 that there is an alternative remedy here, through an adoption application made here once the twelve-month habitual residence criteria is established. He describes that route as *'more onerous'* as there is no statutory provision for leave to be given to make an application before the habitual residence criteria is met. However, in his final analysis he accepted that proceeding via such a route is not impossible and was open to the adoptive parent.

Discussion and decision

57. There is no issue on the evidence that the child has thrived and is settled in their placement. The placement has provided the child with the much-needed security and stability that their welfare clearly required. All the welfare instincts of this court seek

to take whatever steps are necessary to secure the child's legal relationship in their current placement. However, as Mr Osborne observes, this case turns not on welfare, but on the interpretation of the relevant legal principles through which the common law recognises foreign adoptions and consideration of the relevant Article 8 rights.

58. The framework within which that is done is settled and clear, it is through application of the criteria outlined in *Re Valentines* which remain good law, as described by Munby P in *Re N*. They are applied with no additional gloss of best interests or any suggestion that the foreign order should *'substantially'* conform to the English concept of adoption, as set out by Munby P in *Re N* paragraph 129, other than in the context of public policy.

59. Having considered the written and oral evidence I am satisfied that at the time the adoption order was made in Iran, the adoptive parent's domicile of origin remained in Iran.

60. The second criteria, the court must be satisfied is that the child has been legally adopted in accordance with the requirements of the foreign law. The jointly instructed expert, Dr Y, confirms the opinion that the child has been adopted in accordance with the legal requirements in Iran. All the reports that underpin the adoption process are entirely positive and support the placement.

61. The third criteria, does the Iranian adoption order have the same essential characteristics as an English adoption?

62. Mr Powell contends that it does. The effect of the order is that the adoptive parent(s) are responsible for the child as guardians appointed by the court, rather than as natural guardians. Dr Y states *'In practice the rights and duties of natural guardians and adopted parents are the same'*. He recognises that Dr Y has confirmed that it is not legally possible to extinguish the legal relationship between the adopted child and the father but submits that the Iranian adoption order bears all the essential characteristics of an English adoption order. It creates a permanent status between the child and the adopter(s) where there are limited circumstances in which revocation can occur. He submits the process and basis for revocation provided for under Article 25 is not dissimilar to the position in this jurisdiction. It is possible to apply to revoke adoption orders here; they are not immune from challenge although he accepts such applications being permitted are uncommon. He submits the process provided for in Iran requires an application to be made to the court and the requirements set out have to be met. He places emphasis on the passages in Dr Y's report that states that applications under Article 25 are limited and *'extremely unlikely'*. Mr Powell emphasises the facts of this case where the biological parents are unknown, particularly the biological father, make it extremely unlikely any application would be made.

63. Mr Powell seeks to support his position through the Article 8 rights that are engaged in this case. He submits on the evidence they are clearly established and if the court refused to make a declaration those rights are interfered with by the State as by not doing so risks the rights enjoyed by the adoptive parent(s) and the child being able to be developed. He emphasises the fact that a declaration would recognise the social reality for the child. He submits that whilst it is not impossible for an adoption application to be made here, to be eligible to do so would require the adoptive

parent(s)' habitual residence to be established for twelve months which may entail a period of separation from the child, which would breach their right to family life.

64. Ms van Overdijk takes issue with Mr Powell on two key characteristics of the Iranian adoption order that, in her submission, prevent the court from concluding the Iranian adoption order has the same essential characteristics. First, that the order does not extinguish the legal relationship between the adopted child and the biological father as s67 ACA does and, second, that the process under Article 25 to revoke the adoption order provides a much lower threshold than in this jurisdiction.

65. In relation to Mr Powell's arguments under Article 8, Ms van Overdijk submits the court should proceed cautiously for a number of reasons. First, whilst accepting that each case needs to be considered on its own facts, there is no suggestion that the application of the *Re Valentine* criteria per se is not compliant with Article 8. In this particular case to seek to use Article 8 in the way suggested would mean that if the declaration is made and the Iranian adoption recognised here as if it was made here would result in two significant differences: (1) the biological father's legal relationship with the child would be severed, whereas in Iran it would remain, and (2) the biological parents and the paternal grandfather's right to apply to revoke the order in Iran would be viewed very differently in this jurisdiction.

66. Having considered the submissions I have reached the conclusion, for the reasons set out below, that the Iranian adoption order does not have the same essential characteristics as an adoption order made in this jurisdiction and any interference with the Article 8 rights of the adoptive parent and the child is justified.

(1) The effect of an adoption order made in this jurisdiction is to sever the legal relationship between the child and the biological parents as provided for in s 46 (2) and s 67 (1) ACA. S 67 provides that if an adoption order is made the child will be treated as *'if born as the child of the adopters'.* After an adoption order the biological parents have no continuing legal relationship with the child.

(2) This contrasts starkly with the effect of the Iranian adoption order which as Dr Y describes does no extinguish the legal relationship between the adopted child and the biological father, as she describes in her report *'legally it is not possible to extinguish the legal relationship between the adopted child and biological father'.*

(3) In this jurisdiction the court does retain the power to revoke an adoption order but as the cases have set out only in limited circumstances. In *Re C (A Child)* the Court of Appeal stated that once an adoption order is lawfully and properly made it can only be set aside in *'highly exceptional and very particular circumstances*' and such orders should stand even though the natural parents may have suffered a *'serious injustice'* although revocation would be justified where there had been a fundamental breach of natural justice. There are very few reported cases where an order has been revoked other than in circumstances involving a fundamental breach of natural justice or where they are founded on very exceptional circumstances, such as in *PK v Mr K* per Pauffley J.

(4) In Iran the process described by Dr Y under Article 25 sets the threshold at a much lower level. Whilst it is correct, as Mr Powell submits, it requires an application to the court and therefore some scrutiny, the legal framework under

which that is done is very different as it operates with a much lower threshold for revoking the order. For example, if the applicants are in breach of any of the conditions in Article 6 which includes matters such as financial means, physical health and character. Also, if the application is by the biological parents or the paternal grandfather and they can prove they meet the requirements to take responsibility of the child. This framework could not be described as limiting applications to revoke the adoption order as being only in highly exceptional and very particular circumstances, they are more akin to a general welfare reappraisal.

(5) I accept that the parties' Article 8 rights are engaged and a family life is established. It is right that if the court refuses to make the declaration those rights are interfered with, particularly where an adoptive parent(s), as a British citizen, would be unable to come to apply to the SSHD for the child to join them with the benefit of such a declaration having been made. The real question is whether this interference is justified and a key consideration in evaluating that is whether there is no other remedy. In my judgment, unlike in *QS v RS,* there is another remedy. S 49(3) ACA provides one of the gateway requirements for an adoption application in this jurisdiction is twelve months habitual residence, which could readily be established by the adoptive parent(s). An application could be made under the relevant Immigration Rules for the child to come here and the SSHD in considering that application is required to consider Article 8. Whilst of course a matter for the SSHD, but there is powerful evidence to support the Article 8 rights of the adoptive parent(s) and the child being maintained.

(6) I agree with Ms van Overdijk, that the court should proceed very cautiously in the circumstances of this case, where what is being sought via the Article 8 submissions is to invite the court to declare that the Iranian adoption order should be recognised here when by doing so would mean it would have a very different effect than that which was intended in the jurisdiction in which it was made. For example, the effect here would be to sever the legal relationship with the biological father, which expressly can't be done in Iran. Mr Powell's reliance on the facts of this case that the biological parents are not known does not assist with the point of principle when looking at recognition of orders between two jurisdictions. For obvious reasons, the orders need to share the same essential characteristics.

67. The final requirement relates to public policy. Whilst no party took any issue in relation to this, in the light of my conclusion above this is now unnecessary to consider.

68. For the reasons set out above, I refuse to make the declaration sought.