

## Public Law Children

December 2024

**For a useful summary of the operation of the domestic laws of England and Wales in the context of the international legal scheme, see p36 of the judgment.**

**X was a two-year-old Moroccan national who was abandoned shortly after birth. The applicant brought X to the UK from an orphanage in Morocco and applied to adopt him. A case that raises issues about the interpretation and application of the domestic laws of England and Wales and its operation in the context of international law. More specifically, the issues in the case can be defined as follows:**

- i. Was X brought to the UK for the purposes of adoption?**
- ii. If so, can the court make an adoption order in the face of noncompliance with important requirements of the domestic law? And, if so,**
- iii. What are the permissible routes of doing so?**

**[Re X \(Intercountry Adoption: Kafala: Noncompliance s.83 ACA 2002\) \[2024\] EWHC 3198 \(Fam\)](#)**

### Facts

The applicant was a UK national who, after her divorce, decided to adopt a child from Morocco where she had previously spent time. In 2017 she contacted the Intercountry Adoption Centre (IAC), following assessment she was approved as a prospective adopter and was granted a certificate of eligibility in 2019. In 2020, the family court in Morocco granted the applicant a *Kafala* for her first adopted child, Y, who she brought to the UK and subsequently adopted in April 2021.

In summer 2021, the applicant sought to adopt a second child from Morocco and was approved by the IAC in February 2022. X was born in 2022, sent to the same orphanage as Y and declared an abandoned child by the Moroccan court on 15 November 2022. In early November 2022, the applicant confirmed her wish to adopt X and the matching process was completed by the IAC in December 2022. On 28 February 2023, the Moroccan courts granted the applicant a *kafala* in respect of X and after immigration procedures were complete, X arrived in the UK on 6 May 2023.

The applicant applied to the courts of England and Wales to adopt X on 28 September 2023. Issues in the case required allocation to the High Court and the IAC, Secretary of State for the Home Department and the Department of Education were served notice of the proceedings following which the Secretary of Education intervened.

HHJ Moradifar examined the Kafala process under Moroccan domestic law, the laws of England and Wales and the international scheme.

### Moroccan Kafala process [p7-9]

The Moroccan Kafala is rooted in Islamic doctrine and regulates the legal relationship and responsibilities of the person appointed as the guardian, the kafil, and the child who is subject to the Kafala. Moroccan domestic laws make a clear distinction in the treatment, legal rights and obligations towards children that are born within the family and those that are not. The former have clear legally delineated rights that arise from their filiation. The second category of children do not have any recognised filiation which impacts rights such as inheritance. Importantly, the Moroccan Family Code specifically provides that adoption has no legal effect in Morocco.

Moroccan Kafala may only come about through two distinct processes. The first and most common, a grant of Kafala by the family court (a judicial Kafala), and the second; a notarial Kafala. A judicial Kafala is a contractual arrangement endorsed by the court following the completion of set procedures, including efforts to find the child's biological parents which when exhausted lead to the next stage; a declaration that the child is abandoned. The prospective kafil is then subject to assessment, following which the court makes a welfare decision on whether to grant a Kafala. Once granted a Kafala, the kafil cannot rescind from their obligations, but a court can terminate a Kafala in certain circumstances, including at the biological mother's request.

### Domestic laws of England and Wales [p10-15]

HHJ Moradifar identified the relevant, well-known, and not repeated, regulatory framework in English law, namely;

- S.49 of the Adoption and Children Act 2002 (applications for adoption)
- S.83 of the Adoption and Children Act 2002 (restrictions on children being brought to England and Wales for the purposes of adoption)
- S.66 of the Adoption and Children Act 2002 (the definition of adoption) and the amended definition as set out in S.38 of the Adoption Act 1976
- The requirements for assessment and procedure for applications for adoption as set out in the Adoption Agencies Regulations 2005, including the provisions at Part 14 of the FPR

Importantly in the instant case, S.83 ACA 2002 had been complied with. Finally, HHJ Moradifar made reference to the overarching welfare consideration of S.1(2) ACA 2002 and the factors of S.1(4) ACA 2002.

## International framework [p16-17]

Per S.83(2) ACA 2002, the requirements are expressly disapplied to 'convention adoptions'. The convention referred to is the Hague Convention on Protection of Children and Co-operation of Intercountry Adoption (1993) (the '1993 Convention'), to which the UK is a party, but Morocco is not. The UK adopted the 1993 Convention procedures by the Adoption (Intercountry Aspects) Act (1999) and the associated Regulations, the Adoptions with a Foreign Element Regulations (2005) ('AFER 2005'). The requirements for an 'overseas adoption' or a 'non-convention adoption' are set out in F. Save for the specific provisions of AFER 2005 relating to a non-convention adoption, the general procedure under ACA 2002 for the preliminary steps to adoption (s. 42-45) and the making of the adoption orders (s. 46-51) are the same.

Both Morocco and the UK are parties to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (the '1996 Hague Convention'). Pursuant to Art. 23 of the 1996 Hague Convention the Kafala order of the Moroccan courts is recognised in the United Kingdom.

## **Judgment**

There was no dispute between the parties that X should remain living with the applicant and she should, if permissible, be allowed to adopt him. The issue for HHJ Moradifar was the lawful route through which this could be achieved. Three identified routes were identified:

1. The court's powers to make an adoption order are not hindered by any non-compliance with the domestic statutory and regulatory framework. Any breach of the terms of S.83 ACA 2002 do not fetter the court's powers to make an adoption order under S.46 ACA 2002
2. The court by adopting a purposive interpretation of the legislation can find that the regulatory requirements have been complied with in substance and can make an adoption order, and
3. The court is obliged to adopt an interpretive approach under S.3 of the Human Rights Act 1998 and to 'read down' S.83 ACA 2002 and to disapply the requirements of regulation 4 of AFER 2005.

## Application of S.83 ACA 2002 and AFER 2005 [p20-26]

The requirement for strict, necessary and proportionate safeguards and compliance with requirements, when making any application for adoption cannot be underestimated. This is

particularly challenging when applications for adoption are made for children from other jurisdictions. S.83 ACA 2002 places important controls and restrictions on children being brought to the jurisdiction of England and Wales for the purposes of adoptions that do not fall within the 1993 Convention, such as the present case. A helpful analysis of the law was provided in *Re A & B (Adoption: s.83 ACA 2002)* [2024] EWHC 2837 (Fam), in which Cobb J observed that in exceptional cases, the court retains a power to make an adoption order despite noncompliance with AFER 2005 as to do otherwise would deny the child and the applicant's Article 8 ECHR rights, therefore; there are exceptional cases where the court is required to disapply AFER 2005.

The applicant, and the guardian (in the main) argued that her case fell squarely within Cobb J's analysis in *Re A & B* and invited the court to find that the purpose of bringing X to the UK was to meet her ongoing obligations under the Kafala, thus falling outside the statutory regime and S.83 ACA 2002 is not engaged. The Secretary of State argued that the observations of Cobb J were obiter and that following ordinary principles of statutory construction, the domestic statutory regime allows for an adoption order to be made despite non-compliance.

HHJ Moradifar held that the evidence overwhelmingly showed that the applicant had an '*ardent desire to offer both children a lifelong permanent family through adoption* [p25], she had been positively assessed and that the only purpose of bringing X to the UK, was to adopt him. Whilst the Moroccan Kafala creates rights and obligations that the applicant must observe, the Kafala was granted as part of a larger plan to adopt X in the UK. To state otherwise would be to '*create an unsustainable and impermissible legal fiction designed to avoid the legislative controls and restrictions that Parliament has put in place*' [p26]. In short, S.83 ACA 2002 and AFER 2005 are engaged and the applicant, unwittingly, breached the terms of the provisions.

#### Consequences of non-compliance [p27-32]

The ACA 2002 creates a criminal offence for non-compliance, punishable by a term of imprisonment not exceeding six months and/or a fine. Whilst the family court cannot interfere with the decision of the prosecuting authorities, the consequences of any decision to prosecute may be relevant to the welfare decision of the family court.

On whether the court is permitted to grant an adoption order in the face of non-compliance, HHJ Moradifar identified that the route to answer first lies in the statutory construction and interpretation of ACA 2002 and AFER 2005, both are carefully and precisely drafted, creating different consequences for non-compliance. However, the consequences of non-compliance do not lead to the court being prohibited from making an adoption order.

Three authorities were relied upon to support this argument, and accepted by HHJ Moradifar. First, *Re C (A Minor) (Adoption Illegality)* [1999] 2 WLR 202, in which Johnson J speculated that breaches of prohibitions in the Adoption Act 1976 could not lead the court to making a decision contrary to the child's welfare. Second, *Re X* [2008] EWHC 1324 Fam, in which Munby J (as he was) observed the relevance of public policy to welfare which included dishonesty and subterfuge, but where welfare

points to a different outcome, that outcome will prevail. Finally, *Re Z (A child: Egyptian fostering: UK adoption) (Rev 1)* [2016] EWHC 2963 (Fam), in which Russell J found that the AFER 2005 do not bar the court from making an adoption order. All of the above is consistent with the leading cases on statutory interpretation, namely: *R v Soneji* [2005] UKHL 49 and *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46 in which the court stated that the court must ask if Parliament intended that the act leading to non-compliance with prescribed provisions should be invalid.

It was held that any breach or non-compliance can only be purposeful and intentional given the precise nature of the drafting of S.83 ACA 2002 and AFER 2005 which recognises the significance and importance of compliance to safeguard and promote the welfare of children brought to the jurisdiction for the purposes of adoption. This is balanced by not fettering the court's powers to make orders that promote and safeguard welfare. To do otherwise would lead to outcomes entirely irreconcilable with a child's lifelong welfare and protection of their rights, threads that run as the court's paramount consideration throughout the legislative framework. It is this core function of the legislative framework that allowed HHJ Moradifar to conclude that there was no requirement to disapply secondary legislation or 'read down' the legislative framework.

Finally, HHJ Moradifar recognised the purpose and function of safeguards, identifying them as crucial to protecting children from maltreatment or being inappropriately brought to this jurisdiction and that nothing in the judgment should be regarded as a dilution of those restrictions and safeguards. Whilst non-compliance is not a bar to the court making an adoption order, in such circumstances an order may only be made in the most exceptional circumstances where the child's welfare demands it be made.

The final welfare decision is at p33-35 and HHJ Moradifar concluded that X's welfare demanded that the court make an order for adoption in favour of the applicant.



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