RE AN ADOPTION APPLICATION

Family Division

Hollings J

24 October 1991

Adoption – Adoption of foreign child – Applicants employing lawyer in El Salvador to arrange for adoption of baby – Child brought to England and applicant issuing adoption proceedings – Authorities in El Salvador and in England not informed of criminal proceedings pending against applicant – Whether adoption order in breach of Adoption Act 1976 – Whether adoption order in child's interests – Whether considerations of child's welfare outweighing implications of public policy

The applicants had a son born in 1981. The wife was unable to conceive another child and, knowing that they were over the age at which they would be considered eligible to adopt through English agencies, the applicants commissioned a home study report for which they paid £200, with a view to adopting a foreign child. At that time the husband, who was a solicitor, was the subject of investigation into criminal activities, for which he was charged in August 1988. The applicants were put in touch with lawyers in El Salvador and, in due course, were notified by them of the birth of a baby girl in April 1989 who was available for adoption. Adoption papers were prepared by the lawyers and a notarial document obtained, signifying the mother's consent to adoption. On receipt of them, the husband flew to El Salvador and returned with the baby. The wife met them at Heathrow. The applicants then notified the City Council Social Services of their wish to adopt the baby. Adoption proceedings were issued in August 1989 and a guardian ad litem was appointed. On 21 September 1989 the formal adoption order was made by the El Salvador court, followed by a formal notarial confirmation of the mother's consent. Neither the City Council Social Services nor the El Salvador court were informed by the applicants of the pending criminal proceedings. In February 1990 the husband was convicted on fourteen counts of obtaining property by deception and sentenced to 4 years' imprisonment. He was released on parole in August 1991. The guardian ad litem in her report and at the hearing of the adoption application, whilst accepting that the baby was bonded to her adoptive mother and to the son, opposed the adoption order on the grounds: (a) that because of the background and behaviour of the applicants, it would not be in the child's interests; (b) that breaches of the Adoption Act 1976 precluded the making of the order; and (c) that an order should not be made for reasons of public policy. She recommended the placing of the child with a family of more appropriate ethnic background. The council, while criticising the lack of honesty on the part of the applicants, recommended adoption on the ground that it was in the child's best interests to leave her where she was. At the hearing, the judge dispensed with the mother's agreement, about which some doubt had emerged, because she could not be found.

Held –

(1) Insofar as the criticisms of the applicants, ie their dishonesty with regard to the criminal charges and their apparent failure to appreciate the child's cultural needs, related to welfare, which was the first consideration, they did not justify removal of the child from the applicants nor militate against the making of an order, since the welfare of the child clearly dictated that she should not be subjected to the disruption of being removed from the mother, to whom she was bonded, and from the only home she had known. The fact that the background and behaviour of the applicants might mean that they would not have been approved as prospective adopters if applying to adopt a British child, and therefore

should not be approved with regard to a child from overseas, although clearly relevant before a child was placed, became of less weight after placement when the de facto situation had to be considered in relation to a child's welfare.

(2) As regards the provisions of the Adoption Act 1976, notwithstanding that the placement of the child with the adoptive mother at Heathrow constituted an 'arrangement for the adoption of a child' made by 'a person other than an adoption agency' in contravention of s 11(1), it was open to the High Court to give dispensation, pursuant to s 11(1)(b), so as to enable an adoption order to be made. Similarly, authorisation could be granted retrospectively by the High Court with regard to payment or reward to any person for the making by that person of arrangements for adoption in contravention of s 57. Taking into account all the circumstances, including the unsatisfactory aspects of the adoption in EI Salvador and the behaviour of the adopters as well as the breaches of the Act, considerations of the child's welfare outweighed any considerations of public policy, so that the court should give dispensation in respect of the breaches and make the adoption order.

Per curiam: where a local authority is notified by prospective adopters that they have brought into the country a foreign child whom they hope to adopt, the authority should at once seek information from the relevant embassy or consulate as to the validity of any foreign adoption order obtained by, or on behalf of, the proposed adopters. Any delay tends to affect the quality of the ultimate decision.

Statutory provisions considered
Adoption Act 1976, ss 11(1), (3)(c), 24(2), 57 and 72(3)

Cases referred to in judgment
A (Adoption: Placement), Re [1988] 2 FLR 133, [1988] 1 WLR 229
Adoption Application (Payment for Adoption), Re [1987] Fam 81, [1987] 2 FLR 291, [1987] 3 WLR 31, [1987] 2 All ER 826
D (An Infant) (Adoption: Parent's Consent), Re [1977] AC 602, [1977] 2 WLR 79, [1977] 1 All ER 145, HL
H (Adoption: Non Patrial), Re [1982] Fam 121, (1983) 4 FLR 85, [1982] 3 WLR 501, [1982] 3 All ER 84
R (Adoption), Re [1967] 1 WLR 34, [1966] 3 All ER 613
S (Arrangements for Adoption), Re [1985] FLR 579, CA
W (A Minor) (Adoption: Non Patrial), Re [1986] Fam 54, [1986] 1 FLR 179, [1985] 3 WLR 945, [1985] 3 All ER 449, CA

Judith Parker QC for the applicants
Barbara Slomnicka for the local authority
Allan Levy QC and *Angelica Mitchell* for the guardian ad litem

Cur adv vult

HOLLINGS J:

These proceedings are still in chambers, but I have given permission for law reporters to be present so that my judgment can be reported. That is on the strict understanding, and pursuant to my direction, that complete anonymity should be preserved so far as the identity of the applicants is concerned; that means that there should be no reference to their name and no identification, for instance, by reference to the Crown Court to which I shall be referring in the course of this judgment or any other way of identifying the applicants. Subject to that direction, I give permission for this report to be published.

The applicants in these adoption proceedings are now 48 and 43. They

met and cohabited in England in 1977, the husband having settled in England in 1975. Their son was born on 28 December 1981 and he is now aged 9½. The applicants married on 19 March 1985. The husband was married before and has a daughter by his first wife. He and his first wife separated in 1976 and a divorce followed. He remains in contact with his daughter.

The husband practised as a solicitor in New Zealand and requalified in England, joining a firm of solicitors in London. In 1985, in his capacity as a solicitor, he was party to a series of mortgage frauds. Criminal investigations followed. In July 1986 the police raided his office and removed files and he was eventually charged in August 1988.

Meanwhile, the applicants had been consulting a specialist because the wife was failing to conceive another child, and she indeed attended a fertility clinic. She did conceive later but miscarried, the last time being in April 1988. They very much wanted another child and it became clear that she would not now be able to conceive. They joined the National Association for the Childless. They knew that, at their ages, they would not be considered eligible to adopt through English agencies and, indeed, had been told by Westminster Social Services, whom they had contacted, that they would only be considered for adoption of a handicapped child, which they did not wish to consider. So they looked for the possibility of adopting a foreign child. To this end they commissioned a home study report from Miss Janice Ray, dated 25 July 1988, for which they paid her the sum of £200.

The applicants have varied in what they have said from time to time about when the wife was told or knew of her husband's criminal activities. At all events he, and later, when she knew, she seemed to have hoped that nothing would come of the police investigation and after, when the husband was charged, they even hoped that he might be acquitted. Notwithstanding this situation, having contacted a lawyer in Ecuador, armed with the report of Miss Ray they both travelled there in November 1988. They decided, however, that adoption would take too long in Ecuador. The Ecuadoran lawyer whom they engaged has since, it appears, been imprisoned on charges relating to abduction of children and illegal adoptions.

The applicants were then put in touch with a firm of lawyers in El Salvador, who also specialised in foreign adoptions. They were Robert del Cid Aguirre and Carmen Aguirre Granados. I shall refer to the first named as 'del Cid'. This was in January 1989. Del Cid was given the husband's power of attorney. On 24 April 1989 the applicants were notified of the birth and availability for adoption of a baby girl born on 21 April 1989.

Adoption papers were prepared by del Cid; a notarial document was obtained, signifying the consent of the mother for her daughter to be adopted 'under the laws and authority of Great Britain', according to the translation of the El Salvadoran document, which is in the bundle of documents, and declaring that the father, to whom she was not married, was of unknown domicile.

The applicants obtained a psychological report upon themselves for the purpose of the adoption in El Salvador and, on 21 May 1989, the husband, without his wife, flew to El Salvador. The following day he flew back with the baby, who has ever since been known as G, to England. The natural

mother had brought G to the airport and there handed her to the husband, together with G's passport.

The wife was waiting at Heathrow and met her husband with G at the English side of immigration.

No entry clearance certificate ('ECC') had previously been obtained from the immigration authorities in respect of G, but, on arrival at Heathrow, G was given limited leave to enter and to stay for a certain period. This period has been extended, from time to time, so that G has been allowed by the immigration authorities to stay in England pending the result of these proceedings and, indeed G has been in the care of the wife and, latterly, the husband S as well, ever since.

Because the ECC had not been applied for in advance of arrival, there was no opportunity for the Entry Clearance Officer at the British Embassy in El Salvador to make inquiries and report as envisaged in the Home Office circular of March 1979 (*Clarke, Hall & Morrison on Children* (10th edn), para E.5557), nor for the application to be considered by the DSS as also envisaged in that circular.

The applicants immediately verbally contacted Westminster City Council social services, whom I shall call Westminster, and notified them of their wish to adopt G. Formal notice to this effect was given on 7 August 1989. The applicants did not, at this stage, inform the local authority of the pending criminal proceedings or charges, although the first interview with the social worker who prepared the Schedule 2 report, Miss Clancy, took place on 3 August 1989. Indeed, nothing was known by Westminster of the pending charges until they were revealed by the police check which they caused to be made in September 1989, which also revealed that the criminal trial was pending in February 1990.

The adoption proceedings were issued on 9 August 1989 in the Westminster County Court and have since been transferred to the High Court. In September 1989, Mrs Simpson was appointed guardian ad litem. In the meantime, proceedings were continuing in El Salvador and, on 21 September 1989, the formal adoption order was made by the El Salvador court, followed by a formal notarial confirmation of the order and of the mother's consent, dated 6 October 1989. At no time did the applicants inform the El Salvador court of the criminal charges or the pending criminal proceedings. The husband told me in evidence that he had told del Cid of the charges and asked him whether the El Salvador court should be told, and that he, del Cid, replied that since documentation was by then complete there was no need; not a very satisfactory explanation. In his affidavit, the husband claimed that del Cid told him he was not obliged to disclose this information to El Salvador.

With regard to not telling Westminster, he said he and his wife were certain the information would come to light in any event through the police checks. Finally, so far as El Salvador is concerned, G's adoption was recorded in the Civil Register on 19 October 1989.

At his trial at the Crown Court, after a plea of not guilty, the husband was convicted of fourteen counts of obtaining property by deception and fourteen counts of procuring the execution of a valuable security by deception and was sentenced to 4 years' imprisonment concurrent. I should interpose to add that, after the police raid in July 1986 when the

files were removed, the husband was requested to leave the firm in which he was a partner. He did so, set up practice on his own account and acquired an interest in a nursing home. He was, of course, struck off the roll of solicitors, but he and his wife have been able to carry on the nursing home business, which is very profitable. The mitigation on his behalf at the Crown Court presented a some what different picture of his financial future.

The adoption proceedings were eventually transferred, as I have said, to the High Court and Mrs Simpson was confirmed as guardian ad litem. The Home Office were duly informed of the application to adopt a foreign child. The Home Office have intimated that they do not wish to take part in these proceedings and they have not done so, so that, if an adoption order is made, G will obtain British nationality and the right of abode.

Miss Clancy provided the original Schedule 2 report for Westminster on 11 April 1990. She concluded, in effect, that notwithstanding her considerable reservations, particularly with regard to the husband, G should not be removed from the applicants, but she also recommended that a final decision should be postponed for a year, in her words, 'to enable all concerned to be surer'. In the meantime, the applicants were considering what to tell their son, T. T had not been told anything about the police inquiries or the criminal charges, let alone of the pending trial. The husband has been serving his sentence, after a brief sojourn in a closed prison, in an open prison from which he was allowed out on parole. The applicants had at first thought of telling T that his father was going to be abroad for a while.

During the summer of 1990, the husband discussed this with Dr Heller, the consultant psychiatrist whose advice the applicants have sought in this matter and who has given evidence before me. Dr Heller advised that T, who was moving to a new school as a boarder, should be told when he came home. In the end, he was told earlier and, apparently, accepted it well in the circumstances.

Mrs Simpson, the guardian ad litem, filed her report on 20 November 1990. Mrs Simpson is highly qualified in the field of psychology and social work. She made extensive inquiries. Her report revealed that, in the opinion of the Counsul General for El Salvador, the adoption of G was a breach of El Salvadoran law: (a) because G had left the country before the adoption was agreed by the court; and (b) because the adoption would not have been allowed if the judge had been aware of the husband's criminal activities, though the Consul General added that he believed, at that stage, that it would be against the interests of G to have been sent back to El Salvador, and advised placement with another British couple.

Mrs Simpson concluded that G was settled in the only home she has known and that, on the basis of her personal observation, was appropriately attached to the wife and T, and that T, and G enjoyed each other's company. Nevertheless, she said, she had to advise the court that she did not believe the applicants would be approved by an adoption agency in this country, nor did she consider, for the reasons set out in her report, that the placement was in the best interests of G. She advocated a move to a more suitable alternative family which, she hoped, would be of a more appropriate ethnic type and which she had no reason to believe could not be found. So she did not support adoption by the applicants. She has,

through her counsel Mr Levy and by her evidence, reiterated this view in the hearing before me.

In subsequent addenda to the Schedule 2 report, the latest being dated 6 October 1991, Westminster have firmly recommended adoption by the applicants. They have been represented throughout by Miss Slomnicka, who has maintained this submission, Westminster being satisfied that G is receiving loving care from the wife and that, in spite of the justified criticisms of the applicants, adoption by them was in G's best interests.

The husband was released from open prison on 30 August 1991, following the death of his mother in New Zealand. His parole licence runs until 8 December 1992.

When the application first came before me in July 1991, adoption by the applicants was, as I said, supported by Westminster but opposed by the guardian ad litem. After a part hearing, I adjourned so that service of notice of the proceedings could be attempted on the natural mother who, if found, was to be told of the husband's criminal convictions, so as to give her the opportunity of reconsidering whether she still consented. Previous attempts to serve her, in accordance with the order of the district judge, had failed.

When the hearing was resumed in October 1991, I was informed of the further unsuccessful attempts which had been made to find the natural mother. There was a suggestion, indeed, that the true mother was someone else with a similar but different name who lived in a part of the country distant from the capital. The mother named in the El Salvador proceedings could not be found at the address given in the adoption papers, if she existed. The second person, who still may not have been the mother, had not been served, and I considered it, on the evidence, highly unlikely that she could be served; the only available method which could be attempted was by the British Consul who was also the acting ambassador, himself driving several hours at high cost when he could spare the time. In those circumstances, I dispensed with service on the natural mother.

Further information obtained after the conclusion of the hearing, of which I was told later, at a brief resumption of the hearing, has given me no reason to change this decision.

In the meantime, further inquiries had been made as to the validity of the El Salvador adoption order. I have a copy of the relevant El Salvador law. Decree No 1973, headed 'Adoption Law', sets out the requirements of a valid adoption. Amongst others, under art 3(b), the applicant must be of good conduct and have sufficient economic resources. Article 12 provides that an adoption which does not meet the requirements of, inter alia, art 3 is null and, it continues, likewise null is any adoption which is suffering from error, constraint or fraud. The same article, however, further provides that an action of nullity is vested in any person who has an apparent interest therein but it may be exercised only within a period of 4 years. No such action has yet been taken, so it seems, accordingly, that the El Salvador adoption remains valid, notwithstanding that, if the court had been told of the husband's criminal conduct or of the allegations of such conduct, the order would no doubt not have been made, that is, it would either have been refused or the application would have been adjourned.

It was also believed that, by leaving the country before the making of the adoption order, although with the mother's consent, there had been a breach of El Salvadoran law; that, indeed was the opinion of the British Vice Consul, which was sent to the solicitor for the guardian ad litem on 5 July 1991, as it had been, too, of the Consul General of El Salvador; see her letter of 4 May 1990 addressed to the county court.

However, an opinion has now been received from Ana Gladys Charez de Melendez, a lawyer and notary of El Salvador who has held many responsible legal and judicial positions in that republic. I am satisfied that her opinion is authoritative. She states that, while it is not an accepted practice for a child to be taken out of the country before completion of adoption proceedings, yet there is no law which explicitly prohibits this. So that, in her opinion, in this case that would in no way hinder the final judgment of her adoption. She also confirmed the effect of the non-disclosure by the husband of the pending charges, that is that set out in the adoption law above quoted. There is no reason, then, to suppose that the El Salvador adoption is not prima facie valid.

An adoption application is, of course, principally governed by s 6 of the Adoption Act 1976, which provides:

> 'In reaching any decision relating to the adoption of a child a court . . . shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood.'

If the necessary parental agreement, which of course is essential, is not forthcoming, consideration has to be given to whether such agreement can be dispensed with under the provisions of s 16, which provides that if there is no agreement it can be dispensed with on certain grounds, which include that the parent concerned cannot be found or is withholding her agreement unreasonably. Although, strictly, I should deal with the question of agreement later, I think it is more convenient in this case to deal with it now.

Miss Parker submits, first, however, that the mother did indeed agree for, as she correctly submits, no particular form of agreement is requisite, though, of course, it would be desirable. One cannot be sure, however, whether the mother would have agreed, as she apparently did, if she had known that the husband had criminal charges pending against him, and there is no doubt that she should have been so informed. It is true that agreement can properly be given, even though the identity of the proposed adopter is not known, but then, no doubt, the parent concerned might properly expect to rely on the reporting authority and/or the guardian ad litem or their equivalent in ensuring that any applicant was at least of respectable and responsible character.

I accordingly consider that the mother's agreement in this case ought not to be relied upon. I am, however, satisfied, on all the evidence which has been obtained and placed before me, that G's mother cannot be found as, indeed, I decided when I dispensed with service. In respect of this, I have referred to the judgment of Buckley J, as he then was, in the case of *Re R (Adoption)* [1967] 1 WLR 34 at p 38.

In opposing the making of an order and seeking, instead, an order providing for G's placement elsewhere, Mr Levy, on behalf of the guardian ad litem, submits:

(a) that it would not be for G's welfare or in her best interests to be adopted by the applicants;
(b) that breaches of the Adoption Act preclude the making of an order;
(c) that an order should not be made for reasons of public policy.

As to welfare or best interests of G, he relies upon the report and evidence of Mrs Simpson.

Mrs Simpson has also engaged the service of Dr Dare, another child psychiatrist, well known, like Dr Heller, to the courts. Dr Dare, however, in his report and in his evidence before me, has concluded, though reluctantly, he says, that it is now too late to move G because she is firmly bonded to the wife, who is, to all intents and purposes, her true mother, her psychological mother, and is now one of the family, together with T. And I can do no better than read from the conclusion of his report, which sums up his view. He says:

> 'As far as [the applicants] are concerned, I find myself in absolute agreement with the guardian ad litem that they would and should not be approved as prospective adoptive parents. I have described the various deficits in their background and attitude. Mainly, this is an inability to perceive their children's needs and put such first. There is also concern about their impaired ability to share and communicate. Despite these concerns, however, all the indications are that they have so far adequately parented T for 9½ years and G for 2 years 2 months.
> I have considerable doubts that they will be very effective at safeguarding and incorporating G's culture and ethnicity in her ongoing upbringing if they remain her caretakers. G is psychologically securely placed in this family. To remove her at this age would cause her considerable emotional distress and trauma. I have little doubt that she would eventually get over such trauma if she could be placed quickly and securely in an ideal adoptive family. However, it would undoubtedly be exposing G to a considerable degree of risk by destroying all the trust and loving relationships that she has developed with the [applicant's] family. The guardian ad litem highlights two fundamental questions. Would the [applicants] be approved as adopters if they were adopting a British child? Are they prospective adoptive parents able to meet the child's cultural and racial needs? I would add another question: with this child absolutely securely and firmly placed in this family, are there sufficient concerns and certainty for the inadequacy of the parents' ability to meet her needs, such that she needs to be removed? Is there sufficient ground to believe that her developing is likely to be impaired, such that removal and placement in a substitute family with greater awareness of her racial and cultural needs is in her best interests?'

And his overall conclusion was:

> 'Somewhat reluctantly, I am forced to the conclusion that the least detrimental option is that G should be left in the family with which she

> has formed such close, meaningful and appropriate psychological relationships.'

In saying that his decision is reluctant, he means that he is very concerned about aspects of the characters of the applicants, particularly the husband, to which Mrs Simpson also refers. Besides the husband being convicted of fraud, there is evidence that each applicant, in particular the husband, in several respects has failed to be entirely honest. I refer to para 8.5 of the guardian ad litem's report.

For instance, at one stage he said he had told the El Salvador authorities of the criminal charges and later he said, as I said earlier, that he had told del Cid. In any event, the fact is he did not tell the adoption court of these charges, and he was putting himself forward, by implication, as an honest lawyer. Secondly, he did not tell Westminster of the charges. Thirdly, he caused a misleading plea in mitigation to be made in the Crown Court as to the serious effect upon his ability to earn a living of a conviction. Fourthly, T was not aware, at first, that his father was in prison. According to the guardian ad litem, the husband was not prepared to discuss how T would react if, for example, another child at school or someone else told him. They did, however, as I have said, later seek the advice of Dr Heller and followed it and, indeed, eventually told T rather earlier than Dr Heller had suggested. Fifthly, there is some doubt as to how soon the husband revealed to his wife his criminal activities. When he did, he asserted to her his belief that he would be acquitted and she therefore, she says, did not believe he had been doing anything criminal.

They are, understandably and properly, criticised by the guardian ad litem and Westminster for embarking on G's adoption when the criminal proceedings were pending. It is to be observed, also that Miss Janice Ray was not informed, for the purposes of the home study report that she prepared for use in the El Salvador proceedings, about the criminal investigations, nor given true reasons for the husband's decision to set up his own legal practice.

The above factors are undoubtedly relevant to one of the question in Mrs Simpson's report which, she submits, is to be raised in respect of the adoption of children from overseas, that is, would the prospective adoptive parents be approved as adopters if they were applying to adopt a British child? That such a question is relevant is obvious before a child is placed, but it clearly becomes of less weight if a question has to be asked after a child has been placed, when the de facto situation has to be considered in relation to the child's welfare.

A second question to which Mrs Simpson rightly gives importance is to what extent the applicants are able to meet G's cultural and racial needs. In her report and evidence, Mrs Simpson says:

> 'I have to say that [the wife] seems to appreciate the need for G to have knowledge of her background. Various pictures, craft work and artefacts of Central American origin decorate the child's room and [the wife] tells me she has tried to buy books on El Salvador. [The wife] also said she regretted she had not gone to El Salvador to collect G as she would have liked to have had photographs of G's mother.'

The wife confirmed this in her evidence. With regard to the husband,

however, Mrs Simpson asserted, in her report and in her evidence, that he was totally dismissive towards the possibility of G being seen as different in any way in an English setting and was actively negative and hostile in his attitude towards the child's background and origins, saying, in his words, 'What culture? You should see what culture she comes from.'

In his affidavit, Mr Papworth, a team leader of Westminster in the Family Team of the area, refers to Westminster also being concerned about such matters. He and Miss Clancy, who wrote the main Schedule 2 report, he said, had three main concerns, and I read from parts of paras 6 and 7 of his affidavit:

> '(a) the level of honesty on the part of [the applicants];'

– which I have referred to already –

> '(b) [the husband's] understanding of the importance of a child's ethnic and cultural identity; and
> (c) the fact that there is a question as to whether G had been removed from El Salvador illegally.'

He continued:

> 'I have to say that [the husband's] response to the first two matters and his general attitude troubled me considerably. He could not acknowledge that it was reasonable for us to expect him to have informed us of the investigation or even the charges earlier, saying he had known when he gave his consent to police inquiries that the matter would come to light, and wondering why we should expect him to give prejudicial information about himself. I commented that he seemed to take a narrow, legalistic view of matters and he agreed. On the question of G's racial identity, he denied that it was possible she might be subject to abuse or discrimination because of her origins, such that she would want sensitive support, and, although he did not display any prejudice himself, he rather dismissed the issue, saying that we all lived in a very cosmopolitan society.'

And then with regard to the third point, the collection of G from El Salvador:

> 'He said he was not aware of doing anything inappropriate and, although it would have been desirable for his wife to have collected her as well, neither finances nor the care of T made this possible.'

The husband, in evidence and in his affidavit, denied being dismissive and agrees that he did refer to the dreadful conditions in El Salvador where, in addition to enduring a very poor standard of living, they were in the throes of a civil war.

I am, on the other hand, satisfied that the wife S now fully appreciates, if she did not earlier, the need for due regard being paid to G's cultural needs, for G is, as can be seen in photographs shown to me, of light brown skin with black hair, typical Central or South American, and it will be important for her to be assured that she has nothing to be ashamed of and, on the contrary, much to be proud of.

The wife, as she says in her affidavit, had, long before the guardian ad litem had expressed such concerns, joined the El Salvador Cultural Association, about which Irma Gomez gives full details in her affidavit. I am reasonably confident that, at least now, both applicants are conscious of this aspect and willing to deal satisfactorily with it.

Dr Heller, like Dr Dare, supports the application, but is not, however, reluctant in doing so. As he sets out in his report and has said in his evidence, he is able to understand, and to some extent sympathise with, some of the attitudes and aspects which Dr Dare and the guardian ad litem criticise. He considers the risk involved in moving G to be unacceptable, though he agrees that moves have been ordered of a child of such an age from even a natural mother when other considerations were preponderant. In those cases, 'needs must' prevails because there would be a greater risk in not removing the child. And I refer, without quoting, to the last few sentences of Dr Heller's second and latest report, dated this month, which confirm and reiterate the situation as it now is, with this little girl being so well bonded in this family.

I should add that to move G would, as Mr Hussel, an Assistant Divisional Director of Westminster, says in his affidavit and his evidence, involve a bridging placement for, say, 6 months in foster care before transfer to prospective adopters, and this time could be longer. Indeed, I accept entirely what Mr Hussel has to say about this in para 6 of his affidavit: first, as I have said, there would inevitably be two moves. Secondly, the process of separation from her psychological mother would be exceedingly distressing, especially as it would be difficult to imagine [the wife] being capable of giving G positive preparation for the move. Thirdly, although the current positive attachment, may suggest that G will be able, eventually, to form a new healthy attachment, there is bound to be a greater danger that she will be emotionally scarred by the experience in the long term. In addition to these factors, the very positive relationship between G and T would be broken, with adverse effects for both of them.

The views of psychiatrists are not, of course, conclusive. Welfare, as the first consideration, has to be considered by the judge in the light of the evidence, together with expert opinion. Insofar as all the criticisms of the applicants and the other matters to which I have referred up to this point relate to welfare, which is the first consideration, I am of the clear view that they do not justify removal of the child from the applicants, nor militate necessarily against the making of an adoption order on the ground that the welfare of G clearly dictates that she should remain with the applicants and grow up as one of the family, notwithstanding the contention of the guardian ad litem, who stresses that the long-term interests of G to be brought up by responsible parents would not be served by her remaining with the applicants.

Mr Levy, as well as contending, for the reasons already referred to, that it would not be in the best interests of G to remain with the applicants and

that, accordingly, she should be moved, with all the risks that that entails, submits that there are other considerations than the welfare of G which militate against the making of an adoption order, namely, breaches of certain provisions of the Adoption Act 1976 and considerations of public policy.

1. By s 11(1) of the Adoption Act 1976, a person other than an adoption agency shall not make arrangements for the adoption of a child unless: (a) the proposed adopter is a relation of the child; or (b) he is acting pursuant to an order of the High Court. By subs (3)(c), a person who receives a child placed with him in contravention of subs (1) shall be guilty of an offence. By s 72(3), it is provided that, for the purpose of the 1976 Act, a person shall be deemed to make arrangements for the adoption of a child if he enters into, or makes an agreement or arrangement for facilitating, the adoption of a child by any other person, whether the adoption is effected or intended to be effected in Great Britain or elsewhere.

In *Re A (Adoption: Placement)* [1988] 2 FLR 133, Anthony Lincoln J held that placement, in the sense of making arrangements for adoption, occurs or can occur on reception of a child by the applicant or the applicants. I agree that, as Anthony Lincoln J assumed, or accepted, this section should not be deemed to have extraterritorial effect. Mr Levy submits that, in any event, there was a placement with the wife when she herself received G into her care, though jointly with the husband, after the latter had passed through immigration at Heathrow airport. I accept this submission.

Whether breach of this section is a bar to an adoption order, or is limited to the penal consequences of a criminal offence, is not clear, but it seems that it is not such a bar; compare this section with s 24(2) of the 1976 Act, and see also per Booth J in *Adoption Application AA272/85*, referred to in *Rayden & Jackson on Divorce*, Service volume, para 1571.

In *Re A* (above), Anthony Lincoln J held, following the indication given in *Re S (Arrangements for Adoption)* [1985] FLR 579, that it is open to the High Court to give dispensation pursuant to s 11(b) (Anthony Lincoln J was, in fact, considering the similar provisions in the Adoption Act 1958), so as to enable the adoption order to be made.

2. By s 57, it shall not be lawful to make or give to any person any payment or reward for, or in consideration of (and I move to para (d)), the making by that person of any arrangements for the adoption of a child. The definition of 'arrangement', in s 72(3), also applies here. Mr Levy stresses the phrase, 'for facilitating'. He submits that the husband is in breach of the section in respect of two payments, £200 paid to Miss Ray and the £7000 paid to del Cid for his services as a lawyer in connection with the adoption abroad.

Besides the making of a breach of this section a criminal offence (see subs (2)), an earlier section, s 24(2), provides that the court shall not make an adoption order in relation to a child unless it is satisfied that the applicants have not, as respects the child, contravened s 57. By s 57(3), however, it is a proviso that the section shall not apply to any payment or reward authorised by the court to which an application for adoption in respect of a child is made. Similar provisions in the Adoption Act 1958 and the Children Act 1975 were considered by Latey J in *Re Adoption Application (Payment for*

Adoption) [1987] Fam 81, [1987] 2 FLR 291, when he had an adoption application before him in which certain payments had already been made. At pp 87 and 296 respectively, he said:

> 'Much of the argument has been directed towards this question. It turns on the interpretation to be given to s 50(3) which provides, as I have said, that the prohibition shall not apply "to any payment or reward authorised by the court . . ." Can such authorisation be given only in advance of the making of a proposed payment or giving of a reward? Or can it be given for a payment or reward already made or given?'

I omit the next paragraph. He continued:

> 'I do not believe that Parliament ever intended to produce such a result (nor, anticipating, has it done so in my judgment). The result it intended to produce is wise and humane. It produced a balance by setting its face against trafficking in children, on the one hand, but recognising that there may be transactions which are venial and should not prohibit adoption, on the other hand.
>
> Nor in my judgment does the language of the section compel the Draconian interpretation. What does "authorise" mean in this context?'

And he refers to definitions. He continues:

> 'To my mind, in plain language there is nothing in "authorise" or its synonyms to suggest that authorisation can only be given prospectively. On the contrary, it can equally well be given retroactively.'

He continues later:

> 'For these reasons the correct interpretation is the second one, with the result that Parliament has produced the result it intended to.'

There then follows a passage which Mr Levy draws to my attention and relies upon. He continued:

> 'It follows that in each case the court has a discretion whether or not to authorise any payment or reward which has already been made or may be contemplated in the future. In exercising that discretion the court would no doubt balance all the circumstances of the case with the welfare of the child as first consideration against what Mr Levy well described as the degree of taint of the transaction for which authorisation is asked. If the matter were to reach that stage, Mr Holman, with evident pleasure and relief, submitted that authorisation be given and an adoption order be made.'

Mr Holman appeared as the *amicus curiae*, giving the arguments for opposing the adoption.

I am satisfied that both payments which were made, both to Miss Ray and del Cid, were in breach of this section and, accordingly, would bar an adoption order being made unless dispensation were granted.

In relation to these breaches Mr Levy has put forward the guardian ad litem's submissions that Westminster has been at fault, in the case of the provision against private placement, in not taking action under s 11 and, in the case of s 57, in not informing her of the payments, so that she was precluded from taking some unspecific action earlier, before the husband went to El Salvador.

3. Mr Levy also submits that, in a number of aspects, the way in which the applicants proceeded delayed appropriate police checks and inhibited Westminster from making their own inquiries. The home study report was a private one, not one, as can be and should be, according to the Department of Health, carried out by a local authority social worker. In other respects, he submits, Westminster were at fault; the principal allegation is that they should not have taken the adoption papers at their face value, but should have checked and made inquiries of the El Salvador Consulate, when certain discrepancies would have been found and earlier inquiries made.

All these matters, Mr Levy submits, taken together with the deceit, or at least lack of frankness, on the part of the husband in what he did and said in El Salvador and in what he said to Westminster and Mrs Simpson, together with the unsatisfactory evidence as to the identity of the natural mother, cast a substantial taint over the whole of this application, so that it would be wrong and against public policy to dispense with the statutory effect of the breaches with regard to private placement and payments or, in any event, to make an adoption order notwithstanding the aspects of G's welfare which support the granting of an order.

In regard to ss 11 and 57, Mr Levy, as I said, particularly relies upon those words of Latey J which I have referred to.

As to the making of an adoption order generally, I have already set out the relevant part of s 6 of the Act relating to the duty of the court in reaching any decision as to adoption, and in *Re D (An Infant)(Adoption: Parent's Consent)* [1977] AC 602 at p 638, Lord Simon of Glaisdale said, in reference to the equivalent section in the Children Act 1975:

> 'In adoption proceedings the welfare of the child is not the paramount consideration (ie outweighing all others) as with custody or guardianship; but it is the first consideration (ie outweighing any other) . . .'

In the case of *Re H (Adoption: Non Patrial)* [1982] Fam 121, (1983) 4 FLR 85, I had to consider an adoption application where the immigration authorities had refused entry permission for a child, so that considerations of public policy had to be weighed against welfare. I said, in Lord Simon of Glaisdale's words, that the court must treat welfare as the first consideration, outweighing any one factor but not all factors, and that, in every case, it is a matter of balancing welfare against public policy, and the wider the implications of the public policy aspect, the less weight was to be attached to the aspect of the welfare of the particular individual.

This was approved by the Court of Appeal in *Re W (A Minor) (Adoption: Non Patrial)* [1986] Fam 54, [1986] 1 FLR 179, another immigration case.

In the judgment of the court (at pp 62 and 185 respectively) Balcombe LJ said:

> '. . . if the child or its parents/relatives have been guilty of practising a deception on the immigration authorities –which is *not* suggested in the present case – this, too, must be given serious consideration by the court, being part of "all the circumstances" to which the court is to have regard under s 3 of the Children Act 1975 . . .'

which he was then considering.

Miss Parker points out that in *Re H* (above) there was such deception, yet an adoption order was granted. Mr Levy strongly relies upon the several deceptions or economies of the truth of which the husband has been guilty, which include the deception of the El Salvadoran court. He does not, any longer, suggest that there was a breach of El Salvadoran law in bringing G out before the final adoption order, though she did enter the UK without an entry clearance certificate. This latter aspect loses its strength when it is known that the Home Office do not wish to intervene. The Home Office have, indeed, been apprised of the latest developments and still have not wished to intervene.

The inquiries which have been made do, I accept, give ground for disquiet as to the provenance of G; for example, it appears that her passport is defective. On the other hand, there is no reason to doubt that the person claiming to be her mother did, indeed, give G to the husband, together with her passport, in El Salvador airport.

Taking all these matters into account, and bearing in mind the unsatisfactory aspects in relation to the welfare issue as well as the breaches of the 1976 Act, I nevertheless conclude that I should give dispensation in respect of those breaches, and that considerations of public policy do not outweigh considerations of G's welfare and that an adoption order should be made. Nothing short of an adoption order would be sufficient to meet G's need for security.

The essential issue was, of course, whether the applicants should be adopters. Dr Dare did suggest that there might be some kind of supervision. I do not consider that that would be necessary or appropriate, even if it could be achieved, either in law or in practice. Both applicants are, I am satisfied, prepared to seek advice with regard to the cultural aspects. There will be an adoption order, therefore, in favour of the applicants, containing appropriate particulars of G's name and other statutory particulars.

Many criticisms of Westminster are contained in the guardian ad litem's report and were carried through in her evidence, and I have allowed Westminster to seek to meet these criticisms, some of which have been relied upon as aspects of public policy. I do not, however, consider that they are matters of public policy so far as the adoption application itself is concerned. In particular, there have been submissions as to the respective duties of the local authority and the guardian ad litem.

I propose to restrict myself, however, to making one comment or suggestion, and that is that where a local authority is notified by prospective adopters that they have brought into the country a foreign child whom they hope to adopt, the authority should, at once, seek

information from the relevant embassy or consulate as to the validity of any foreign or adoption order obtained by, or on behalf of, the proposed adopters.

This case has demonstrated the need for prompt action, for any delay tends to affect the quality of the ultimate decision. in the present case, this investigation was carried out by the guardian ad litem, who, of necessity, comes into the case later after the originating process has been issued. Once a guardian ad litem is appointed, I see no reason for the Schedule 2 report to be awaited by the guardian before making any inquiries which it already seems ought to be made, as Mrs Simpson says she understood she was expected to do. Otherwise, the respective duties seem to be adequately set out in the Adoption Rules and the relevant local authority circular.

I conclude by warning that the inquiries in this case show that there may well be other cases giving cause for concern as to the provenance of children offered for adoption in El Salvador and, perhaps, other countries in Central or South America. The lawyer consulted by the applicants in Ecuador has, it is reported, been convicted and imprisoned for being concerned with illegal dealing with children for adoption abroad, and recent information indicates that del Cid's partner has been convicted on somewhat similar grounds in El Salvador, though there is no reason to connect either of these with the present case.

These concerns underline the need for responsible and experienced legal advice, co-operation with social services and the use of social workers and guardians ad litem who, if not already experienced in this field, have at least been adequately trained in how to proceed and what to look for.

Adoption order made

Solicitors: The names of instructing solicitors are omitted in the interest of preserving anonymity for the parties.

PATRICIA HARGROVE
Barrister