EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 25
AD10/23

Lord Malcolm
Lord Doherty
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition of

AD

Petitioner

for

authority to adopt the child EO

Petitioner: Moynihan KC: SKO Family Law Specialists LLP (for J K Cameron, Glasgow)
Respondent : Scott KC and Conroy Solicitor-Advocate: CSG Legal

1 October 2025

Introduction

[1] The now 9 years old child at the centre of this petition for adoption, whom we will call EO, arrived in Scotland just a few weeks after his birth. In November 2016, his parents, who are both of Nigerian origin, brought him and his three older brothers to these shores while their home in Italy was being repaired after earthquake damage. When EO was 5 months old, he and his brothers were taken into care to protect them from serious abuse at the hands of their parents. Based largely on the evidence of the two older boys, the grounds of referral, in summary narrating serious physical and emotional abuse of the two older

boys over several years, were established in respect of all the children. The sheriff stated that the evidence was "clear and strong" and that assaults on both children were proved beyond reasonable doubt. The third child, who is seriously disabled, had to have 12 teeth removed due to his parents' inattention to his dental health. In subsequent criminal proceedings the oldest son, who by that stage was no longer a child and had resumed living with his parents, retracted his allegations. Since it could no longer be corroborated, the Crown did not lead the other son's evidence and the parents were acquitted. A fuller history is given in *LO* v *McGinley* [2022] CSIH 50; 2023 SC 39. The parents are, and have always been, implacably opposed to the removal of their children, the findings made by the sheriff, and the jurisdiction of the Scottish authorities and courts to interfere with their family life.

[2] EO was placed with a foster carer in Scotland and lived with her for almost 5 years. His parents did not engage with social workers, nor with assessments designed to establish whether the children could be returned to their care. An aunt resident in Scotland has stated that she is unable to care for the children. She refused to disclose her address or entertain a visit from social workers. Initially contact sessions with EO were successful, but over time the parents' attendance record deteriorated. In September 2019 a decision was taken to proceed to permanence care planning for EO.

[3] In February 2020 EO's parents returned to Italy without their children. In December 2021 EO was moved to a new "foster to adopt" carer, the current petitioner, who resides in England. She shares his ethnicity and, like his parents, she is a Christian, albeit of a different denomination. In common with his parents, EO has dual Nigerian/Italian nationality; the petitioner has dual Nigerian/French nationality. At first the move was difficult for EO because of the strong attachment he had formed with his foster carer.

However he is now settled, happy and thriving. Though fully aware of his parents and siblings, he has a warm bond with the petitioner, whom he calls mummy. She provides a loving and stable family life for him. She actively promotes a continuing relationship between him and his brothers, two of whom are in Scotland. Adoption has the support of agencies on both sides of the border.

[4] After a contested proof, a judge sitting in the Outer House granted an adoption order sought by the petitioner on the basis that it is necessary to safeguard and promote EO's welfare throughout his life. It has the effect of removing the mother's and the father's parental rights and responsibilities in respect of EO and vesting them in the petitioner. That decision has now been reclaimed (appealed) by EO's mother to this court.

A summary of the judge's decision

[5] The judge's decision runs to 158 paragraphs spread over 82 pages. The full details of the evidence and his reasoning can be obtained at [2025] CSOH 45. After the petition was lodged, several proofs were fixed but then discharged at the instance of the parents. When evidence was eventually led, the parents represented themselves until a late stage when solicitors and senior counsel were instructed. Evidence was given by the petitioner; four social workers; both parents; their eldest child; their parish priest; their family lawyer in Italy; a recently retired neuropsychiatrist who was a judge of the juvenile court in Italy; a counsellor of the Court of Appeal in Perugia (in relation to recognition of Scottish adoption orders in Italy); and an English barrister on alternatives to adoption orders in England. The judge also had two reports from an advocate appointed as EO's reporting officer and *curator ad litem* (legal representative), and a social work report prepared in terms of section 17 of the Adoption and Children (Scotland) Act 2007.

[6] The petitioner's and the social workers' evidence was judged to be credible and reliable. The curator's report was "thorough, considered, and objective". The evidence of the respondents, little of which was relevant, and that of the eldest child, who said he had been bribed to make the allegations and that his younger brother had lied, was not accepted by the judge. Only some of the evidence of the priest and of the family lawyer was relevant, and it is clear that the judge did not attach much weight to it in the light of other evidence. The barrister's evidence, so far as relevant, was accepted.

[7] The retired neuropsychiatrist's parenting assessment spoken to by him in evidence in chief was positive as to the parents' parenting skills and ability to look after the children in a healthy environment. However, during cross-examination he was made aware for the first time of the grounds of referral and the findings of the sheriff. He regarded these as matters of "extreme concern". They prompted the remark that EO would "of course" be at risk if returned to his parents' care. He agreed that the removal of the third child's teeth was concerning. The judge rejected the parenting assessment but accepted the oral testimony given by this witness. The evidence as to the recognition of Scottish adoption orders in Italy is addressed later in this opinion.

[8] The parents did not consent to the order sought, therefore the question arose as to whether this could be dispensed with on the basis that in the opinion of the court they were unable satisfactorily to discharge their parental responsibilities or exercise their parental rights in relation to EO, and were likely to continue to be unable to do so, see section 31(3) and (4) of the 2007 Act.

[9] The judge noted that the grounds of referral had been established in relation to EO because of his close connection to the parents rather than being a direct victim. The sheriff had held that his parents were responsible for significant acts of harm to the two older boys

over a lengthy period, namely 2011 - 2017. They had shown no insight into their conduct and its impact on the children. The acquittal in the criminal proceedings did not remove those findings nor elide the cause for concern. The removal of 12 teeth from the third child was caused by parental neglect. The judge noted that a prediction of future harm can be based on proven past conduct.

[10] Whilst in Scotland the parents became poor attenders at contact sessions, often giving no notice of non-attendance. They refused to engage with the authorities in respect of reviews and parenting assessments. They did not engage with the court's reporter. In recent years they have had no contact with EO and have displayed no real interest in his welfare. They have embarked on a campaign of litigation focussed on procedural and jurisdictional matters as opposed to substantive issues concerning the welfare of their children. The judge was satisfied that the parents did not prioritise the needs of their children, and that they were unable to promote their health, development and wellbeing.

[11] With reference to sections 1 and 2 of the Children (Scotland) Act 1995, the judge had "little hesitation" in concluding that the parents were and would continue to be unable to discharge parental responsibilities and exercise parental rights in a satisfactory manner. That conclusion is not challenged in the grounds of appeal against his decision. For his full reasoning on this finding, see paragraphs 110 – 127 of the opinion cited earlier.

[12] The judge recognised that this was not the end of his task. He required to evaluate each of the options available to him, including making no order, so that he could decide which best satisfied his duty to treat EO's welfare as the paramount consideration, all as per sections 14 and 28(2) of the 2007 Act, and *Fife Council* v *M* [2015] CSIH 74; 2016 SC 169, Lord Bracadale at pages 185 - 186. Was an adoption order required for the safeguarding of EO's welfare throughout his life? The judge appreciated that the removal of parental rights

and responsibilities from EO's mother and father, and the vesting of them in the petitioner, would be appropriate only if such an order was necessary and proportionate, sometimes expressed as "nothing else will do". He noted that in many cases the avoidance of further delay was a factor and that it has been said that decisions resulting in further protracted procedure "seldom promote the welfare of the child throughout the child's life", see *North Lanarkshire Council* v *KR* [2018] CSIH 59; 2020 SCLR 1 at paragraph 70. Overall, the test was a strict one, but not insurmountable. The judge's full reasoning on this aspect can be found at paragraphs 128 - 156 of the opinion; the following is but a brief summary.

[13] The judge observed that for young children there is value in a stable family unit. Disruption of his current situation would be traumatic for EO. He is happy and thriving in a loving and positive environment. He wants to remain with the petitioner, whom he calls mummy, as her son. The professional evidence was very supportive of her attitude towards EO's needs and of her ability to provide him with the environment he requires. They share Nigerian heritage and she supports a continued relationship with his brothers. Given his traumatic start to life, a lifetime bond based on being claimed both legally and emotionally will be invaluable to EO. The extensive litigation pursued by his parents undermines the current stable family unit. The judge's conclusion was that only an adoption order will assure EO of a parent able, willing and committed to supporting him throughout his life. It would prevent continued disruptive actions by his natural parents.

[14] Responding to submissions made to him on behalf of the parents, the judge noted that there was a proper basis for the children's removal from their care, a matter which in any event was of lesser weight with the passage of time. Given the seriousness of the allegations, their subsequent retention in care was reasonable and lawful. On the establishment of the grounds of referral, the relevance of a parenting assessment was

reinforced. With regard to the UN Convention on the Rights of the Child (UNCRC), a decision consistent with the requirements of the 2007 Act would be compatible with it.

[15] The judge assessed the merits and demerits of making no order. The compulsory supervision order and regular confrontational hearings would continue. The petitioner would be unable to take important decisions regarding EO, for example as to medical treatment. This, along with the possibility of applying for English orders, such as a special guardianship order, would add to the delay in matters being resolved, all against the background that in recent years the parents had neither enquired as to EO's welfare nor engaged with the Scottish authorities. Reference was made to the concerns about delay expressed by the First Division in *North Lanarkshire Council* v *KR.*

[16] The judge considered a residence order coupled with a grant of some parental responsibilities and rights. This would minimise interference with the parents' rights and maintain the possibility of rehabilitating EO in their care, albeit they had done nothing which suggests that this is feasible. Unless such an order also extinguished their rights, disruptive litigation at their hands would continue. Furthermore, any such arrangement would end on EO's 16th birthday and would deny him the benefit of a parental bond with the petitioner. (Given that EO lives in England, a residence order may not have been competent; but any orders lesser than adoption available in England would be subject to the same disadvantages.)

[17] The matter which gave the judge the most concern was the Italian counsellor's evidence that an adoption order would not be recognised in Italy where single person adoptions were considered to be contrary to public policy. For the Italian authorities EO would remain the child of his parents, not that of the petitioner, and would continue to be an Italian national unless he renounced his citizenship. Rather than make what has been

described as a "limping adoption order" the judge had been invited to make no order, thus allowing an adopter in Italy to be identified. However the uncertainties and potential complications flowing from non-recognition of his decision in Italy did not persuade him that an adoption order was not required for the welfare and best interests of EO throughout his lifetime. Similarly the possibility of seeking a lesser form of order in England did not change that conclusion.

The grounds of appeal

[18] The grounds of appeal relied upon (one was not maintained) can be summarised as follows. The judge did not carry out a global holistic evaluation of all the relevant options open to him, specifically a comparison of the limited effect of a "limping" adoption with alternative orders available in the courts of England. The judge erred in concluding that it was better for EO that an adoption order be made, rather than it not being made. It was disproportionate interference with his family life, contrary to Article 8 of ECHR. It was inconsistent with the court's obligations under Articles 7, 8, 9 and 21(b) of UNCRC.

[19] These propositions were elaborated upon in written and oral submissions which can be summarised as follows. The judge had to apply his mind to the effect of his decision on EO's status in the UK, Nigeria, Italy and France (the last of these being the petitioner's country of origin), see *In re N (Children)* [2015] EWCA Civ 1112; [2016] UKSC 15; 2017 AC 167. There is some authority for the proposition that before it could be granted the judge had to be satisfied that the adoption order would be recognised in the parents' country of domicile, here Italy. Reference was made to *Paquette* v *Galipeau* [1981] 1 SCR 29; an article by Laing entitled *Adopting Foreign Children* in [2015] Fam Law at 565 and 703; and to certain

textbook discussions. Until a late stage the parents were unrepresented by Scottish lawyers. The evidence on these issues was incomplete.

[20] Even if the order was competent, the judge failed to consider the implications of Italian domestic law for EO's welfare. For example, in that country, as per his Italian passport, EO would remain his natural parents' son. He could not travel to Italy as the petitioner's child. He might have difficulties in opening a bank account. Which country's embassy or consulate would have responsibility for EO? There could be uncertainty in respect of tax, inheritance, and military service issues. Who is and who is not part of his family? In short the submission was that not enough consideration had been given to the lifetime of legal complications and uncertain status which will afflict EO and his family.

[21] Adoption should be the last resort. The judge was not favoured with the investigations, reports and evidence necessary for the global, holistic and multi-facetted evaluation desiderated in *In re B-S (Children)* [2013] EWCA Civ 1146; [2014] 1 WLR 563 and approved in *Fife Council* v *M.* Such an evaluation would set out the pros and cons of all the options in the context of the international dimension and complexities, and the alternatives south of the border. Instead, ignoring these concerns, the matter had been addressed by the authorities as if it was a purely Scottish case, described by counsel as a "parochial" approach.

[22] The judge did not provide an adequately reasoned and clear necessity and proportionality analysis assessing all the positives and negatives of the alternatives open to him. There were other ways of providing EO with security and stability. The judge had carried out a highly one-sided examination of the issues. For example, there had been no suggestion of his parents ill-treating EO. Initially contact was positive. To her great distress EO had been removed while being breast fed by his mother. Eventually his parents could

no longer stay in Scotland, and shortly after their return to Italy the Covid-19 pandemic struck. There was no recognition of their positive engagements with EO, the children's hearings and the authorities.

[23] While it was accepted that delay is a relevant factor, a lesser order, such as English special guardianship, would not create such a confused status. Recognising that this was not a Hague Convention adoption, the decision was nonetheless incompatible with Article 21 of UNCRC. In unqualified terms that provision prevents an intercountry adoption unless the child cannot be cared for in his country of origin. This had not been established. There were also infringements of EO's rights to a name, an identity, and to maintain personal relations and direct contact with his parents, see Articles 7, 8 and 9.

The submissions for the petitioner

[24] Counsel for the petitioner explained that it was the particular suitability of the petitioner's ethnicity, religion and background which resulted in EO being in England. Nonetheless he remained subject to the Scottish authorities and courts. The placement was designed to progress the decision that adoption was in his best interests. It would have been inconsistent to explore an English special guardianship order. The parents had vigorously contested the jurisdiction of the Scottish authorities and courts; this would be repeated if the English agencies and courts were asked to assume responsibility for EO.

[25] Counsel questioned the proposition that this is truly an intercountry adoption as contemplated by Article 21 of UNCRC. It is a concept aimed at preventing child-trafficking from one country to another. The touchstone is the child's place of habitual residence when adoption is contemplated, not domicile or nationality. When EO's adoption became a possibility he was resident in the UK. Indeed, apart from his first few weeks, he has always

lived here. There is no intention to remove him to another state for the purpose of adoption. Reference was made to *In Re Z* [2016] EWHC 2963 (Fam); [2017] 4 WLR 20 at paragraphs 99 - 100, and to *Z* v *S* [2024] EWHC 2837 (Fam); [2025] 2 WLR 357 at paragraphs 29-30. The adoption order was compatible with both EHCR and UNCRC.

[26] Nonetheless it was accepted that there is an international dimension which has to be taken into account in the overall balancing exercise. Reference was made to *In Re Z* at paragraphs 47-48 and 114; *In Re N* at paragraphs 19 and 110; and section 14 of the 2007 Act. However, for reasons to be discussed later, the concerns regarding recognition in Italy carry less traction than was anticipated at the time of the judge's decision. In any event the petitioner is not contemplating recognition proceedings in other countries. With regard to EO's passport, the petitioner is not a UK citizen so EO will not gain UK citizenship by virtue of his adoption. That said, he is now well along a 5 year track for EU settled status after which he will be well-placed to apply for UK citizenship. The section 17 report noted that an Italian court had refused to assume jurisdiction for his welfare on the basis that EO's future lies in the UK. Notwithstanding the international dimension, this was seen as a domestic adoption.

[27] EO has been in care since he was 5 months old. He is now nine and his childhood is passing. There is a legitimate concern to avoid further litigation and delay. Reference was made to *S* v *L* [2012] UKSC 30; 2013 SC (UKSC) 20 at paragraphs 51-52, and to *Strand Lobben* v *Norway* App No 37283/13; (2020) 70 EHRR 14. Counsel for the parents had told the court that she was unable to say that any application in England for a lesser form of order, such as special guardianship, would be uncontested. In any event the petitioner wishes to adopt EO. There can be no certainty that she would apply for any other form of

relationship. EO is now embedded with the petitioner. To remove him would be very damaging. He needs affirmation that the petitioner is his mother.

[28] The judge was not distracted by the parents' continued reliance on jurisdictional and procedural complications. He focussed on safeguarding and promoting the welfare of EO. His finding as to their inability to care for him is not challenged. He had a wealth of evidence as to the stability of the current family unit and the suitability of the petitioner as EO's adoptive parent. His best interests require the adoption order.

Analysis

The international dimension

[29] The specific complaint concerned what was described as the "limping" nature of the adoption order, and the alleged failure of the authorities and the judge properly to address and weigh the implications of the international dimension in these proceedings. The submission extended to resultant incompatibility with UNCRC, and the proposition that if the order would be regarded as contrary to public policy in Italy then the judge could not make it, even if satisfied that it was necessary for the child's welfare. The strongest plank in the argument was the evidence that single person adoptions are unconstitutional in Italy.

[30] Shortly before the hearing in this appeal the court drew parties' attention to Judgment No 33 [2025] of the Constitutional Court of Italy. The Family Court of Florence had referred a question as to the constitutionality of the prohibition on single people resident in Italy applying for a decree of suitability for intercountry adoption. The referring court argued that a harmonious and stable family environment could be provided by a single-parent family network. The prohibition interfered with the goal of protecting the interests of the child and violated the right to respect for the private life of single people.

These propositions were accepted by the Constitutional Court. Since it was submitted that the judgment is of limited application, it is appropriate to provide an account of its main features.

[31] The court noted that a child-protective purpose was not in place at the outset of adoption procedures in Italy but was grafted on to address orphans and children born out of wedlock in the aftermath of the First World War. As matters developed, from 1967 only married spouses could adopt a child in the sense of them establishing kinship relations with the child and the legal bond with the family of origin being severed. This was termed special adoption, as opposed to ordinary adoption, the latter being open to single people. Ordinary adoption transferred parental responsibilities for the protection of the child, but maintained the legal status of the biological family.

[32] For minors, in 1983 special adoption was replaced by a general set of rules for the full adoption of those who were in a state of abandonment. The guiding principle of the new law was the best interests of children, affirming their right to be raised and educated within their family of origin and, where this is not possible, ensuring a stable and harmonious family environment in line with Article 8(2) of the 1967 Strasbourg Convention on the Adoption of Children. The legislature wanted to afford the child the status that, at the time, offered the broadest guarantees of protection, namely that of a legitimate child, which presupposed married parents. The option allowed by the Convention of single person adoptions was rejected, thereby reducing the chances for children to be adopted. This continued after Italian ratification of the Hague Convention on Intercountry Adoption. However the court noted that in certain circumstances the legislature had recognised that a single person could provide a stable and harmonious environment for a child, for example if

one spouse died or they separated during pre-adoptive foster care, or in respect of children with disabilities who have no parents.

[33] As for whether there was a breach of Article 8 of ECHR, the court noted that, in general terms, choices orientated toward the establishment of parental bonds are ascribable to the broad content of freedom of self-determination, and concern the private and family sphere. This implies a claim not to have that freedom unduly restricted by the legislature. There is an interest in expanding the spaces of parenting-orientated self-determination and opposing unreasonable and disproportionate restrictions. The individual needs of the potential adoptee must be taken into consideration as well as the interests of the aspiring parent. The assessment must be made in the light of present-day conditions and of the ideas prevailing in democratic states today.

[34] The exclusion of unmarried persons from access to intercountry adoption violates Articles 2 and 117(1) of the Constitution, the latter in relation to Article 8 of ECHR. The provisions challenged by the referring court have implications for the right to privacy, understood as the freedom of self-determination. In the present context this manifests as an interest in being able to realise one's aspiration to become a parent by making oneself available to adopt a foreign child. If the purpose of intercountry adoption is for people in Italy to take in foreign minors abandoned abroad, assuring them a stable and harmonious environment, the insuperable prohibition on unmarried persons does not meet a pressing social need, and, in the current socio-legal context, constitutes unnecessary interference in a democratic society. It no longer served a need to ensure the child the full protections associated with legitimate child status.

[35] The court observed that the *a priori* exclusion of single persons from adoptive parenting is not an appropriate means of ensuring a stable and harmonious environment for

children. Since its ruling in No 183/1994, the Constitutional Court had recognised the abstract fitness of single people in this regard. The single parent family is recognised in the Constitution. The best interests of the child remain protected by judicial assessment of the fitness of the prospective adopter. Support can come from an extended family network. Two parental figures are not essential for the emotional and educational needs of the child.

[36] Counsel for EO's mother submitted that since the ruling concerned provisions concerning the adoption in Italy of foreign minors, it makes little change to the picture as presented to the judge at the proof. We do not agree. The evidence of the Italian counsellor was that single person adoption was contrary to public policy in Italy, and thus it could be asserted with confidence that the Scottish order would not be recognised there. While the judgment addressed restrictions on intercountry adoptions, it seems plain from its terms that it has broader ramifications and would be at least highly influential, more probably decisive, should the constitutionality of recognition of a single person adoption arise in another context. Of course, as counsel observed, any attempt to seek recognition and enforcement of the order in Italy is still likely to be contentious and the outcome uncertain. However claims of a "silver bullet" do not survive the Constitutional Court's judgment.

[37] Turning to UNCRC, counsel focussed her submissions on Article 21(b). From this we infer that it was appreciated that if the Article 21(b) argument fails, there is no arguable merit in the proposition that nonetheless the order was incompatible with Articles 7, 8 and 9 or any of them. Although not subject to the Hague Convention and the legislation made thereunder (because EO was not brought to the UK for the purpose of adoption), it was contended that this remains an intercountry adoption. The proposition was that because EO was born in Italy and remained an Italian national, Italy should be treated as his country of origin. Thus in terms of Article 21(b) of UNCRC, now part of our domestic law, as a

pre-requisite to an adoption order in Scotland there was an absolute requirement to be satisfied that EO could not be provided with appropriate care in Italy.

[38] Article 21 begins by recognising that in adoption proceedings the best interests of the child shall be the paramount consideration. However it was submitted that this is subject to sub-paragraph (b) which provides that participating states shall:

> "recognize that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin."

The authorities had failed to provide the judge with the information necessary for a reasoned decision on this requirement. Rather they treated the case as a purely domestic matter.

[39] We do not agree that Article 21(b) imports the absolute requirement suggested by counsel. As noted, the article begins with a restatement of the paramountcy of the child's best interests. In any event, we are satisfied that EO's adoption is not an intercountry adoption as envisaged in Article 21(b). Intercountry adoption safeguards were considered necessary in respect of what was sometimes termed child-trafficking, whereby would-be adopters identified a child living in another country (the country of origin) and brought him or her to where they lived for this purpose (the receiving state). The main vehicle for regulating such arrangements is now the 1993 Hague Convention on Intercountry Adoption, incorporated in the UK by the Adoption (Intercountry Aspects) Act 1999. For Scotland reference can also be made to section 58 of the 2007 Act and the Adoption with a Foreign Element (Scotland) Regulations 2009. The state of origin is responsible for assessing whether the child is suitable for the process, with the receiving state addressing the suitability of the adopter(s). Understandably, these provisions concern the countries where respectively the child and the prospective adopter(s) are habitually resident, with the proposal being that the

child is moved from one to the other. So if both live in the UK, it is not an intercountry adoption.

[40] By the time the authorities turned their mind to EO's adoption, he had been living in Scotland for 3 years, having arrived here on a temporary basis with his family when just a few weeks old while earthquake damage to their home in Italy was being repaired. These plans were then overtaken by events. When the section 17 report was drafted, it was noted that an Italian court had refused jurisdiction on the basis that EO's future lay in Scotland. The multi-national aspect was recognised in the report, but, correctly, as no more than a factor in what was properly considered to be a domestic procedure. That EO was born in Italy and retains Italian nationality does not render this an intercountry adoption. It was pointed out that UNCRC pre-dates the Hague Convention, but this does not persuade us that it envisaged a materially different regime. On the contrary, if read as a whole, much of Article 21 is aimed at the provision of appropriate safeguards for intercountry adoptions, including the encouragement of bilateral and multilateral agreements, and all at a high level of generality. It can be seen as a precursor to the later more detailed instrument.

[41] In a similar vein the authority's approach to potential orders in England was criticised. We do not share those concerns. Under reference to the factors set out in section 14(4)(c) and (d) of the 2007 Act the petitioner was regarded as especially well-matched with EO as his potential adoptive parent. Fortunately the relevant children's hearings regulations allowed him to be placed with her in England, but the whole matter remained the responsibility of the Scottish authorities and courts. But for the decision to progress towards adoption, EO would not have been in England. All involved, including the petitioner, were aiming at a Scottish adoption order in respect of someone who, despite the efforts of the parents to argue otherwise, remained subject to a Scottish compulsory

supervision order. We have no difficulty in understanding that English orders such as special guardianship were not being considered. In any event, even if the petitioner had been prepared to change tack and participate in proceedings south of the border, such would have been hotly contested by the parents who were taking every action possible to have matters transferred to the Italian authorities and courts. Indeed that remains the position today.

[42] Notwithstanding the recent judgment of the Constitutional Court, the outcome of any recognition proceedings in Italy cannot be predicted with any certainty. Although not urging it upon the court, counsel for EO's mother drew the court's attention to certain academic comment to the effect that before it would be open to the court to grant an adoption order it would require to be satisfied that the order would be recognised in Italy, this being EO and his parents' domicile. Reference was made to the 1981 Canadian decision in *Paquette*, cited earlier, which concerned parents in Ontario regretting an informal adoption and then seeking a writ of *habeas corpus* for the child's return from Quebec.

[43] Given that many countries do not recognise non-consensual severing of the legal status of parent and child, were this proposition correct it would stymie many adoptions otherwise judged to be necessary in a child's best interests. The matter has been judicially considered, see *In Re N,* cited earlier. When the case was in the Court of Appeal, Sir James Munby provided detailed guidance on cases with an international dimension. He affirmed that local authorities must follow the legislature's decision that non-consensual full adoptions are permitted in the UK, if and when that is in a child's best interests.

> "The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs", see paragraph 19.

The court's jurisdiction and powers, which include dispensing with parental consent and changing the child's legal status, are laid down in the adoption legislation and are not restricted by the nationality, domicile or habitual residence of the child or his or her parents: see the discussion at paragraphs 76-77 and 93-103.

[44] Sir James' detailed discussion of the issue, which he said "had been rumbling on for years and needs to be put to rest", repays study. He outlined the competing arguments, including those favouring the supremacy of the child's status in their domicile of origin. However the conclusion was that when a court is creating rights afresh, rather than declaring or enforcing rights created by the parties themselves, foreign law cannot be applied. An English adoption is governed by English law, and will be granted if the relevant statutory conditions are fulfilled.

[45] Importantly for present purposes, that was not to say that the foreign law is wholly irrelevant. It is "an important factor to be taken into account in considering the *welfare* of the child; not … by virtue of the foreign law but rather because English law requires the court to do so", paragraph 103 (emphasis in the text). The "welfare checklist" in the legislation required no less. The court "must always be sensitive to the cultural, social and religious circumstances of the particular child and family", paragraph 108. The court cannot shut its eyes to the possibility that in other countries there may be a dispute as to whether the order will be recognised.

[46] Black LJ considered it imperative that the court considers links the child has to other countries and reflects on any practical implications of non-recognition there. She figured the case of adoptive parents taking the child to explore his cultural roots in the country of which he and his natural parents are/were nationals, see paragraph 187. Uncertainties as to whether the adoption would be recognised there, and potential complications if it was not

recognised, "would be a factor to be weighed in the balance, along with all the others, in deciding what order is going to be most conducive to the child's welfare throughout his life."

[47] The Court of Appeal's decision was appealed to the UK Supreme Court. Baroness Hale delivered a judgment with which the rest of the court agreed. She endorsed Sir James Munby's analysis of the issue as summarised above. We take this opportunity to do likewise in respect of the position north of the border. While our legislation is not identical to that in England and Wales, the essential features are sufficiently similar to allow us to apply his comments and analysis to a case such as the present. Even if it was clear that an adoption order would not be recognised in Italy, and similarly if that was the case in Nigeria and France, that would not present an insuperable obstacle. As observed by Russell J in *In re Z* at paragraph 115, no aspect the child's life, "be it background, nationality, heritage culture or religion" takes precedence over his welfare as a whole. The paramount consideration remains the child's best interests throughout his life. If, after all relevant factors and options have been properly identified and weighed, the judgement is that only an adoption order will serve that purpose, the judge must act accordingly. Decisions of this kind are not discretionary, see *Osborne* v *Matthan (No 2)* 1998 SC 682, Lord President Rodger at 688 - 689.

The judge's overall evaluation

[48] This was a difficult proof for the judge to manage. The procedural history demonstrates that the parents did all they could to delay and frustrate the proceedings. There is no doubt that the late instruction of agents and counsel and their contribution were of benefit to the judge. His opinion demonstrates that he applied his mind to all the

appropriate statutory provisions and case law. He summarised their requirements and principles at paragraph 18. He assessed all the evidence, explaining that which he found to be relevant and acceptable. Having concluded that the terms of section 31(4) were met and thus the parents' consent could be dispensed with, he appreciated that this was not the end of his task. He had regard to the section 14 and 28 considerations and assessed all the realistic options available to him when deciding whether only an adoption order would safeguard and promote EO's welfare throughout his life.

[49] Though expressed in various ways, the principal criticism of the judge's reasoning concerns the implications of the order not being accepted in other jurisdictions, with the main focus being on the complications of non-recognition in Italy, and in respect of his consideration of lesser alternatives available in England. The judge was alive to these issues and weighed them in the balance. He proceeded on the evidence that a single person full adoption would not be recognised in Italy (now subject to the caveat of the Constitutional Court's judgment), and that EO would remain an Italian national. He had regard to the evidence as to the possibility of a lesser order in England. However none of this persuaded him that an adoption order was not required. It is clear that he was heavily influenced by the contrast between the certainty, stability and other benefits provided by an adoption order in favour of the petitioner as against the uncertainties and further delays involved in Italian and English alternatives. He was particularly keen to free EO from "undermining and destabilising litigation". Earlier we noted that when discussing the possibility of a residence order the judge appears to have overlooked the doubts as to its competency given that EO lives in England. However, any error in this regard is of no moment since any orders lesser than adoption available in England would mean that his parents would retain residual parental rights and responsibilities, something which the judge considered, in our

view correctly, as contrary to EO's best interests. Making no order or anything less than an adoption order would deny EO the opportunity of being accepted by the petitioner as her son, legally and emotionally, for life, an outcome EO has made clear he wants, see paragraph 150 of the opinion.

[50] During the hearing counsel listed the main risks and complications of non-recognition of the order in Italy and other countries, summarised above at paragraph 20. It will always be possible to assert that a judge could have said more when setting out his reasons, but there is no reason to think that the judge was ignoring these factors. He was aware of the analysis in *In Re N* and the need to take into account that the order may be ineffective in other countries that the child and his adopter may wish to visit, see paragraph 153 of his opinion. For ourselves we have no difficulty with the view that the potential international complications are out-weighed by the factors pointing to an adoption order. We agree with judge and the submission for the petitioner that having spent almost all his 9 years in care, what EO needs, and without further delay, is a stable, harmonious and predictable environment which will sustain him in his childhood and adolescent years, and then beyond. The evidence was that the petitioner is well-placed to provide such for him. In any event, there was no evidence that an English lesser order would be sought, nor that if it was it would progress quickly and unopposed; indeed the opposite is by far the more likely.

[51] The judge's full analysis was summarised earlier. The findings in fact and the evaluation and weighing of the competing considerations were primarily a matter for him. We see no merit in the submission that his assessment was one-sided and unfair on the parents. We have identified no errors or deficiencies in his overall approach, his reasoning, and the reliance on the key factors set out in paragraph 156 of the opinion. In the whole circumstances the judge was fully entitled to conclude that only the adoption order sought

by the petitioner will provide EO with the security and stability he needs. The over-arching criticism that he failed to provide an adequately reasoned and clear proportionality and necessity analysis, sometimes termed a "global and holistic" evaluation, is not accepted. There is no incompatibility with either ECHR or UNCRC.

Disposal

[52] In our view there is no merit in any of the grounds of appeal. Both parties pointed out a minor technical error in paragraph 3 of the judge's interlocutor, namely the reference to the 2009 Regulations. That will be corrected, but otherwise the reclaiming motion is refused.