IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FAMILY & PROBATE DIVISION
ADOPTION CAUSE NO. 13 OF 2022

IN THE MATTER OF THE ADOPTION OF CHILDREN ACT (CAP 26:01 OF THE LAWS OF MALAWI)

-AND-

IN THE MATTER OF THE ADOPTION OF K.A.Z. (A MALE INFANT) OF XXX VILLAGE, TRADITIONAL AUTHORITY XXX, XXX, PRESENTLY IN THE CARE OF XXX (CHILD CARE INSTITUTION), P.O. BOX XXX, XXX, MALAWI

AND

IN THE MATTER OF A PETITION FOR THE ADOPTION OF THE SAID K.A.Z.* (A MALE INFANT) BY A.D.F.M.E.M.D.R. OF XXX, NO. XXX, APARTMENT NO. XXX, XXX, STATE OF XXX, XXX

BETWEEN:
A.D.F.M.E.M.D.R.* …….. PETITIONER

-AND-

K.A.Z.* (INFANT)…….…….…... RESPONDENT
-AND-

ENOCK BONONGWE ……..GUARDIAN-AD-LITEM

(*Names withheld to protect the identity of the infant)

CORAM: THE HONOURABLE JUSTICE FIONA ATUPELE MWALE

Soko, Counsel for the Petitioners

Mpandaguta, Court Clerk

In attendance:

K.A.Z., the infant

A.D.F.M.E.M.D.R, the petitioner

J.D., biological father of the infant

J.M., maternal grandmother of the infant

N.V.E., Director, child care institution

Mr. Enock Bonongwe, Guardian-ad-Litem

MWALE, J

JUDGMENT

Introductory Background and Facts

1. Before me is a petition for the adoption of a male infant, K.A.Z. aged one year and seven months. He is a single orphan whose mother died in childbirth. The infant's father is still alive and together with the infant's maternal grandmother, have relinquished parental responsibility over the infant and have given consent for the adoption. The petitioner, Dr. A.D.F.M.E.M.D.R is a XXXian national aged 41years. He is resident in XXX.

2. There are filed in these proceedings the Petition itself and in addition, the following:

2.1 Sworn Statement verifying the Petition sworn by the petitioner;

2.2 The petitioner's passport;

2.3 The articles of association of the school to which the petitioner is a partner;

2.4 The articles of association of the medial practice to which the petitioner is a partner;

2.5 The transfer of land documents verifying ownership of a piece of land in the urban centre;

2.6 Income tax returns showing the petitioner's annual income;

2.7 A medical and physical health assessment report, certifying the petitioner as fit to adopt;

2.8 Certificate of filing from the Judicial Branch of the Federal Regional Court of the 2nd Region certifying that the petitioner has no criminal, civil or tax related actions against him;

2.9 A police report from the Ministry Justice and Public Security, Federal Police Department certifying that the petitioner has no criminal record;

2.10 The infant's birth certificate;

2.11 The infant's mother's death certificate;

2.12 The petitioner's full professional qualifications; and

2.13 Sworn statements by the petitioner's mother, M.D.R.D.F.M., and his brother P.D.F.M.E.M.D.R. undertaking to look after the infant in the event of the petitioner's death or incapacitation.

All official documents were duly apostilled, and all originals were made available to the Court for verification.

3. In compliance with rule 8 of the Adoption of Children (High Court) Rules, an application for the appointment of a Guardian -ad-Litem was also filed and the Director of Social Welfare was appointed Guardian-ad-Litem in these proceedings. Mr. Enock Bonongwe the Deputy Director of Social Welfare duly took up this role and filed a Gaudian-ad-Litem Report. Counsel for the petitioner also filed Skeleton Arguments which were adopted at the hearing. In addition, this Court having noted prevarication in the infant's biological father on the issue of consent, also directed Counsel for the petitioner to file additional arguments to support a number of legal issues that had arisen in the course of the proceedings.

4. By way of background, as alluded to earlier, the infant's mother died at childbirth and the infant was left with health workers until he was placed at XXX a child care institution which I shall refer to as the orphanage. With regard to the father, according to the Report of the Guardian -ad-Litem, he is a 27-year-old man who has no capacity to take care of the infant. Further, he is an itinerant seasonal worker. The biological father does have another child from a previous relationship though, whom he supports. The infant's biological grandmother is of advanced age and has no source of income. According to the Report of the Guardian-ad-Litem, she therefore lacks the capacity to provide care for the infant. The infant's biological father and other extended family members discussed the plight of the infant and concluded no family member is able to care for him and hence their relinquishing parental rights to make way for adoption.

5. The petitioner according to the Guardian-ad-Litem's Report, is a 41-year-old bachelor. He has never married. It is on record that previously, his life was all about pursuing academic dreams and financial stability such that he has not had the chance to have a family. He now feels that the time is right and since none of his three siblings has been able to give his mother grandchildren, he believes that he can do so through adoption, now that the time is right.

6. By way of background, the petition was heard on two days. At the first hearing on 9th August 2022, the Court had opportunity to examine the all the parties and to observe the interaction between the infant and the petitioner. Both biological family members who gave consent were examined at length about their decision and whether it had been arrived at freely and willingly without any external inducement or payment of consideration. Both were consistent and confirmed that they had firmly resolved to relinquish parental responsibility having consulted the extended family at large (as per custom) and that their means were by no means sufficient to sustain the welfare and needs of the infant.

7. During examination by the Court, the biological father was warned about the criminal law implications of his failure to provide for the needs of the infant under sections 164 and 165 of the Penal Code (Cap. 7:01 of the Laws of Malawi). I took time to inform him that pursuant to these provisions in the Penal Code, neglect of a child or failure to provide the necessaries of life to a child having the means to do so is an offence.

8. Although it was on record that the biological father has very limited means, it was his testimony during examination by the Court that he has another child

whom he supports. It was important in these circumstances for the Court to determine the basis upon which he decided with the means available to him, that he would only maintain one particular child. His response was that the other child aged 8 years, is of school going age and has a mother. Consequently the biological father is better able to assist that other child since being a single man he cannot look after a small child.

9. When asked to expound on his response considering that that the petitioner is also a single man with no wife, the biological failed to give a tangible response, other than that his assistance to the other child is not substantive. As the Guardian-ad-Litem report was not detailed on this aspect, it is very difficult for the Court to make a determination as to the precise means of the biological father. This is an area that the Guardian-ad-Litem needs to improve on in report writing. If a parent can afford to support one child, then the nature of this support should be explained so that a court can decide as a matter of fact whether such parent can indeed not afford to support the infant up for adoption. I urge Guardian ad-Litems to take serious heed of this direction in the conduct of their role.

10. It also emerged during the Court's examination of the petitioner that his legal counsel had been the one who organized the obtaining of consent from the infant's birth family and not the Department of Social Welfare as is routinely the case.

11. It was very evident during the hearing that the petitioner and the infant had not bonded. The infant was carried on the back of the Director of the orphanage the entire time. The petitioner did not even look in the direction of the infant

during the proceedings until the one time that the infant woke up and started to fuss. At this point, the Director of orphanage brought the infant down from her back to pacify him and it was only then that the petitioner glanced in his direction. This lack of connection was a matter of great concern to me. Consequently I specifically examined the petitioner as to how long he had been in the country and whether he had spent time with the infant. His response was that he had been in the country for about 10 days and that as the infant was still young and naturally wary of him, more time was needed for a bond to form.

12. In view of the circumstances I ordered that the Guardian-ad-Litem supervise visits between the petitioner and infant for a period of 2 weeks, during which the bonding process would be facilitated, observed and supervised. The Guardian-ad-Litem was to present his report on the bonding process at the next hearing, at the conclusion of the stated period.

13. Prior to the date of the second hearing, this Court received a letter dated 18th August 2022. The letter was written by the infant's biological father, revoking his earlier consent for adoption. The contents of the letter, written in the vernacular, explain the reason for the change of heart. I reproduce below the relevant parts as follows:

> *"Ndinabwela ku court pa 9 August 2022 pakhani yoti apite ku adoption. Nditaona ndikumva za bambo yemwe akutenga K. sindinakhutire popeza bamboyo alibe banja amakhale yekha ndipo anakana mwantuwagalu kuti sadzakwatira.*

Ndiye ine J.Z. ndasitha maganizo sindifuna mwana wanga kukasungidwa ndi munthu opanda mkazi kotero ndikunena motsimikiza kuti K. asapite ku adoption pokhapokha tipeze banja lina loti muli mayi ndi bamboo ndipo ndaganiza zomutenga mwanayu kukahala naye kumudzi kuti ndimusamale ndekha.

Ine J."

In essence, it is the biological father's position that having found out at the hearing that the prospective adoptive parent is a single man who stated outright that he has no intentions of getting married, the biological father is uncomfortable to proceed with the process of adoption. He is therefore willing to withdraw the infant from the orphanage and take care of the infant himself until a family which consists of a married couple is identified.

14. On the date of the second hearing, on 26th August 2022, the biological father confirmed the sentiments in the letter. Since he is illiterate and can only write his own name, he had asked someone else to write the letter withdrawing consent on his behalf. He went on to confirm that after he found out during the proceedings that the petitioner is a single man like himself, he saw no reason why he shouldn't be able to take care of the infant himself. He therefore felt that he was better off looking after his own child.

15. The dynamics of the relationship between the petitioner and infant were markedly different at the second hearing. In an almost theatrical manner, both the infant and the petitioner appeared in Court wearing identical or matching outfits. The infant was no longer in the arms of the Director of the orphanage,

but in the arms of the petitioner. I also noted though the presence of a stranger in chambers who was helping the petitioner with the infant was holding the infant's milk bottle. In view of the privacy requirements of such proceedings I asked that this gentleman be identified and that his role in the proceedings be clarified. The petitioner's response was that, "*he is with me, he is my driver*." The gentleman thereafter left the chambers and the petitioner proceeded to look after the infant on his own.

16. A supplementary Report of the bonding process was submitted in the proceedings by the Guardian-ad-Litem. Photographs of the infant in the company of the petitioner were submitted as part of this Report. The purpose of the supervision, according to the Report, was to "observe key milestones in the bonding process" and to "determine whether or not the child can live with the Petitioner without the assisted care of the orphanage caregivers." I reproduce below the methodology of the supervision as stated in that report:

> "*The supervision was arranged in such a way that the Petitioner had free access to the child. The methodology involved getting reports from the orphanage caregivers, virtual observation, interviews and direct observation. There were three levels of supervision in terms of its progressive trend. Level one involved observation of the Petitioner playing in the presence of orphanage caregivers. The second level involved periodic outing with the child in the company of caregivers, the second level involved periodic outing of the child away from the orphanage without the company of caregivers. This was done to gradually develop the bond and the movement to the next level and was dependent on achievement of the preceding level*."

The Guardian-ad-Litem reported all three levels went well and obvious signs of bonding were documented.

17. The Guardian-ad-Litem, however further reported that the petitioner flew into the country on 7th August 2022, 2 days before the court date hence the initial lack of bonding. This finding directly contradicts the petitioner's own testimony under oath that he had been in the country for about 10 days and had occasion to spend time with the infant.

18. The Guardian-ad-Litem also expressed the opinion that the petitioner seemed to have embarked on this process relying on his family in XXX to provide care for the infant. The fact that there has to be a definitive parent charged with the care of the infant seemed to have initially eluded the petitioner and this was only enforced during the bonding process when he realized he would have to take care of the infant. This observation is also in stark contrast to the evidence of the petitioner who gave the Court every assurance that he would be the primary care provider and would be assisted by domestic helpers, with the family only assisting from time to time.

19. This incident at the outset of the second hearing in which the infant seemed to have taken to a third party stood in contrast to the first hearing in which the infant had not taken to the petitioner. The fact that a driver had bonded enough with the infant for the driver to have walked into the hearing and was assisting with the infant's care meant that the infant had gained a level of familiarity with him. Considering that the infant had not taken to the petitioner during the first hearing, it is surprising the same infant had easily taken to the driver. The

driver must therefore have spent a considerable amount of time with the infant for that bond to have developed. It stands to reason that the petitioner must have either been leaving some of the care of infant to the driver or the infant spent considerable time with both. Such would be consistent with the Guardian-ad-Litem's concern that the petitioner gave the impression that he expected the day-to-day care of the infant to family members and did not envisage himself as the primary carer. Whilst the petitioner is free to get help in raising the infant once in his care, at this stage, the petitioner must demonstrate his commitment to the care, thus his conduct was not inspiring in this regard.

20. The Guardian-ad-Litem also subtly in his Report and more overtly during the proceedings brought out the issue that there seems to be discomfort in the petitioner being a single man which "seems to grow both from the perspective of the orphanage and the child's biological father". He reported that the biological father had called him on 16th August to withdraw his consent but as Guardian-ad-Litem, he responded that he had "no jurisdiction nor process for withdrawing consent, the GAL advised the biological father that this will be reported to the court through the appropriate channel." The Guardian-ad-Litem further concludes as follows:

> "*The Director of XXX Foundation is perhaps not supportive of this adoption drawing from conversation this GAL has had with her*."

21. Finally, the recommendations consequent to the findings in this Report, were as follows:

Guided by international and local safeguarding instruments, this GAL believes that adoption is all about the child and state agencies should endeavour to secure the best interests of the child. In this adoption matter I have observed that we have a single male Petitioner who we doubt his intention and quality of care in adopting this child on the one hand and on the other hand a biological father who intends to withdraw consent on the other.

In deciding this matter, the Court should consider that;

There is improvement in the bonding process and the child has been in the care of the Petitioner for some days. This shows that the child has adapted to the environment of the Petitioner. However, we cannot guarantee the continuity of this bonding process once the Petitioner is outside the country and is back to his normal business.

The biological father intends to withdraw consent in support of this adoption. It is important to hear from the biological father why he has changed his mind and would like to withdraw consent.

The Department of Social Welfare has observed that the orphanage director seems to have influence on the decision which ordinarily falls under Social Welfare. It is important to spell out the role of childcare institutions in decisions regarding adoption.

> *There should be guidelines for assessing eligibility of single male Petitioners to adopt a child which should include an accompanying female relative.*
>
> *Based on the foregoing, I would recommend to the Honourable Court to delay granting of order of adoption or grant the order with conditions for post-adoption supervision."*

These recommendations had evolved since the first Guardian-ad-Litem Report which had recommended adoption with only one caveat as follows:

> "***Careful consideration of a single man adopting a child***. *The natural family unit consists of married couples and commonly there have been single women adopting children. Although we may not discriminate against single men adopting children. Rarely do we have single men adopting children, there must be careful consideration of the motivation for adopting a child and the quality of care given to the child knowing that men are not natural care givers. The court should in these circumstances be satisfied that the adoption motivation is the best interests of the child and not a mere acquisition of the child to serve the interest of the Petitioner*."

22. The Director of the orphanage who was in attendance by virtue of her role as the infant's current care giver, sought permission to address the Court. Considering the accusations of meddling leveled against her, it was only fair that she respond. Under oath, the Director testified as to how it was the biological family of the infant that reached out to her, and not the other way

round. According to her, the family told her how they were surprised to learn, for the first time during the hearing, that the petitioner was a single man. It was her testimony that she told the family that she is not part of the legal process and as such, they should refer their concerns to the Department of Social Welfare. She took great exception to being accused of influencing the decision of the biological family in any way.

23. In addition, the Director of the orphanage questioned how the Guardian-ad-Litem prepared his report because what he documented was far from what had transpired in reality. According to her, after the first hearing, there was no actual supervised visit as ordered by the Court. She was only aware of a virtual conference or "Zoom" call in which Social Welfare spoke to the petitioner who was visiting the infant at the orphanage. The infant was subsequently picked up to go with the petitioner, purportedly to XXX, a destination which the Director cannot confirm. I quote verbatim the testimony of the Director with regard to the veracity of the Report:

> "*I am so sorry that so many lies have been said but I want to stand for the truth. I just want to tell the truth*."

24. The petitioner was given an opportunity to speak thereafter and his response was that he had visited the infant every day for a week and had taken part in feeding and changing diapers. There were photos in evidence that did show the petitioner in a variety of settings, interacting, feeding, playing with and socializing with the infant and other children and adults. The Guardian-ad-Litem, to the contrary, did not offer a response to any of the claims made by the Director of the orphanage.

25. At the close of the hearing, counsel for the petitioner was directed to file supplementary arguments for which I am grateful.

The Law

26. Section 3 of the Adoption of Children Act (Cap 26:01 of the Laws of Malawi) provides for restrictions on the making of orders on adoption as follows:

> *(1) An adoption order shall not be made in any case where—*
>
> *(a) the applicant is under the age of twenty-five years; or*
>
> *(b) the applicant is less than twenty-one years older than the infant in respect of whom the application is made:*
>
> *Provided that, where the applicant and the infant are within the prohibited degrees of consanguinity, it shall be lawful for the court, if it thinks fit, to make an order notwithstanding that the applicant is less than twenty-one years older than the infant.*
>
> *(2) An adoption order shall not be made in any case where the sole applicant is a male and the infant in respect of whom the application is made is a female unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.*
>
> *(3) An adoption order shall not be made except with the consent of every person or body who is a parent or guardian of the infant in respect of whom the application is made or who has the actual*

custody of the infant or who is liable to contribute to the support of the infant:

Provided that the court may dispense with any consent required by this subsection if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with.

(...)

(5) An adoption order shall not be made in favour of any applicant who is not resident in Malawi or in respect of any infant who is not so resident.

27. Section 4 of the Act places a further duty on the Court on matters to which it must be satisfied before it can make an order as follows:

The court before making an adoption order shall be satisfied—

(a) that every person whose consent is necessary under this Act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case

of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;

(b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant; and

(c) that the applicant has not received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction.

As the welfare of the infant under section 4 (b) of the Adoption of Children Act is interpreted to require the Court to consider the best interests of the child in the grant of an order of adoption. The twinning of the two concepts (best interests of the child and welfare) find justification under section 23 (1) of the Constitution which provides as follows:

> *"All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be <u>a primary consideration</u> in all decisions affecting them"* (Emphasis supplied).

28. As was determined by this Court, ***In the Matter of the Adoption of Children Act and In the Matter of EM and SM,*** Adoption Cause No. 1 of 2017, High Court, Lilongwe District Registry (unreported):

> "*Adoption petitions are heard by the High Court as an exception to the general rule under section 134 of the Child Care Protection and Justice Act which gives generally child justice court's jurisdiction "over children matters". However, it is clear from the decision in* ***In the Matter of the Adoption of Children Act and in the Matter of the Adoption of Children Act and in the Matter of P.S. (a male infant),*** *Adoption Cause No. 10 of 2012, Lilongwe District Registry (unreported) that the High Court has jurisdiction over inter-country adoption matters by virtue of section 9 of the Adoption of Children Act. In its exercise of jurisdiction over children the High Court must comply with the requirements of the Child Care, Protection and Justice Act and most importantly, it must give primacy to the rights of the child as set out in the Convention of the Rights of the Child (See section 88(b) of the Child Care Protection and Justice Act). In particular, as the Malawi Supreme Court of Appeal determined in* ***In the Matter of the Adoption of Children Act and in the Matter of C.J.*** *(a* ***female infant)*** *(cited above), the primary consideration in the grant of an order of adoption is "the best interests" of the infants concerned."*

29. Further, section 10 of the Adoption of Children Act further proscribes the giving or making of payments as follows:

> "10. *It shall not be lawful for any adopter or for any parent or guardian except with the sanction of the court to receive any payment or other reward in consideration of the adoption of any infant under this Act or for any person to make or give or agree to make or give to any adopter or to any parent or guardian any such payment or reward*."

30. With regard to responsibilities of biological parents and guardians, sections 164 and 165 of the Penal Code criminalize neglect and desertion of children where parents do so despite having the means to maintain he children. Viz:-

> *"164. Any person who being the parent, guardian or other person having the lawful care or charge of a child under the age of fourteen years, and being able to maintain such child, wilfully and without lawful and reasonable cause deserts the child and leaves it without means of support, shall be guilty of a misdeamenour.*
>
> *165. Any person who, being the parent or guardian or other person having the lawful care or charge of any child of tender years and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding and other necessaries for such child, so as thereby to injure the health of such child, shall be guilty of a misdemeanour."*

31. Issues of discrimination also arise in this case and section 20 (1) of the Constitution expressly proscribes discrimination as follows:

> *"Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition."*

Issues Arising

32. From the foregoing discussion of the factual background of this matter and the law, in determining whether the petitioner satisfies the legal requirements for the grant of an order of adoption other important issues also arise. These are issues over which the law is either silent or unclear about in view of the facts of the matter and the surrounding circumstances or issues that the Guardian-ad-

Litem has sought the Court's guidance on. In sum, these issues are:

32.1 Does the current status quo in which a non-resident petitioner who is not in the country *in itinere* permit the courts adequate opportunity to assess whether the adoption would be in the best interests of the child?

32.2 Can a biological parent withdraw consent and if he or she can, under what circumstances?

32.3 Who should facilitate the obtaining of consent, the legal practitioners of the parties or the Guardian-ad-Litem?

32.4 Can the courts make a direction as to whether or not single male applicants should be allowed to adopt or make recommendations on the requirements in such matters as has been requested by the Guardian-ad-Litem?

32.5 What is the Guardian-ad-Litem's role in adoption proceedings?

Court's Reasoned Determination

33. As can be seen from the issues arising in the matter before me, the grant of an order of adoption is not a run of the mill decision. I take every opportunity to inform prospective adoptive parents at the outset of every hearing that adoption is founded on social work practice and the effectiveness of the judicial function relies heavily the work of the Guardian-ad-Litem. A judge only encounters the prospective adoptive parents and infant for a limited time period, barely extending over an hour and has to make a decision that will impact both the infant and the prospective adoptive parents for their entire lifetime.

34. Whilst the judge must assess the situation and analyse the evidence in determining the best care option for the child, it must be remembered that care decisions are primarily the remit of social workers whose training enables them

to apply a forensic approach in making good assessments of complex family situations so that they can produce reports that enable the courts to reach fair and balanced judgments. Considering that judicial officers have no social work training and decisions in care proceedings must be informed by sound guidance from social workers, without leaving the final decision to them. Judge Leonard Edwards (Ret.) of the Santa Clara Superior Court in the United States of America wisely warned against delegating judicial decision making to social workers when he stated as follows:

> *"Perhaps it would be easier of these decisions were made by the social worker. The judge would only have to say "so ordered" and stamp the file with the judge's signature. But that is not the law. The law is clear that it is the judge who must make these decisions and the judge must explain the basis for these decisions*."[1]

35. This confirms the notion that the time the judge spends with the parties is crucial. This time presents a unique window in which the eye of the judge must pick up on specific nuances of the relation between the prospective adoptive parent and the infant and form an opinion. This window thus affords the courts an opportunity to test the sincerity and eligibility of the petitioner in fulfilling the objectives of adoption.

36. The primary role of the Guardian-ad-Litem is to ensure that any care arrangements and decisions for and about children protect them, promote their welfare and are in their best interests. In essence, the Guardian-ad-Litem is

[1] Judge Leonard Edwards (Ret.); "Judges and Social Workers" The Bench, Summer 2019 at p.6.

the voice of the infant in adoption proceedings. The Guardian-ad-Litem being a social worker by profession must also support the court in adoption proceedings by providing it with the professional expertise in social work, upon the basis of which the judge must make his or her decision. Faced with evidence provided by the Guardian-ad-litem, the judge must scrutinize it. The judge must also safeguard not just for the child's need for decisiveness but also balance the interests and protect the rights of the biological family and the prospective birth parents and their need for justice. Ultimately, the judge must all the while prioritize the child's best interests as a paramount consideration. The judge is therefore not a rubber stamp for recommendations of the Guardian-ad-litem although they play a significant role in his or her decisions.

37. Further, the Guardian-ad-Litem in the performance of his or functions must be forward looking. The sheer desperation and absolute need for children who are up for adoption makes it very attractive to recommend adoption to just about any prospective adoptive parent who comes forward. Faced with such desperation, any person seems to offer a better life than the life the child is currently facing. The matter before me has demonstrated that paying attention to the underlying issues is important to determining whether the long-term prospects of the child will really improve or not. The courts have no crystal balls with which they can see into the future, and they are not expected to see into it. They must however, based on the sound evidence before them, be able to make a decision that will positively impact the life of the child from the time he or she is adopted, until they become adults.

38. The matter before me has shown that the limited time of observation that the Guardian-ad-Litem had to monitor the infant and the petitioner did not give

sufficient opportunity for the Guardian-ad-Litem to be satisfied about the petitioners parenting abilities as a lingering doubt hovers. Whilst it is not possible to see into the future, it would not be in the best interests of the child to make permanent decisions in the face of lingering doubts. Any uncertainty or doubt must therefore be exercised in favour of the infant as it is at the infant whose entire life the decision hangs on. In the words of Lord Justice MacFarlane in ***Re W (A child)*** [2016] EWCA Civ 793 the final arbiter in any decision concerning the child, is the child themselves. Thus,

> *"The final tribunal in this case is not us or the Supreme Court. It is A herself. In later life A will probably read these judgments on the internet. She will decide whether the positions adopted ... were reasonable. She will also make up her mind whether we were right or wrong ...."*

It is against this background that my determination proceeds.

Has the Petitioner Fulfilled the Requirements of the Adoption of Children Act?

Age restrictions

39. The starting point in my analysis of the matter before me must begin with whether the requirements of the law have been satisfied. As alluded to earlier, section 3 of the Adoption of Children Act sets out the restrictions to adoption. In terms of sections 3 (1) (a) and (b) of the Adoption of Children Act, the petitioner satisfies the age requirements for adoption and the age difference between him and the infant is also with the range stipulated by the Act, respectively.

Status and Sex of Petitioner

40. Much ado has arisen with respect to the fact that the petitioner is a single male. There is no restriction however under section 3 of the Adoption of Children Act with regard to the marital status of the applicant, nor is there any restriction proscribing a single petitioner from adopting an infant of the same sex. This nevertheless is not the end of the story. Section 3 (2) of the Adoption of Children Act does nonetheless make some restrictions for "sole" applicants which are worth considering in the matter before me. Section 3 (2), which has already been reproduced earlier, proscribes a sole male applicant from adopting a female infant, "*unless there are special circumstances which justify as an exceptional measure the making of an adoption order*."

41. Whilst section 3 (2) of the Adoption of Children Act does not appear to expressly apply to the matter at hand, surrounding factors must still be taken into consideration. To begin with, in its express and ordinary language, section 3 (2) of the Adoption of Children Act is discriminatory. I have had occasion to comment on the anachronistic nature of this section in the past. In view of our current constitutional order, the provision not only offends against the right to equality under section 20 of the Constitution, it also fails to take into account current or modern-day realities. The mischief that was sought (at the time of its drafting) to be avoided by preventing a male petitioner from adopting a female child in the absence of special circumstances was based on the then prevalent myth that it is only males perpetrators who abuse female children sexually. It is however increasingly becoming a problem worldwide that sexual abuse is not restricted to perpetrators of a different sex from the child. Sexual, or indeed any other type of abuse, may equally be perpetuated by a female

petitioner adopting a male child or a petitioner of either sex adopting a child of the same sex. The position of the law as it currently stands provides little protection and it my reasoned opinion that Government should speedily amend section 3 (2) of the Adoption of Children Act so that any threats to the protection and welfare of the child through are adequately dealt with, taking into account present day realities. I urge the Ministry responsible for child welfare and the Ministry responsible for Justice to take heed of this recommendation as a priority.

42. Section 3 (2) has given rise to discussion in a number of decisions of this Court. Two examples are ***In the Matter of the Adoption of Children Act and In the Matter A.B. (A Male Infant)*** Adoption Cause No. 13 of 2015, HC, Lilongwe District Registry and, ***In the Matter of the Adoption of Children Act and In the Matter F.M. (A Male Infant)*** Adoption Cause No. 12 of 2015, HC, Lilongwe District Registry. In both these cases, a single female petitioner sought to adopt a male child. It was acknowledged in former case that the discriminatory effects of section 3 (2) of the Adoption of Children Act cannot be cured by simply applying the statutory interpretation maxim that by the legislator expressly excluding single males from adopting male children must have meant that reverse situation was included. Thus by excluding males from adopting female children, females can adopt male children. Such an interpretation is discriminatory and cannot stand in light of section 20 of the Constitution. To avoid discrimination on the grounds of sex, it would be tempting to conclude that the mischief intended to be prevented by section (2) can be achieved by preventing all single persons from adopting children of any sex. However, that too would breed discrimination on the basis of marital status. Both cases therefore proceeded on this premise.

43. Proscribing adoption by single parents would also obliterate the realities of modern life. Conventionally, if not stereotypically, married couples are considered the best parents for children, especially those who are adopted. The basis for such favoured consideration is that married couples are mythically considered more stable and committed to one another, making them more capable of being consistent parents than unmarried persons. This stereotypical assumption ignores the realities that married couples may end up divorcing and may end up being terrible parents. Of course either of the married parents could abuse the child in many ways, either unknown to the other spouse or with the other spouse choosing to ignore the abuse.

44. As was stated in the case of ***In the Matter of the Adoption of Children Act and In the Matter F.M.*** (cited above),

> *"The best interests of a child require that in all circumstances of adoption that the child be offered a stable loving family environment. In the ideal situation, such an environment is provided by a married couple. This scenario, I must stress, is the ideal. Given the appropriate extra measures, a single parent can provide just as well for a child as can a married couple. There are some obvious challenges that a single parent may face, for example, not having an extra income or not having the physical and emotional support of a spouse in parenting the child. These are not insurmountable challenges and with such measures as a sizeable income and family support, for example, a single parent can, depending on the circumstances, make an equally suitable adoptive parent as a married couple.*

This position is consistent with international best practices. To provide an example, the adoption process in South Africa does not preclude single parents from adopting as South African law does not discriminate against single parents. The screening process, however, will specifically deal with the ability of the single parent to cope with raising a child on their own. As a single person their support structures become vitally important in raising a child and this is also examined. If the single parent is successfully screened, a child will be matched according to the wishes of the birth parent(s), the needs of the child, and the specific ability of the single parent to cope with a child as a single parent. It is therefore critical that these particular requirements should form part of the report of the Guardian-ad-Litem so that the court is satisfied that the single parent is indeed eligible to adopt.

45. Thus, rather than an outright ban against single persons adopting, the condition in section 3 (2) of the Adoption of Children Act should be emphasized, namely that adoption orders in cases by single petitioners will only be granted if there "special circumstances which justify the making of the adoption order."

46. Both ***In the Matter of the Adoption of Children Act and In the Matter F.M.*** (cited above) and ***In the Matter of the Adoption of Children Act and In the Matter A.B. (A Male Infant)*** (cited above), differ from the present one in that the petitioners were female. However both had in place measures that mitigated the fact that the applicant was single. There were no credibility issues with the petitioners and the Guardian-ad-Litem had occasion to observe both the infant and the petitioner and the infant in the home environment for a sustained period of time. Thus, ***In the Matter of the Adoption of Children Act and In the Matter F.M.*** (cited above) for example,

> *"The starting point in ensuring the child's protection is to refer to the age difference between the infant and the prospective adoptive parent. The infant in the matter before me is at the time of judgment 16 months old and has been in the custody of the petitioner since he was a few months old. A mother child bond has formed between the two from the evidence presented in the entire matter, which I cannot ignore. From the evidence before me in the form of the testimony of the Guardian-ad-Litem and the police checks the petitioner has not abused the child in any way. It is also in evidence that based on the nature of petitioner's job as a teacher, working internationally, rigorous scrutiny for any record of child abuse is demanded and this allays any fears I may have had as to the potential for abuse in this matter."* (Emphasis supplied)

47. ***In the Matter of the Adoption of Children Act and In the Matter A.B.*** (cited above), the petitioner had also fostered the infant for a significant time period prior to the adoption. Although she was not married, she had been cohabiting with a gentleman and had therefore been in a serious relationship for 5 years. The gentleman availed himself for police checks and was found to be without criminal record. Her whose household and the significant persons in the child's life were therefore all assessed. She was therefore only technically single.

48. Most importantly, in both the cases cited above, the petitioners were both resident and working in Malawi. Although they were foreign applicants, they had been resident in the country for a fair amount of time. The infants had been in their continuous care for considerable time before they came to court for the proceedings, which stands in stark contrast to the current situation where the

petitioner had just flown in two days before and then proceeded to lie to the Court about the length of time he had been in the country.

49. The special circumstances in these previous cases emanate from the fact that the petitioners were in the country and the infants had been assessed in these homes. The Guardian-ad-Litem had first-hand experience of the infant in the home environment and was able to make a recommendation based on that experience. I must therefore conclude that on the basis of the facts before me, there is nothing to anchor any special circumstances on, and accordingly find that there are no special circumstances to justify the grant of an order of adoption to a single petitioner. My finding is reinforced by other findings which I discuss below.

50. The Guardian-ad-Litem has in professional opinion asked the Court to exercise caution and even delay the grant of an order for reasons I repeat below:

> *In this adoption matter I have observed that we have a single male Petitioner who we doubt his intention and quality of care in adopting this child on the one hand and on the other hand a biological father who intends to withdraw consent on the other.*

As alluded to earlier, the Guardian-ad-Litem has also stated that:

> "***Careful consideration of a single man adopting a child***. *The natural family unit consists of married couples and commonly there have been single women adopting children. Although we may not discriminate against single men adopting children. Rarely do we have single men adopting children, there must be careful consideration of the*

motivation for adopting a child and the quality of care given to the child knowing that men are not natural care givers. The court should in these circumstances be satisfied that the adoption motivation is the best interests of the child and not a mere acquisition of the child to serve the interest of the Petitioner."

The first observation is very compelling and consistent not only with my own observations after examining the petitioner but is also within the remit of the Guardian-ad-Litem's professional expertise. The petitioner's lack of veracity to the Court, and the doubt expressed by the Guardian-ad-Litem in the petitioner's ability provide care as well as in his intentions raises doubt which this Court cannot ignore. Whilst I am alive to the fact that lies can be told for a number of reasons, in adoption proceedings which require the utmost good faith, lies on such a trivial matter as this raises red flags about the suitability and motives of the petitioner. Not only are there no special circumstances to enable the grant of an adoption order to a single petitioner, the petitioner in question has conducted himself in a manner that leaves the Court with doubt and such doubt must be exercised in favour of the infant, in his best interests.

Consent

51. There are other reasons which cumulatively and in the alternative prevent me from granting the order of adoption to the petitioner. One such reason emanates from the consent to adoption that was given in this matter. It is a requirement under section 3 (3) of the Adoption of Children Act that parental consent be given before an order of adoption can be made. As alluded to earlier, two parties gave consent, the biological father and the grandmother. The consent

must be given by "every person or body who is a parent or guardian of the infant …" (underlining supplied.) There is however a proviso to this provision by which a court can dispense with the requirement for consent "*if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant, or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all circumstances of the case to be dispensed with*."

52. Thus, according to section 3 (3) of the Adoption of Children Act, it is every person or body who is the parent, guardian or person who has actual custody or who is liable to contribute to the support of the infant who are legally required to give consent. The grandmother is not a 'parent' at law and there is an existing and available parent. In order to be considered as a person whose consent is required, she would have to have been granted legal guardianship or be a person in actual custody or liable to support the infant. This is not to water down the significance of her position as a grandmother at customary law. In terms of statutory law however, her consent was a mere formality and not a legal requirement. Strictly under the Adoption of Children Act which requires the consent of every person within the eligibility spectrum it is the consent of the biological father and the Director of the orphanage who was in actual custody of the infant that fall within the legal spectrum. Since the consent of the person with custody is required in the alternative to the consent of the parent, it was not necessary for the Director of the orphanage to give consent in these proceedings.

53. The biological father originally consented to the adoption and his Consent to Adoption Order in accordance with the requirements of the Act was filed and tendered in these proceedings. As alluded to earlier, the Infant's biological father went on to confirm his consent in the course of the proceedings when I took great care and caution to examine him with a view to assessing whether such consent was freely given, without inducement and whether he had understood the consequences of such consent. Even when faced with the adverse consequences is he was simply giving consent as an escape clause to get away from his parental responsibilities, the biological father was resolute that he was freely giving his consent. When asked why the biological father felt he was unable to provide care to the infant because he is a single man when the petitioner, also a single man was able to do it, the petitioner seemed unmoved in his resolve. It was only some days after the proceedings that he decided to write to the Court to withdraw consent.

54. Two questions arise from this state of affairs. First, can consent, once given be withdrawn and if so, at what stage. Secondly, is the biological father a person whose consent ought, in the opinion of the Court and in all circumstances of the case, to be dispensed with as required by the proviso in section 3 (3) of the Act as has been argued by counsel? Although counsel for the petitioner provided me with Supplementary Skeleton Arguments, they have not touched on the first issue and have only fleetingly addressed the second.

55. In most jurisdictions the question whether consent can be withdrawn and what stage has been expressly provided for by statute. Case law in the area is largely influenced by the legislation. Unfortunately our Adoption of Children Act is silent on the issue. I have therefore had to look outside our jurisdiction on

guidance from the academic literature and jurisprudence available. Gaylord Henry in his academic article entitled "*Adoption - Withdrawal of Parent's Consent to Adoption*"[2] based on the American Legal System, gives insights of how the courts in the United States of America are somewhat divided on the issue, as follows:

> "*But the courts are divided on the question of whether the prior consent of a person whose consent is necessary to a valid adoption can be effectively withdrawn before the judicial proceedings become final.*[3] *A majority of the jurisdictions follow the older rule that a parent who gives consent required under a statute for adoption may withdraw such consent at any time before a judgment or decree approving the adoption has been entered. Such withdrawals have been permitted during the period allowed for rehearing after an order confirming the adoption has been entered*[4].
>
> *But a more recent trend of the law is toward the rule that after consent to adoption is given freely and with full knowledge of all necessary facts such consent cannot be arbitrarily withdrawn even though the adoption proceedings have not become final*[5]***;*** *or because of judicial*

[2] Gaylord Henry, Adoption - Withdrawal of Parent's Consent to Adoption, 35 Marq. L. Rev. 77 (1951). Available at: http://scholarship.law.marquette.edu/mulr/vol35/iss1/15

[3] *Re White, 300 Mich. 378, 1 N.W. (2d) 579, 138 A.L.R. 1034 (1942). (and cases collected therein). State v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921); In re Nelmo, 153 Wash. 242, 279 P. 748 (1929); Adoption of Cap-parelli, 180 Ore. 41, 175 P. (2d) 153 (1946) ; Allen v. Morgan, 75 Ga. App. 738, 44 S.E. (2d) 500 (1947); In re McDonnell's Adoption, 77 Col. App. (2d) 805,) 176 P. (2d) 778 (1947) ; Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947).*

[4] *Re White supra*

[5] Re Adoption of a Minor, 79 U.S. App. D.C. 191, 144 F. (2d) 644, 156 A.L.R. 1001 (1944); cases collected in annotation, 156 A.L.R. 1011 (1944).). *This rule has been supported on the following grounds: that the consent has been acted upon by a court (*Wyness v. Crowley, 292 Mass. 459, 461, 198 N.E. 758, 759 (1935))***;** *that the adoptive parent has a "vested right" in the child (*Lee v. Thomas, 297 Ky. 858, **181** S.W. (2d) 457 (1944)

interpretation of the adoption statutes of a particular jurisdiction[6]*. Other cases have held that execution on the part of the parent of the child of a document of surrender containing a consent to adoption constitutes abandonment, making the consent unnecessary and its revocation ineffective as a bar to adoption proceedings*[7]*. The welfare of the child is generally a primary concern of the court, and where the child's best interests will be served by adoption the court will be more reluctant to allow the natural parents to revoke their consent*[8]*".*

56. If one were to follow the old rule, then it would stand to reason that the biological father in this case could withdraw his consent at any time before the final order of adoption is granted. Thus since the matter was adjourned to allow for supervised bonding between the petitioner and the infant, no final order was made at the time the biological father changed his mind. Adoption is a process fraught with emotion and from which once a final order is made, there is no turning back. The old rule therefore proceeds on the premise that it is only fair that biological parents should be given ample time to reflect upon their decision throughout the pendency of the proceedings. However a consideration of both approaches is useful considering our jurisprudence has yet to develop on the subject.

57. The latter approach proceeds on the premise that once full consent is freely

[6] Ex parte Schultz, 64 Nev. 264, **181** P. (2d) 585 (1947); Re Adoption of a Minor, *supra*
[7] Appeal of Weinbach, 316 Pa. 333, 175 **A.** 500 (1934), In re Davison's Adoption, 180 Misc. 494, 44 N.Y.S. (2d) 763 (Sur. Ct. 1943). But cf., In re Annonymous, 178 Misc. 142, 33 N.Y.S. (2d) 793 (Sur. Ct. 1942); Matter of Cohen, 155 Misc. 202, 279 N.Y.S. 427 (Sur. Ct 1935)
[8] Re Adoption of a Minor, *supra*

given, based on knowledge of all relevant facts, such consent cannot be arbitrarily withdrawn. Ultimately though, whether the court will allow consent to be withdrawn or not will depend on the best interests of the child. The question in this case is whether the biological father gave his consent based on the knowledge of all relevant facts. The biological father says he only heard about the petitioner's single status in court. This to him was a material fact. Considering that he only heard about it in court, was his confirmation, in court, of the Consent to Adoption Order which was executed without this prior knowledge valid?

58. The biological father still confirmed his consent in court during the proceedings, but the legal point which is relevant is the time at which the Consent to Adoption Order was executed. Consent is not made in court, it is simply confirmed in the presence of the Court.

59. In order to appreciate what the biological parent ought to understand to give informed consent it is necessary to jump forward to section 4 (a) of the Adoption of Children Act. Section 4 (a) of the Adoption of Children Act requires that the court be satisfied that every person whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order and in particular understands that the order will deprive him or her of his or her parental rights. What the biological father didn't know is who would be adopting the infant, or rather the marital status of the person who would be adopting the infant. Knowing that, according to him, would have enabled him to decide whether he wanted to relinquish his parental rights or not.

60. When a parent relinquishes parental rights, the adoptive parents assumes those

rights and decides how the child will be brought up. There is only one right which the birth parent can hang on to and the adoptive parents are bound to bring up the child in the wishes of the birth parent is the exercise of that right. The right to religion of the child is only one of the rights that is protected in international law as binding on birth parents in accordance with wishes of biological parents. Under article 5 of the United Nations Convention on the Rights of the Child all rights under it are differ from the rights accorded to adults. Under the Convention of the Rights of the Child parents, and sometimes members of the extended family or community, retain the right and duty to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by their children of their convention rights. Article 14 further qualifies the right to religion by specifically obliging states to respect the rights and duties of parents to provide direction to the child. Parental rights are only mentioned in regard to freedom of religion and no other right.

61. Before a birth parent relinquishes control, owing to the magnitude of that decision, such parent ought to be given sufficient information in order to make an informed decision. Once a child is adopted the biological parent has no right to control the manner in which the child is brought up. As alluded to earlier, the only exception in which the birth wishes of the birth parent may be taken into account in identifying suitable adoptive parents for the child is religion. It is not uncommon in adoption practice for birth parents to express a preference of the religion of birth families for their child. Such a preference tends to be respected as it is a constitutionally recognized right (see section 33 of the Constitution) which is exercised on behalf of the children by their biological

parents. Ideally such a preference should be expressed before the infant is matched with a prospective adoptive parent so that only those parents that fulfil this requirement are matched with the child. Therefore in keeping with international best practices, obtaining information about biological parents preferences for adoption is an important part of the role of the Guardian-ad-Litem. This is vital information for the screening process. Once biological parents have relinquished a child for adoption, the process of screening the prospective adoptive parents for that child should take into account any legitimate wishes of the biological parents, subject only to the child/s best interests.

62. Thus, the biological father should have been informed that if he relinquishes parental rights to the child, the only precondition that will be binding on the Department of Social Welfare in finding prospective parents for the infant is the pre-condition of religion. Anything else, such as preferences in terms of the marital status or other factors, may be respected but the Department of Social Welfare will not be bound by them if the best interests of the child require otherwise. Knowing this information is important for the biological parent to make an informed decision as to whether he or she wants to relinquish his or rights or not.

63. Going forward, merging the two approaches of the American courts in dealing with revocation of consent, I find that consent may be revoked at any time before a final order, but it cannot be arbitrarily withdrawn. A court can only permit the revocation of consent where it was not freely given and with full knowledge of all necessary facts. The final decision will be based on the overall

welfare and best interests of the child as a paramount concern.

64. It should be emphasized that the court process merely confirms that process in which the Consent to Adoption Order was obtained was lawful. It is not the court's role to explain to the biological parents the consequences of their actions in relinquishing their rights, the court must only be satisfied that all explanations that needed to have been made in order for the biological parent to make an informed decision, were made. The Guardian-ad-Litem is accountable for this process and should report on it in the Guardian-ad-Litem's report. From the petitioner's responses to the Court's examination, it would appear that the Consent to Adoption Order was executed by the petitioner's legal counsel. The petitioner did not have direct contact with the biological family, according to him, consent was obtained through his legal counsel and the Director of the orphanage who facilitated the obtaining of consent. The Director of the orphanage did not confirm this statement.

65. The fact that consent was obtained by counsel is probably the reason why the consent given was not full and informed consent. The legal practitioner had no duty to present the information in the fullest respects in the manner that the Guardian-ad-Litem has. Such conduct by the legal practitioner is irregular to say the least and legal practitioners should desist from it.

66. Although the Adoption of Children Act is silent with regard to which party in the proceedings should obtain consent, as reasoned above, the legal practitioner should not be that party. It becomes peculiar if this process is facilitated by counsel because the very nature of the role in legal representation precludes

counsel from giving evidence in the very case in which he or she is on record. It would be highly and professionally embarrassing (to say the least) if counsel had deponed to the fact that the biological father was given all the necessary information and he now states during the proceedings that this was not the case. Counsel's veracity would be called to question and their role as officer of the court compromised. Suffice it to say, it is clear that the biological father was not given sufficient information by the party who facilitated the consent. I reiterate that the Guardian-ad-Litem should therefore never delegate this role and should always account to the court in the Guardian-ad-Litem Report as to process that was followed in obtaining consent and the information given to the biological parent so that the court is satisfied that informed consent was indeed given. It should be recalled that under section 3 (3) of the Adoption of Children Act, an order of adoption shall not be made except with the consent of (in this case) the biological father and informed consent was not given in this matter.

67. Having established that the biological father was not given sufficient information to make an informed decision, is his withdrawal of consent unreasonable and therefore contrary to the best interests of the infant so that it should be overridden by the Court? In looking at the considerations under section 3 (3) of the adoption of Children Act, it is clear that the biological father neither abandoned nor deserted the infant. Nonetheless, he has never provided support for the infant, a fact he attributes to lack of financial capacity or means. I do however find as a fact that he did provide some nominal support for another child. However in the absence of information regarding the quantity or quality of the support it would be impossible to return a finding based on this information alone that the biological father neglected or refused to provide

support to the infant who is the subject of these proceedings. There is evidence before me that he was previously unable to provide support to the infant and there is no evidence of any change of circumstances.

68. Counsel for the petitioner in arguing this point has cited three cases in which the English courts have emphasized that in situations such as these, the key consideration is not parental rights but parental responsibility as well as the child's best interests (**Re G (Children**) 2006 UKHL 43). Thus, it is only as a contributor of the child's welfare that parenthood assumes significance (**Re B (A Child)** 2009 UKSC 5). Finally, once a court reaches the conclusion that adoption is in the best interests of the child, it will follow that his or her welfare will require the court to dispense with parental consent to adoption (**Re S** (Adoption Order) 2007, EWCA 54). As I have found that there are no exceptional circumstances to justify the grant of an order of adoption to a single parent and one whose integrity is in question, this adoption would not be in the best interests of the child. There is therefore there is no need to even consider whether the paternal father is a responsible father. However, in the alternative, it must also be stated that contribution by a biological parent does not always place that parent in a position to be the best decision maker for the child. The biological father in this matter from the little evidence there is, is indigent. He must not be excluded from making decisions about his child's welfare for the sole fact that he has been unable to contribute to the infant's care unless the decision he makes is contrary to the child's best interests.

Residence

69. For all I have reasoned above, the grant of adoption order would not be suitable in the present case. There are other issues which in addition further cement this

view. So far, only the legal requirements of persons eligible to adopt and consent have been discussed. Residence is another legal requirement provided for in the Adoption of Children Act. With regard to the legal requirement of residence, section 3(5) of the Adoption of Children Act, requires that both the petitioners and infant be resident in Malawi and an order of adoption cannot be made if none are so resident. There is however case law that has determined how residence is to be interpreted.

70. From the facts, the petitioner who is a XXXian national, resides in XXX. As a medical doctor who volunteers with an NGO that does work in Malawi, he has travelled to Malawi a number of times. These trips have enabled him to have a lot of contact with local children to whom he has become attached. Like most XXXians who have opted to adopt a Malawian child, his decision to adopt in Malawi was based on a meeting with a XXXian couple that has adopted a Malawian child. This encounter led him to realize that the "child he so wanted could also come from international adoption". It is at that point that he embarked on the process.

71. On the face of it, the petitioner's presence in Malawi aligns with the interpretation of residence rendered by the Supreme Court of Appeal in the case of ***In the Matter of the Adoption of Children Act and In the Matter of CJ, (A Female Infant)****MSCA* 2009 MLR at 247. The Supreme Court in that case reasoned as follows:

> *The appropriate test to the question whether an Applicant is resident or not is that which was applied in* ***Keserue v Keserue [1962] 3 All E.R. 796.*** *In that case the husband was born in Hungary in 1925. In 1949 he*

went to Australia where he became a naturalized Australian subject. In 1958 he married the wife and the matrimonial home was in Australia where he worked as a public accountant. There was one child of the marriage and in 1961 with the husband's consent the wife and the child went to England on a visit with the wife's parents. The wife then wrote to the husband a letter on 27 March 1961 in which she suggested divorce. On 21 January 1962 the husband arrived in London hoping to effect reconciliation and anxious to see the child. On 26 January 1962, he issued summons asking that the child be made a ward of the court. Four days later the wife presented a petition for judicial separation, alleging that the court had jurisdiction by reason of the husband's residence in England. While in London the husband had been staying at hotels, but on February 18, 1962 he went to Paris where he obtained employment. On 21 February 1962 the husband entered an appearance denying that he was resident in England. The case was set down to try the issue of residence. It was argued on behalf of the husband that there was no residence of a kind or quality which would give the court jurisdiction to entertain a suit for judicial separation. He argued that in order to found jurisdiction on residence in England there must be proved some degree of permanence and intention to settle there. This submission was rejected by the court <u>which held that residence on the facts of that case was satisfied</u>. In rejecting the husband's submission, Karaminski J (as he then was) stated on page 798 that:

> *"In my view, however, the duration of the stay is only one of the matters which the court must consider. At least equally important in a case of this kind is the motive of the husband in coming to this country. It is important to ascertain whether he came here by chance*

or by design. If by chance, he would come within the category of having a mere casual presence here. Equally if he was here not by chance, but merely, for example, because his aircraft landed at an English airport for the purpose of refueling, he would be here in itinere and could not be said to be residing here. "

We think that this is the correct approach to the question of residence. Coming to the particular facts of this case it is clear from the evidence on record that at the date of the hearing of this application the Appellant was present in the country not by chance but by design. She specifically came here for the purpose of this application for adoption. And on that day she had already adopted another infant known as ...[9] from Malawi. The Appellant has plans to travel to Malawi frequently with her adopted children in order to instill in them a cultural pride and knowledge of their country of origin. The Judge in the court below had evidence before her indicating that the Appellant had a project in Malawi which had noble and immediate ideas of investing in the improvement of the lives of more disadvantaged children in Malawi. It is clear from this evidence that the Appellant in this case is not a mere sojourner in this country but has a targeted long term presence aimed at ameliorating the lives of more disadvantaged children in Malawi. (Underlining supplied)

72. On the basis of the Supreme Court of Appeal decision, many petitioners who

[9] Name withheld to protect the privacy of the infant

come to Malawi for the particular purpose of adopting an infant are, on the facts of their particular case, able to demonstrate some links to Malawi. The vast majority are engaged in some projects helping disadvantaged infants and almost all indicate an intention to travel back with the infant to cement his or her cultural heritage. Some have adopted children before who are thriving in their care and their ability to parent on the subsequent applications is evident. The Supreme Court of Appeal decision is binding on this Court and as such, where petitioners fly into the country with the proved intention of adopting in Malawi and have proved some links to Malawi, this Court and others have, on a case-by case basis, granted orders of adoption in their favour.

73. The present case has however raised some issues that provides this Court the opportunity to reflect upon whether the status quo is in conformity with protecting the best interests of the child which urge states to provide the maximum level of protection to children. By allowing non-residents to adopt with no minimum practical requirements to safeguard the integrity of the process, is our system providing children with the fullest level of protection? This question must be contextualized against the background that Malawi is not a signatory to the Hague Convention on Intercountry Adoption which provides the practical requirements necessary for states to safeguard the best interests of the child in such cases where foreigners fly in to adopt a child.

74. In considering the Supreme Court decision cited above, it is worth noting that the case of ***Keserue v Keserue*** (cited above) referred to in the Supreme Court of Appeal decision ***In the Matter of the Adoption of Children Act and In the Matter of CJ, (A Female Infant)*** (cited above) was not a case on adoption. As is clear from the excerpt reproduced above on which the Supreme Court based

its decision, the matter involved a petition for judicial separation. It is the wife, then in London, who petitioned for judicial separation against her itinerant husband who had been resident in Australia and had landed a job in Paris. The matrimonial home was in Australia and in London where the wife was visiting her parents, he lodged in hotels while in London. It was on the basis that there was no degree of permanence in his stay in London that the husband was denied residence status in London for the purpose of defending the petition. It was based on these facts on that particular application that the court held that residence was satisfied as the petitioner was not in the country by chance, but by design. According to the court, he was not a mere sojourner for the purposes of those proceedings. Judicial separation proceedings are entirely different from adoption. The consequences arising from a non-resident litigant in a judicial separation cannot in any way equate to those in an adoption matter.

75. Historically, in judicial separation the issue of residence was important for the purpose of establishing jurisdiction.

> "*Jurisdiction in matrimonial suits before 1858 belonged to ecclesiastical tribunals. … Jurisdiction was based on residence of the respondent within the diocese, as the bishop had duty of care to all persons there living*."[10]

When the courts took over this duty of care from the bishops, their primary interest was to protect one spouse from the unwelcome visits of the other spouse after the separation and if the two were not resident in the jurisdiction, it would be impossible for the courts to offer the offended party any protection.

[10] JK Groceki and F.A. Mann (1956) "Problems in Public and Private International Law, Transactions for the Year 1956" *Transactions of the Grotius Society* Vol. 42 pp 23-48 at p. 26

Equating residence in a case of judicial separation and adoption due to these historical nuances may not produce results that are currently aimed ensuring the best interests of the child.

76. Considering that ***In the Matter of the Adoption of Children Act and In the Matter of CJ, (A Female Infant)*** (cited above) has not been overturned, it may be necessary to distinguish it. There many cases of foreign petitioners who have been granted an order of adoption following this case; the circumstances have been very different in the Supreme Court decision and in this decision. To begin with this is the first case in which this Court has been presented with a single applicant and there is no evidence of special circumstances to justify the grant of an order of adoption in his favour. In fact it is also a case in which the petitioner has proved to be untruthful, a fact which has not been established in cases before. It is also the first case in which the Guardian-ad-Litem has recommended that the Court exercise caution as he is not satisfied that the petitioner's intentions are in the infant's best interests.

77. Each of these facts of this case have prompted this Court to reflect again on the mischief behind the statutory requirement of residence, in considering that the best interests of a child refer to not to decisions but also to decision making processes. According to the Supreme Court of Appeal ***In the Matter of the Adoption of Children Act and In Matter of CJ, (A Female Infant)*** (cited above), section 3(5) of the Adoption of Children Act was never intended to be an arbitrary impediment to adoption which is inconsistent with several sections in the Constitution, but should be viewed in as "a beacon of protection and safety against unscrupulous aliens and therefore goes to enhance the welfare of

the infant." Championing the rights of the child by reasoning in this way requires this Court in deference to consider whether any process that the court takes to ensure the safety and protection of the child, is in itself in the best interests of the child.

78. In practice, protecting the infant from unscrupulous aliens in the way the Supreme Court intended requires a number of practical tangible actions. As alluded to earlier, the current matter has prompted an issue which did not arise upon the facts if the Supreme Court decision cited above. The petitioner before me may satisfy the residence requirements as stipulated by the Supreme Court in that decision, however, closer scrutiny has shown that it is impossible to offer the infant maximum protection based on just a short court observation and a Home Study Report prepared in the petitioner's country. Some level of residential monitoring, not just visitation, is required. The minimal practical requirement of observing the infant with the petitioner is lacking and in the absence of such, the petitioner can misrepresent or even tell outright lies without the court every knowing. It is for this reason that generally in varying degrees of strictness, most countries require that the prospective adoptive parents be residents of the country they are adopting in or that they have a reasonable connection with the country. In situations where the prospective adoptive countries are not residents or have no connection, the requirement is that they spend some time in country, before the hearing of the petition so that they can be observed or monitored in a trial residence with the infant.

79. With regard to the first category, as to what constitutes sufficient connection, a historical journey into the legal culture we have inherited is instructive. In the past, under England's first Adoption Act of 1926, both domicile and residence

were required before a court could have jurisdiction of an adoption matter. The requirement was later changed in the Adoption Act of 1950 to residence only of both the child and the applicants in England for English residents and Scotland for Scottish residents. These residence requirements enabled the investigations of the prospective adoptive parents by social welfare agents of the state who were able to observe the child and the prospective parents in their natural habitat before an application to the court was made.

80. The second category of prospective adopters who come in country merely to adopt, the considerations are different. The current requirement in international best practice is for residence for a stated or unstated period of both the child and the prospective parents in the country they are adopting in, immediately prior to the filing of the petition. That is to say, the petitioners need not be residents of the country they are adopting in, but once they file the petition, they must reside in country with the infant so that they are observed over a stated period of time. In almost all of the 12 Canadian states and some African states such as Kenya and South Africa just to name a few, what is required is some investigation by a social welfare agent of the state who investigates the child and applicants in suitable accommodation during a temporary placement period. Neither the investigation nor the placement period of the child and prospective adoptive parents necessarily contemplates residence within the country as a condition precedent to the grant of an order of adoption.

81. What is emphasized as an important factor are the best interests of the child which determine the length of the placement period while under investigation and any other requirements. Such parents will have already undergone

extensive investigation by an accredited social worker in the state of origin. These states will further be signatories of the Hague Convention on Intercountry Adoption which emphasizes the importance of the decision to grant an order being made in the best interests of the child.

82. In the absence of this in country placement period where the prospective adoptive parent are under investigation, there is a lot of room for an incomplete or inaccurate picture of the petitioner's intentions and motives for adoption to be painted. It is my reasoned opinion that this period is a necessary practical step to ensure as the Supreme Court reasoned, that the residence requirement should be seen as "a beacon of protection and safety against unscrupulous aliens and therefore goes to enhance the welfare of the infant."

83. At any rate, ***In the Matter of the Adoption of Children Act and In Matter of CJ, (A Female Infant)*** (cited above) is distinguished from the matter at hand in that although the petitioner who had only flown into the country two days earlier had some connection with Malawi through his charity works like the petitioner in the case above, there is a difference in the levels of connection and investment in Malawi. There is also a difference in that the petitioner in the case above had adopted in Malawi before and there was evidence that the other child was thriving in her care.

84. In order to assess whether the infant's welfare and protection needs would be met by the petitioner in the present case, the Guardian-ad-Litem in this case relied on information provided by a XXXian social worker who worked under his supervision. Based on that information alone, the Guardian-ad-Litem

found that all the welfare requirements and the best interests assessment on the basis of those needs as provided in the guiding principles discussed above appeared to have been satisfied. In his words:

> "*I hereby declare that I have read the petition, verified its contents and carried out a thorough social inquiry on this matter. I have found that K. was placed at a child care centre after his mother died one hour after his birth. Family members further agreed that if suitable parents are found, he can go found, he can go for adoption. His father indicated that no capacity to take care of the child and other family relations are equally over stretched. This means that K. is in need of parental care and can be adopted by the Petitioner who has complied with all conditions of adoption. I have also evaluated the evaluated the suitability of the Petitioner to adopt a Malawian child and I have no objection allowing the Petitioner to adopt the said child.*
>
> *Based on the foregoing, I would like to recommend to the Honourable Court that if all other requirements are satisfied, the court may consider granting the Adoption Order in favour of the Petitioner*." (Underlining supplied)

85. It has become very clear in these proceedings that relying on the work of a social worker in XXX (and by extension, any other country) to conduct the assessment does not achieve desirable results in providing our own social workers the opportunity to see for themselves what the situation is like on the

actual ground. As can be seen from this case, the recommendation that the Guardian-ad-Litem gave to this Court before he was tasked to oversee a bonding process is quite different from the one he made after actually engaging the petitioner. The picture painted of the petitioner in the reports that came from the social worker in XXX was very rosy. Actual contact has revealed some cracks in the façade. Relying on this modus operandi to assess the petitioner and then report that a "thorough social enquiry" has led to inaccurate results in this case and highlights the shortfalls of allowing a "mere sojourner" who has not spent any time in-country with the infant, to adopt.

86. Adoption, being a childcare and protection option, relies on social work practice. When a court receives the report of the Guardian-ad-Litem, it must take it as a given that all the careful scrutiny that needed to have been done has actually been done. This scrutiny provides a basis for ensuring that the substantive right of the infant to have his best interests assessed and taken as a primary consideration. It should be remembered that the petitioner only arrived in the country two days before the hearing and the Report of the Guardian-ad-Litem was prepared before he had a chance to meet with the petitioner and to see him interact and the infant. When the Guardian-ad-Litem stands on oath to present his or her report, he should do so having had considerable interaction with the petitioner so that he can form an accurate view about him or her.

87. Meetings for the first time at court between the Guardian-ad-Litem and proceeding on virtual meetings or delegated reports can no longer suffice. This matter before me is a watershed which has shone the spotlight on how easy it is for the court to overlook important information if the Guardian-ad-

Litem is not given sufficient time to observe and supervise the prospective adoptive parents and the infant. The discovery in case therefore necessitates a fundamental paradigm shift going forward if the best interests of the child are to fulfilled.

88. Two issues arise from the current practice or *modus operandi* of the court's assessment of the petitioner. Secondly, whether defects in the current modus operandi can be cured by an interim order. In addressing the first issue, the current *modus operandi* shows the weakness in the court relying on a fleeting observation of the parties during the proceedings to establish that there is some level of bonding between the petitioner and the infant. This observation, and the time available for it, is inadequate. It is quite possible for the parties to rehearse an act which when performed perfectly at the hearing has the possibility of masking the petitioner's real intentions or ulterior motives. The point I would like to emphasize in this respect is that the court's observations should be preceded by prior investigation of the petitioner and the infant for a sustained period by the Guardian-ad-Litem who should document this particular process in his or her report. That way, the court will have a basis for determining whether the conduct of the petitioner in the course of proceedings is genuine or not.

89. The Guardian-ad-Litem must however take his or her role seriously and actually undertake the supervision or observation. The Director of the orphanage has raised a doubt that the supervised bonding that was ordered by this Court actually happened in the way it should have. In the absence of contrary evidence this points to a serious flaw in the methodology that the court

expects to be sacrosanct and fool proof. The process only works if all those tasked with functions, perform them to the letter of the law. I therefore urge that Guardian-ad-Litems tasked with these functions by the court, should actually do their work and produce reports based on real time and not virtual observation. Since the Guardian-ad-Litem is accountable for ensuring that consent was freely given with full information, explaining every aspect of the implications or consequences of consent are an important part of this role.

90. To conclude on this first issue arising from the Guardian-ad-Litem's second Report, parties jetting into the country a few days before the hearing and leaving the country with the infant soon thereafter is an anomaly that should not continue as the facts of this case have shown. There must be some requirement to reside in the country with infant in order for a proper assessment of the parties to be made. The Guardian-ad-Litem has suggested as a mitigating factor that this court makes an interim order that would allow more supervision and monitor progress before a permanent order can be granted is the best way forward. This is the second issue that I now address.

91. The prudence of making a temporary order was discussed ***In the Matter the Adoption of Children Act and In the Matter of P.S.*** (cited above) as follows:

> *I am aware that section 7 of the Adoption of Children Act gives the court power to make interim adoption orders for a period not exceeding two years as a probationary period upon which such conditions as provision for maintenance and education as well as supervision for the welfare of the infant may be imposed. Examples of how interim orders have been used in England include the case of In Re AW (Adoption Application), in which the judge made an interim order in favour of elderly applicants who had breached some adoption requirements, but where the welfare officer*

> *nevertheless recommended that the child should stay with them. The interim orders gave an opportunity for further reports pending the final hearing.*
>
> *Section 7 of the Adoption of Children Act is similar to Section 25 of the Children Act 1989, an English statute, referring to which Butler-Sloss LJ stated in* ***Re C and F (Adoption : Removal Notice)***[11] *that:*
>
> > *Section 25 is not intended to preserve the status quo at an early stage or to define the interim position of the children and the parties. It has a different purpose. It is there to give additional powers to the court where all the necessary matters have been dealt with at a substantial hearing of the adoption application, … but there is still some doubt about the wisdom of making the final and conclusive adoption order.*

In short, interim orders should not be used as a "fix it" solution where basic and necessary requirements that should have been fulfilled at the outset have all been fulfilled and yet there is still some niggling doubt about the wisdom on making the final order. In this particular case and this is true of many other cases that have gone before, the one very important step of observing the petitioner and child cohabiting or bonding is missing. The observation of the bonding process should be part of the consideration in making the order of adoption, and not the basis for making a tentative decision. Tentative decisions should only be made where there are outstanding technicalities and not doubts as to whether the match is suitable.

92. While there may be glowing recommendations about any petitioner's ability to take care of the child and the resources that they have to do it as well as the suitability of their home etc., this cannot replace the one crucial factor of being able to see first-hand how the infant and the petitioners are interacting over a

[11] 1997 1 FLR 190, CA at 195

sustained and reasonable time period. To reiterate, the judge's observation in the courtroom should be anchored on this prior observation. Once I again, I flag this as an area of law reform. Government would do well to amend the law so as to provide a statutory requirement of a time period over which prospective adoptive parents must be observed and supervised before they fly out with adopted infants. Further, in the best interests of the child, section 3 (5) of the Adoption of Children Act should not continue to be interpreted on a case-by-case basis. There is need for the term to defined at law so as to avoid the current indeterminate *status quo*.

93. Even if in the case at hand all the legal requirements had been satisfied and there were no outstanding complexities such as the veracity of the petitioner etc., there is yet another problem which goes against making an interim order as recommended by the Guardian-ad-Litem. Malawi is not a signatory to the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter "the Hague Convention on Intercountry Adoption"), the purpose of which is the protection of children who are adopted internationally. ***In the Matter of the Adoption of Children Act and In Matter of GM, (A Female Infant)*** Adoption Cause No. 09 of 2015 an appeal was also made to Government to ratify the Hague Convention on Intercountry Adoption so that co-operation in such matters is eased. The Hague Convention on Intercountry adoption establishes channels of communication between authorities in countries of origin and those where they live after adoption. It is this channel of official communication that is the necessary support for the implementation of interim orders.

94. Under the current *status quo*, if a Malawian court makes an interim order under

which the prospective adoptive parent is to reside with the infant so that a permanent order can only be made after the petitioner and the infant have been observed and supported in their home environment. The Guardian-ad-Litem would then travel to the destination country and observe the infant and petitioner for a few days (at the expense of the petitioners) and then prepare a report on whether the final order should be granted or not. If the Guardian-ad-Litem is satisfied and prepares a report recommending the adoption, a final order is granted. It is nonetheless worth noting that there are some challenges with the status quo. The expenses involved would usually be borne by the petitioner which makes it very expensive for them and the fact that the persons paying for the persons conducting the assessment also raises issues of their independence and therefore has impact on the impartiality of their reports.

95. If the assessment after the preliminary period is that the petitioners are not suitable parents (which could very well happen as can be seen from the case at hand where there was an initial recommendation for adoption which has subsequently changed to the exercise of caution) what happens next? If the court here makes an order for the return of the child, difficulties could arise if the child has already been given citizenship in that country. If the report of the pre-final order assessment pointed to some gaps in parenting skills than can be remedied by some remedial support, the order of the Malawian court would be at the mercy of the receiving country. It would be imposing an obligation with financial implications on a foreign system with which it has no agreement to that effect. Besides once the infant is in the foreign country he or she becomes subject to their laws, which may be inconsistent with our own.

96. Being a signatory to the Hague Convention on Intercountry Adoption ensures

cooperation between Malawi and the receiving country through an effective working relationship based on mutual respect and on the observance of high professional and ethical standards. If Malawi and the destination country to which an adopted infant is taken were both signatories to the Hague Convention then the destination country would be under obligation take the necessary steps to ensure compliance with an order from the sending country. Where the sending country is a signatories of the Hague Convention, it will often receive regular post adoption reports from accredited social workers under the government of the receiving country as ongoing adoption support. It is based on these reports that the court in Malawi would base its final order. Relying on a one-off report by the Guardian-ad-Litem on a temporal visit would not give the court in Malawi the appropriate level of support to base a decision that is consistent with the best interests of the child. Therefore, under the current *status quo*, there is wisdom in avoiding interim orders.

97. To conclude, as one academic has put it,

> "*Modern adoption procedures under which full investigation of the merits of the new home and a trial residence together is normally required. It is largely because of the investigation and trial residence features, based on the child's welfare that we can today accept bases less than domicile of all parties. A court which has technical jurisdiction ... will properly decline to make an order where the adoption cannot be adequately investigated or where the adoption is not a real attempt to give the child a new home.*"[12]

[12] Gilbert D Kennedy (1956) "Adoption in the Conflict of Laws" 1956 Canadian Bar Review 507 at p. 512

The absence of adequate investigation is therefore sufficient basis to decline the grant of an order of adoption. It is not the basis for the grant of an interim order. Adequate investigation is what enables a court to determine whether the adoption is in the child's best interests. A court should not send a child out if uncertain as to what obtains on the other side, even for a temporary period. The court should instead rely on the sound evidence of a period of observation, in country, upon the basis of which it can make its own observations in court.

98. In order to provide guidance for the way forward, it can be safely said that requiring residence for a prescribed period or otherwise, prior to filing the petition as a condition upon which an order of adoption can be made is unsustainable in our current globalized world. However, if a prospective adoptive parent is committed to adopting a Malawian child, he or she should reside in the country long enough to allow observation. The best interests of the child should be the guiding factor; however, provision should nonetheless be made for some minimum requirements that will provide the court the basis for ensuring that the best interests of the child are in fact realized. I further find wisdom in the suggestion made in academia of how the issue of residence should be determined:

> "*I suggest that residence should neither a necessary basis of jurisdiction in all cases nor, if it is, so strictly construed as to almost amount to domicile. Some reasonable connection with the territory … - effective investigations into the suitability of the new parents and child should be the prime concern. The connection will be satisfied in most*

cases by the mere presence of the parties for a reasonable period before the order is made. Our duty is to investigate before it is made. If we are satisfied, should it matter that the parties live elsewhere?"[13]

99. I concur with the suggestion that applicants in intercountry adoption cases should have some level of connection with the country. The purpose of this connection is to ensure that the courts can confirm whether the adoption is in the best interests of the child or not. The best interests of the child should therefore be understood in the context that ensuring such interests must be accompanied by practical measures. It is one thing to find a prospective adoptive parent eligible to adopt and able to provide for the child's welfare which is in the child's best interests. It is another to have a system that enables the authorities charged with making the decision that enables those parents to adopt operates in a system that provides for processes which if followed, will guarantee that the authority making decision took practical steps to ensure that the adoption is indeed within the child's best interests.

100. The best interests of the child should therefore be the paramount consideration not only in the substantive decision itself, but also in the processes that enable such a decision to be taken. A process that does not provide minimum requirements of what steps must be taken before a decision maker can make the ultimate decision is not in the child's best interests. Requiring a minimum level of connection between the prospective adoptive parent is such a practical requirement. There is danger in leaving the decision on the level of connection to be determined on a case-by-case basis. Consistency is not created and

[13] As above at p. 520

superficial considerations may end up being the determinative factors. It is for this reason that the issue of a post-filing residence requirement as a practical step to ensure the best interests of a child needs to be seriously considered.

101. International practice shows that the issue of residence in adoption, especially in countries that have ratified the Hague Convention on Intercountry adoption, comes up in two ways. Signatories of the Hague Convention recognise two categories of adoption by foreigners. The first category is adoption by foreign residents and these need to have been resident for a set number of years before they are eligible to adopt. The time limit differs from country to country. Looking at two Hague Convention countries within the region, South Africa requires a five-year residency period and Kenya requires a three-year residency period for foreign nationals. The second category is that of foreigners who come to adopt from their home countries. The countries from which such applicants come must be signatories of the Hague Convention on Intercountry adoption. While there is no in-country residency requirement prior to the adoption in this category, the applicants must, after being placed with the infant in the country they are adopting, reside with the infant for a number of months before they appear in court.

102. In Kenya, for this second category, the mandatory requirement is that the prospective adoptive parents, or at least one of them must reside in Kenya for a period of three consecutive months with the child. During the three-month residency period, follow-up visits were carried out to assess the bonding and adjustment of both the child and the prospective parent(s). The prospective adoptive parents would then be assessed at three separate occasions:

(i) 1st Follow-up:- one month after the infant is released into the prospective adoptive parents' care. Conducted at the Local Adoption Society's office.

(ii) 2nd Follow-up:- Two months after after the infant is released into the prospective adoptive parents' care. Conducted at the Local Adoption Society's office.

(iii) Final Follow-up:- Three months after after the infant is released into the prospective adoptive parents' care. Conducted at the prospective adoptive parent's home to observe the adjustment of the child in the home environment.

The residency bonding period ensures that the prospective adoptive parents are acquainted with the way of life in Kenya and enables them to help the infant adjust to their new environment after they have been adopted. This is an important way, practically, for the sending country to satisfy itself that the adoption is in the best interests of the child.[14] After the adoption order is granted, the recognized government authority under the Hague Convention in the country to which the child is taken, must send progress reports of the adoption to the corresponding authority in Kenya. These reports must be submitted once every three months during the first two years from the date of making the adoption order, and annually thereafter for three years. South Africa has similar requirements.

103. To reiterate, the point of the residence period in intercountry adoption is to enable a decision maker to determine whether the adoption will fulfil the child's welfare needs and is a real attempt to give a child a home. Motives of the

[14]See https://venasnews.co.ke/2017/02/16/adopt-child-kenyaproceduremoney-adopt/

prospective adoptive parents which are not discernible by crossing out checklists of the prospective adoptive means, health and criminal checks are just as important and must be investigated if an order in the best interests of the child is to be made.

104. The trend in many inter-country adoptions in this Court has been that the prospective adoptive parents fly in a few days before the hearing and leave as soon as it is possible soon after to get travel documents for the infant. Most expect a decision with days so that they can leave without any regard for systems and processes. As I noted in ***In the Matter of the Adoption of Children Act and in the Matter of E.M. (a female infant)*** **and S.M.** ***(a female infant)*** (Adoption Cause No. 1 of 2017 LL. H.C. citing ***In the Matter of the Adoption of Children Act and in the Matter of N.M.B. (a male infant)*** 2012 MLR 166 as follows:

> *Whilst it is noted that prospective adoptive parents that come into the country are either employed or an in business in their own countries and thus can only be in the country for a short period of time in consideration of their terms of employment or pressing business needs, they must, if they are serious about becoming parents, plan their time well so that they leave a fair amount of time open for their stay in the country. Three to four days between the hearing of the application and the scheduled departure of the applicants is by no means realistic and is in fact a mockery of the court process and the weight that is to be attached to a matter of such profound and lasting effects. There is no such thing as a "straight forward" adoption application as the life of a child is involved. Adoption applicants should therefore plan their time well and make room for a reasonable length of time to be spent in the*

> *country or at the very least ensure that their travel plans are open and can be changed to ensure that justice, which is in the best interests of the child, is done. It would not be in the best interests of the child to rush through an application and grant an application when the court has not performed all necessary checks to ensure that the child will in fact be adequately cared for by competent parents who do not pose a threat to any aspect of the child's well-being. The only way for the court to assess whether the applicants before it are bona fide prospective parents or unscrupulous or incompetent persons who pose a threat to the child's well-being is to perform a careful examination and analysis of all the facts before it. The court will therefore not be forced to make a hurried decision simply to pander to the whims of particular applicants.*

Adoption is a time-consuming legal process and those who embark on it, should be committed to investing the time necessary to ensure that every necessary step in a framework that ensures the best interests of the child is followed.

105. It would be a challenge for follow-up orders to be made once an order of adoption is granted and the infant relocates outside the jurisdiction. This case has shown that not much investigation is done before an applicant is given a child to assess the two together because there is no mandatory residence period in which the prospective adoptive parent resides and is assessed with the child in Malawi before departing. To reiterate, such practice is inconsistent with international best practices as required under the Hague Convention for Intercountry Adoption. Once an order of adoption is granted, there are no reports sent back to Malawi and the file on that child is permanently closed.

106. As Malawi is not a signatory to the Hague Convention it has therefore no grounding to request or receive reports from the countries to which the children are sent. This should be seen very seriously as an anomaly. The doubts expressed by the Guardian-ad-Litem in the present case would have been dealt with at intergovernmental level between the two countries had Malawi been a signatory.

107. Going back to the facts of the present case, the petitioner has not had a residency bonding period with the infant. There has been a visiting period which has failed to establish with certainty that this adoption is in the best interests of the infant. A more certain visiting period should have led the court to decide whether the petitioner and the infant should now be on an interim residential placement as it required by international best practice. The fact that the Guardian-ad-Litem still finds doubt with pairing the two precludes the Court from ordering such a placement. Making such an order in situations of doubt seriously undermines the best interests of the child.

108. In concluding on this issue, I strongly urge the Attorney General and the Ministry responsible for children to revisit the recommendations of the Law Commission on the Review of the Adoption of Children Act with a view to providing stringent measures at law that are consistent with international best practice in distinguishing between adoption by foreign residents and by non-resident foreigners. Reasonable time limits in relation to both types of adoption need to be clearly stipulated to avoid the case-by-case approach that opens up to arbitrariness and does not afford the courts with minimum standards to comply with, such minimum standards being necessary to give effect to the best interests of the child.

109. I caution however that simply amending the law on adoption is not enough. If Malawi is to conduct foreign adoptions in a manner that gives effect to the best interests of the child, signing and ratifying the Hague Convention on Intercountry Adoption is a prerequisite. I replicate below the recommendations of the Malawi Law Commission:[15]

> "*The Commission noted that the Hague Convention which has been widely ratified fills in the gaps left by the Supreme Court by setting up the structures necessary for follow up interaction between the country in which the child was adopted and the country in which the child eventually ends up. Without a minimum requirement for the structures and uniform procedures agreed by a number of countries in place, it is inconceivable that children adopted from Malawi will be adequately protected."*

The Law Commission therefore recommended that Malawi adopts legislative provisions that conform to the Hague Convention so as to facilitate intercountry cooperation and communication in safeguarding intercountry adoptions.

110. Having Hague Convention compliant legislation is however not the solution to he problem. Malawi needs to actually ratify the Hague Convention itself so as to avail itself of the cooperation and communication sought. The Law Commission in its Report cited above also noted as follows:

[15] Malawi Law Commission (2013) Report of the Law Commission on the Review of the Adoption of Children Act, Government Printer Lilongwe, at p.74

> "*Overall the Hague Convention emphasizes the general principle that all international adoptions must be guided by the best interests of the child. Malawi is not a signatory to the Hague Convention. The Commission was however aware that there are plans within the Ministry responsible for social welfare and children to engage the Ministry of Foreign Affairs and the Ministry of Justice and Constitutional Affairs with a view to initiating the process of ratification*."

Considering the importance of this first step to ensuring the best interests of the child, it is important that the state actors mentioned be urgently engaged to begin the process as the courts cannot protect children intercountry adoption without the necessary international protection framework and mechanisms.

111. In the absence of legislative measures on residence requirements for foreign residents and intercountry adoption, I strongly urge the Ministry responsible for child welfare to put in place policy measures in the best interests of the child that would set down the minimum requirements which consistent with social work international best practices would ensure the welfare of the child who is adopted by foreigners. Such policy direction should include the length of time for in-country bonding residence that would allow the Guardian-ad-Litem to ensure that the adoption is indeed in the best interests of the child. Policy directives on this issue can only come from the Ministry responsible for children which has the appropriate expertise to make such decisions.

112. Further, the Guardian-ad-Litem has asked the Court to provide directions with

regard to single male applicants. It is the view of the Guardian-ad-Litem that single males should not be allowed to adopt unless accompanied by a female relative. This is another area in which the Ministry responsible for child welfare is better placed to make recommendations. This way, armed with policy direction based on international best practices, the Guardian-ad-Litem would be able to justify the importance of such measures, in the child's best interests, to the court. If the reservation is made only on the basis of gender and arising from the gendered myth that women are natural caregivers while men are not (as the Guardian-ad-Litem has argued), then the Guardian-ad-Litem should prove (for example) that such discrimination is overridden by the more important need to protect the best interests of the child. Comparatively, I have noted a similar reservation has been legislated upon in section 186 (6) (e) of Kenya's Children's Act 2022, provides that:

> "*The court shall not make an adoption order in favour of an applicant or joint applicants, if the applicant or joint applicants, or any of them –*
>
> *(...)*
>
> *(e) is a sole male applicant except where the applicant is a biological relative of the child;"*

Considering that Kenya has a progressive constitution with a bill of rights that enshrines equality and freedom from discrimination, it may be well be that this provision has backing in social work practice which has gained statutory recognition. Such a restriction however, should properly be made by statute, not case law. Besides, if there were proper in country residency investigations, the Guardian-ad-Litem would be able to properly evaluate the individual merits

of prospective adoptive single parents and decide therefrom whether to recommend adoption or not. I can only conclude that these are matters that must be addressed in statute guided by policy of the Ministry responsible for children.

The Best Interests of the Child

113. As alluded to earlier, section 4 (b) of the Adoption of Children Act obligates this Court to be satisfied that the grant of an order for adoption will be for the welfare of the infant. It is now settled law that in ascertaining the welfare of the infant, the guiding principle is whether such an order will be in the best interests of the child. The infant in these proceedings is aged one year and seven months and therefore his wishes cannot be taken into account.

114. In view of the lack of certainty that surrounds the principle of the best interests of the child, this Court, ***In the Matter of the Adoption of Children Act and In the Matter of EM and SM*** (cited above) attempted to demystify the principle with reference to an earlier decision.

> *"Despite its wide acclaim and frequent use, a leading expert in child rights has noted that there is a persistent lack of consensus on how, precisely, the best interests of a child are to be decided. Even the international standards themselves do not specify any criteria at all on how and by whom these interests should be determined.*[16] *Therefore in a bid to demystify principle for the purposes of inter-country adoption* ***In the Matter the Adoption of Children Act and in the Matter of P.S.***[17]**,**

[16] Cantwell, Nigel (2014). The Best Interests of the Child in Intercountry Adoption, *Innocenti Insight*, Florence: UNICEF Office of Research.
[17] MLR 2012 at p. 182

(cited above), 9 non-exhaustive factors that may serve as guidance were adopted. These factors are considered below as they relate to the infants before me. Thus, as I stated in that case,

> *"Best interests" determinations should generally be made by considering a number of factors related to the circumstances of the child and the circumstances and capacity of the child's potential caregiver(s), with the child's ultimate safety and well-being as the primary concern."*

These factors set out in that case, by no means exhaustive, require the court to conduct an investigation into the following:

114.1 Whether the adoption will produce family integrity, by providing the infant with a stable family if he or she did not previously have one; the preference being to leave the infant with his or her biological family if he or she is already in a stable family environment.

114.2 A combination of whether the home the prospective adoptive parents intend to provide the infant is physically safe and poses no danger to his or her health and safety.

114.3 Whether the home is safe from domestic violence and criminal activity.

114.4 Whether the prospective adoptive parents can provide a home that will provide the care, treatment and guidance that will assist the infant in developing into a fully self-sufficient adult.

114.5 Whether the home to which the infant will be raised will be accepting of him or her and there is evidence that emotional ties and relationships will be formed between the prospective adoptive parents, siblings (if any) extended family and other household members or care givers.

114.6 Whether the prospective adoptive parents are capable of meeting the mental and physical needs of the infant.

114.7 Whether the prospective adoptive parents are in sufficiently good health, both mentally and physically to be able to meet the demands of parenting that particular infant.

114.8 The importance of making timely permanence decisions.

115. Where all things are equal, going through each of the factors listed above based on the information provided in the report of the Guardian-ad-Litem leads to a fair assessment of whether the infant's welfare needs, and the best interests of the child will be met. This information, however, is usually obtained from a relegated source. The Guardian-ad-Litem will have received a Home Study Reports which confirms all the above and it forms the basis of the Guardian-ad-Litem's recommendation. As this watershed case has shown, it is not enough to base the decision solely on this Home Study and more structured investigation must be done by the Guardian-ad-Litem in country to ensure that the adoption will indeed be in the best interests of the child.

116. In navigating the challenges surrounding the lack of procedural certainty in the current system, it is important to highlight that these proceedings concern the welfare of an infant under the age of two. His mother died at birth and his father, reportedly because he cannot afford to look after him, sent him to an orphanage. The father has since changed his mind as will be discussed below. Nonetheless, none of the extended family members have volunteered to take him in and they have in fact declared that they cannot afford the additional burden of his care. No evidence of any other Malawian willing to take him in

has been recorded. It is therefore not in doubt that the infant is in need of family integration. The petitioner could possibly offer the security of family integrity which would be in the infant's best interests, but as the facts have shown, his lack of credibility and integrity precludes him from eligibility.

117. Finding a home or providing a child with family integration must be done timeously. Children should not stay in institutions longer than is necessary if a suitable family is found. It is important to reiterate at this stage that no suitable family has been found for this child as I have found that the petitioner has not satisfied me that the grant of an order of adoption would be in the best interests of the child. Not every prospective parent who is able to fulfil the criteria set out ***In the Matter the Adoption of Children Act and in the Matter of P.S*** (cited above) is found suitable by sheer reason of satisfying those factors.

118. One other consideration that the court must take into account is the long-term effect of its order. The sheer desperation that has been painted about the infant's current predicament in the report of the Guardian-ad-Litem makes is very attractive to consider the infant's short-term needs and if not carefully reflected upon may lead to the grant of an order of adoption to a person who 'has ticked all the boxes' as it were. The petitioner is definitely an answer to the these needs however the overall welfare of the child and his or her best interests obligate this Court to go further and consider that the effects of any order made will last a life time. As was stated by Sir James Munby in ***Re B-S*** [2013] EWCA Civ 1146:

> "*The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking ahead into a very distant future – upwards of eighty or ninety years. Against this perspective judges must be careful not to attach undue weight to the short-term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham said in Re O (Contact: Imposition of conditions) [1995] 2 FLR 124 that 'the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems*."

119. The ideal care solution for any infant is family care. The family that comes forward to adopt must however be one that has been through the best assessment possible to enable the Court to make a decision as to whether that particular adoption is in the best interests of the child. It is very possible for a prospective adoptive parent to rehearse and put on an act as to the sort of person they want the court to see them as. In the limited time courts have with prospective adoptive parents it easy for this rehearsed act to persuade court that the adoption will be in the child's best interests. The family that has come forward to adopt this infant is a single parent. While the petitioner has made every effort to produce evidence that the fact he is a single man will not affect the infant's care as there are those that will step in to assist, I have not been convinced that there are exceptional circumstances in this case to enable a single person to adopt the infant. Even after a supervised bonding period, doubt still lingers over the petitioner's character and integrity. In view of

protecting the infant's long-term care in any doubts must be exercised in the infant's favour. It has not therefore not been proved to my satisfaction, for all the reasons I have outlined above that the petitioner before me is a fit and proper person to provide for the infant's long-term welfare, in his best interests.

120. The matter before me has also highlighted a falling-out between the Guardian-ad-Litem and the Director of the orphanage with custody over the infant. It is unfortunate that these two entities who have a common goal, and that is to ensure the best interests of the child, fail to see eye to eye. In resolving this falling-out, it must be remembered that the Guardian-ad-Litem is actually the Department of Social Welfare which has legal custody over all infants in need of care and protection. Child care institutions such as the orphanage in this case, have actual custody and provide all the necessaries of life for children under its care. Such actual custody is given by the Department of Social Welfare and while the institutions provide all the resources, the children they look after. The Department of Social Welfare thus retains legal custody unless and until the children are reintegrated with their families or adopted. Every legal decision affecting such children must therefore be made by the Department of Social Welfare which supervises and approves the care provided to the children. The two entities must therefore work collaboratively and within the limits of each of their powers, to provide the best care solutions for children in care.

121. I strongly urge that the two entities in this matter meet and discuss their differences. It will not be in any child under care's best interests to have an impasse. The child care institutions know their children better and are vital in assisting with the matching process as they have the vantage point is knowing

a child's character and needs. It is with their input that the Directorate of Social Welfare can then determine which prospective adoptive parent would be best placed to provide for the needs of a child of that temperament.

122. Just as legal practitioners representing the petitioner are not the suitable persons to obtain consent for adoption from the biological families, child care institutions should also maintain a professional distance. While they cannot completely avoid contact with biological families, they must not express any views as to prospective adopted parents who have been matched with the infant as this has the potential of influencing biological families. They must generally refrain from any act that may infringe or be seen as infringing upon the duties of the Department of Social Welfare. Any concerns they may have with regard to any legal decision must be raised with the Department of Social Welfare and if this does not yield satisfactory results, they may make their concerns known to the court during adoption hearings or to the Child Case Review Board which has an albeit limited supervisory capacity over such institutions.

Order and Directions

123. For all I have reasoned above,

123.1 The order of adoption is not granted.

123.2 The infant is to be returned to the custody of XXX unless and until;

(a) The biological father is assessed and found to be capable and able to provide for the infant's welfare needs, in his best interests, a report to that effect having been laid before the Court for approval; or

(b) An order is made by the Court authorizing fit and proper parent(s) adopt the infant;

MADE in Chambers in **Lilongwe** in the **Republic of Malawi** on this **11th** day of **November 2022**

Fiona Atupele Mwale

JUDGE

This judgment is being distributed on the strict understanding that in any report no person other than the advocates may be identified by name or location and that in particular the anonymity of the children and the adult members of their family and adopters must be strictly preserved.