IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

ADOPTION CAUSE NO. 2 OF 2006
IN THE MATTER OF THE ADOPTION OF CHILDREN ACT (CAP.26:01)

AND

IN THE MATTER OF DAVID BANDA (A MALE INFANT)

CORAM : HON. JUSTICE NYIRENDA

: Mr. A. Chinula, Counsel for the Petitioners
: Mrs Malera, Counsel for the Malawi Human Rights Commission (Amicus Curiae)

JUDGMENT

Guy Stuart Ritchie and Madonna Louise Ritchie, herein after referred to as the 'petitioners', jointly presented before this Court a petition for the adoption of an infant, David Banda, herein after referred to as the infant.

The petition was determined on the 12th October 2006 whereat the Court made an interim order giving custody of the infant to the petitioners on the following conditions:

(i) *During the period of the interim order the Guardian Ad-Litem, in consultation with a social welfare agency that might be identified in the area where the infant and the petitioners will be staying shall be allowed to oversee the settlement of the infant and make reports to this Court and to the Ministry of Women and Child Development at least twice during the period of the Order.*

(ii) *The interim Order is to subsist for eighteen months and upon satisfactory completion of such period the Court will to consider making an order of adoption.*

The interim Order was made pursuant to section 7(1) of the Adoption of Children Act Cap 26:01. The period of the interim Order has lapsed. It is now for the Court to consider whether an order of adoption should be made and in that context it is necessary that I should mention a couple of developments that have followed the proceedings.

To start with it has become obvious that the case has attracted so much attention within and without Malawi and in some instances, unfortunately, misguided and confrontational sentiments have been expressed. Further, because of the importance of the matter, as we quest to establish what should be the position today in Malawi with

regard to inter–country adoption, the Malawi Human Rights Commission and the Malawi Human Rights Consultative Committee applied to be joined as amici curiae. Both applications were granted, the Court being conscious of reaching out to the wider opinion especially from human rights institutions because obviously they have the human rights and welfare of children of this country at heart. Sadly though, the Human Rights Consultative Committee did not turn up at the hearing and without any explanation. I have been privileged though, when preparing for the hearing, to look at the case authorities which the Committee filed in support of its position. There is no reason why I should not consider those case authorities if I found them of guidance.

The background of the matter, without letting out too much and mindful of the privacy of the infant, his biological parental background as well as that of the petitioners, is that the infant was born on 24th September 2005. His mother died seven days after his birth. Other members of the extended family initially tried to assist the father care for the infant. Apparently that did not work out. The family was forced to seek help from an orphanage where the infant was eventually placed. The petitioners identified the infant at the orphanage resulting into the process that culminated into this petition.

As in all properly processed petitions for adoption a Guardian-Ad-Litem was appointed who prepared a report that accompanied the petition. Suffice to state that the report was detailed and fairly comprehensive. In its conclusion it described the infant as in dire need of care which the father or the extended family could not provide even if time was allowed for it.

The same report revealed the opportunity and potential the infant had in the care of the petitioners. It was also clear from the report that the petitioners were driven by the desire to rescue the infant from dire deprivation. In other words the petitioners were not motivated by any material gain other than the joy of open arms. It was on this basis that this Court made an interim Order of custody with the conditions outlined above.

For purposes of completeness in this judgment it is important that I set out the provisions of the Adoption of Children Act Cap 26:01 that are critical for consideration in this petition some of which I might have cited in the interim Order. The critical sections are the following set out in full:

S. 2 (3) Where an application for an adoption order is made by two spouses jointly, the court may make the order authorizing the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorizing more than one person to adopt an infant.

S. 3 (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:

Provide 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 can not 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.

S. 3 (4) An adoption order shall not be made upon the application of one or two spouses without the consent of the other of them:

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 cannot be found or is incapable of giving such consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.

S. 3 (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.

S. 4. 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; and

(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.*

The reason why this matter has attracted so much attention is that it is strongly argued that the laws of Malawi do not allow for adoption in the circumstances of the present case primarily because of the requirement of residence in section 3 (5) above. It is therefore necessary that I consider the wider content of the law in Malawi as it relates to matters of children's welfare and adoptions in particular.

What quickly comes to mind are the human rights provisions in our Constitution purposely there contained to enhance and uphold the

rights of all manner of people in our nation in order to preserve their dignity. Section 19(1) in particular stresses that the dignity of all persons shall be inviolable. And in order to preserve the dignity of all persons section 30 of the Constitution in turn obligates the State to ensure the right to development at every stage and level of humanity in the following manner:

> 30. *(1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development* ***and women, children and the disabled in particular*** *shall be given special consideration in the application of this right.*
>
> *(2)The State shall take all necessary measures for the realization of the right to development.* ***Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter,*** *employment and infrastructure.*
>
> (3) *The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.*

(4) *The state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.*

Beyond these provisions as we should all be aware the Constitution carries along with it international law in accordance with the international obligation that we have undertaken and that which we will in future undertake.

Section 211 of the Constitution provides:

(1) *Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament.*

(2) *Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.*

(3) *Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic.*

Courts and legal commentators have for some time since the coming into force of our Constitution teased out the implications of section 211. In particular the question has been whether binding international agreements referred to in section 211 (b) automatically form part of our law. It is not here that I shall dwell much on that debate. The position however is that Malawi ratified the Convention on the Rights of the Child (CRC) in 1991. We are also a party to the African Charter on the Rights and Welfare of the Child (ACHPR). These Conventions are binding on Malawi by choice.

In other words, Malawi has consciously and decidedly undertaken the obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions. If for a moment the argument that the Conventions are not part of our law found favour, then at least on part of the Court the duty is to interpret and apply our statutory law, so far as the spirit of the statute could allow, so that it is in conformity and not in conflict with our established obligation under these Conventions. And therefore that unless the

statute, by its words and spirit compels our Courts to ignore international laws that is binding on us, the practice of our Courts is to avoid a clash and the way is to construe the domestic statute in such a way as to avoid breaching the obligation, See *Mwakawanga v Rep (1968 – 1970) 5 MLR 14* and *Gondwe v Attorney General [1996] MLR 492*.

It is also pertinent to always bear in mind the interpretation provision in our Constitution, section 11, which in part provides as follows:

> *11. (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.*
>
> *(2) In interpreting the provisions of this Constitution a court of law shall:*
>
> *(a) promote the values which underlie an open and democratic society;*
>
> *(b) take full account of the provisions of Chapter III and Chapter IV; and*

© *where applicable, have regard to current norms of public international law and comparable foreign case law.*

Chapter IV of the Constitution is the human rights chapter.

Thus far I hope I have meaningfully established two points. The first point is that it is our singular Constitutional obligation to uphold, binding international law. Secondly, and by implication, it says to me if a law is in conflict with our international obligation it runs the risk and the likelihood of being in conflict with our Constitution and this Court is called upon to apply such interpretation of the act or law as is consistent with the Constitution, and by extension, international law, because applicable international law and the Constitution are supposed to work in tandem.

It is therefore my considered judgment that in determining this petition I am compelled to have regard to the two Conventions and other foreign case law as might be considered appropriate. Of particular relevance in this regard is Article 3 of the Convention on the Rights of the Child which rests the case on the paramount consideration in matters concerning children and provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration".

More to the subject of adoption Article 21 provides:

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) *Ensure that the adoption of a child is authorized only by the competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;*

(b) *Recognize that inter-country adoption may be considered as an alternative means of child care, if the child can not be placed in a foster or an adoptive family or can not in any suitable manner be cared for in the child's country of origin.*

(c) *Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption*".

The African Charter on the Rights and Welfare of the Child has similar provisions as above except to stress that inter-country adoption should be considered as the last resort.

The interim order I made on the 12th October 2006 referred to matters with respect to which the Court must be satisfied pursuant to section 4 of the Adoption of Children Act. For purposes of this judgment I should once more confirm that there is no contrary information brought to my attention for me to doubt the consent of every person whose consent is necessary in this petition. It is pertinent however to repeat that the Court had ample opportunity to examine those of the Banda family as well as the petitioners and made up its own impression as regards

consent. The report by the Guardian Ad-Litem is also revealing. I might as well mention that the Malawi Human Rights Commission, in its own right, investigated compliance as to consent of the extended Banda family in the village where the infant's father lives. The infant's father himself was taken through a thorough discussion by the Commission as the Commission's report made available to the Court manifests. Together these reports established informed consent with same degree of counseling. There is no doubt in my mind that the consent is genuinely informed as to the implications of this petition.

The real matter of concern to a lot of commentators who have expressed their views on this petition, which point has also been discussed by the Human Rights Commission in its brief, is the requirement of '*residence'* in section 3(5) of the Act. The bare fact is that the petitioners are not resident in Malawi and therefore that this is clearly a case of inter-country adoption. The question for consideration is whether the whole matter then collapses at that and the Court should not at all proceed to any other consideration. This approach is advanced with reference to some decided cases from a number of jurisdictions which have been referred to me such as that of Re *Adoption Application No. 52/1951 {1952} 1 Ch 16; G N and R N an Application [1985] PNGLR 121* and In *re S (an infant) {1997} FJHC 183*.

The common view in these cases is that *"residence"* when used in a provision requires some degree of permanence. In *Re Adoption Application No. 52/1951* it was observed that the word *'residence'* is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in a particular place".

Quite honestly I would have no quarrels with these dictionary interpretations if only the circumstances of our children and how best to provide for their best interest had manuals and dictionary definitions. What has exercised my mind in all this is whether *"residence"* is an end in itself in the context it is used especially bearing in mind that we are dealing with welfare of children. Or is residence merely a means to an end. Could it sensibly and maturely be argued that this is a situation where the means to an end should hold the end itself in bondage. Is residence so paramount that all else collapses without it?

In the course of determining this matter we engaged in considerable discussion with counsel before me in trying to understand the mischief for including the requirement of residence in our laws. There were a couple of resounding thoughts. The first is to realize that children are

an important asset to any civilized society. Secondly and for the first reason every civilized society has an obligation to bring up its own children in order for the society itself to be sustained. And in this case the best place for the child to experience love and affection and naturally realize its full potential is the biological family unit. Thirdly realizing that there might just be cases, and in these days all too many, where it is not possible to care for and provide for the child with a decent family life and where they can grow under the love and care of their natural parents, then the option is to allow for adoption. Fourthly if adoption is going to be allowed and because of the vulnerable nature of children it is important that the State Administration satisfies itself that the child will be safe with the adoptive parents. It then becomes necessary to be assured of the standing and circumstances of the adoptive parents.

One could only imagine that in 1949 when the Adoption of Children Act was enacted the real practical way of ensuring the child was safe with the adoptive parents was for the State Administration to have known such parents among our society for a while and thereby be able to speak for their commitment from personal interaction with them. Surely the requirement of residence was not for the purpose of making sure the child remains in Malawi. There is nothing in the Act that says

when a child is adopted it can not leave Malawi with the adoptive parents and settle elsewhere. It is also pertinent to point out that the period of residence is not specified in the Act. It is not even qualified as *"habitual residence"* or *"permanent residence"* or *"ordinarily resident"*. Residence can certainly not be equated to nationality.

The scheme that comes out very clearly is that the requirement as to residence was and is intended to protect the child, and to ensure that the adoption is well intended. It is for this reason that I am of the clear judgment that the requirement as to residence, be it important, is merely a means to an end. I also have no doubt in my mind that the "end" is the best interest of the child. I can further safely say it is for this reason that the National Policy of this country also stresses the best interest of the children being paramount in matters involving children. More importantly it is for this reason that as a Nation we undertook the obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Children. As a matter of fact the Constitution itself entrenches and prioritizes the right to development of children. The fact is the two Conventions support and respond more to the aspirations of the Constitution. All I can say about the cases that construed residence as an end in itself is that they could never survive in our Constitutional order

Thus far it can safely be said the requirement of residence has served its purpose and that in its absence there are much more weighty considerations in the welfare of our needy children which in themselves would suffice and compel a decision in favour of an adoption by those that are not resident in this country. It is to all these matters that Bhagwati, J. in *Lakshmi Kant Pandey vs. Union of India*, *AIR 1984 SC 469* said and I quote at some considerable length because of the persuasive nature of the passages:

> *"It is obvious that in a civilized society the importance of child welfare can not be over-emphasized, because the welfare of the entire community, its growth and development, depends on the health and well being of its children. Children are a "Supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is*

a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there can not be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realization in every part of the glob that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional intellectual and spiritual stability and maturity and acquire self confidence and self respect and a balanced view of life withy full appreciation and realization of the role which they have to play in the nation building process without which the nation can not develop and attain real prosperity because a large segment of the society would then be left out of the development process".

The learned Judge went further and said:

"The child shall be protected from practices, which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men". Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents."

And then he concluded:

"What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without deprivation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realize "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter-country adoption' should be acceptable".

From my analysis of the law and case authority on inter-country adoption there are a number of key considerations. The underlying consideration is that inter-country adoption should indeed be a last resort when all other options of the placement of a child have failed. I would go along with the conclusions of the Malawi Human Rights Commissions that the practice should ordinarily follow the following path:

1. Family-based solutions are generally preferable to institutional placement.

2. Permanent solutions are generally preferred to inherently temporary solutions.

3. National (domestic) solutions are generally preferable to those involving other countries.

This practice would certainly complement the search for the best interest of the child and guide decisions regarding long-term substitute care for children once the need for such care has been demonstrated. It is further acknowledged that because inter-country adoption results in permanent deprivations of the biological family environment,

permanent change in the child's ethnic, cultural, linguistic and sometimes religious settling, the process must be circumscribed by sufficient safeguards and standards. Article 21© of the Convention on the Rights of the Child above stresses that where inter-country adoption is considered as an alternative States shall ensure that the child concerned enjoys safeguards and standards equivalent to those existing in the case of national adoption. Of course one of the critical safeguards is for the administrative authorities and the Courts to be absolutely satisfied about the motive and the entire circumstances of the adoptive parents even before making any kind of order be it an interim order of custody.

The reality of the situation in Malawi is that a lot of children are in dire situation of material deprivation characterized by poverty, lack of access to essential nutrition, lack of access to education, lack of access to proper sanitation and lack of access to adequate health care. This is the inescapable reality in Malawi as in most third world countries. And to argue that we will soon find adequate solutions for all our deprived children is to assert a shameless and insolent lie.

The infant in the instant case was among our many materially deprived children whose only remaining parent was forced, because of his

circumstances, to place him at an orphanage. This was the closest to a local solution that the only surviving parent and relatives could get. In seeking to adopt the infant the petitioners are not therefore in the way of any permanent domestic solution for the infant.

Since my interim order I have received two further reports by the Guardian Ad-Litem who has personally visited the petitioners in the United Kingdom where the infant now lives with them. The reports are complemented by several independent reports of a social welfare agency in the United Kingdom. I have meticulously read through all the reports. They are very searching and comprehensive reports about the home and circumstances of the petitioners and more importantly about the development of the infant. In all the reports, the conclusion is that the infant's development is excellent and is assured, physically and mentally. I have no reason to fault any of the reports.

The Court is most appreciative to the Malawi Human Rights Commission for a very detailed and illustrative brief from which the Court has found wealth of guidance. The Court as well as the Malawi Human Rights Commission would urge Government to expedite the reforms that are underway on the whole subject of child care, protection and justice where matters of adoption of children would

hopefully be adequately addressed taking into account the global movement of the law and the reality of the situation in Malawi.

In conclusion and for all that I have discussed, I am left in no doubt that there is sufficient legal basis and reason, and I am also left in no doubt that the best interest of the infant would thus be achieved by granting this petition. Consequently I make a final order of adoption of the infant David Banda in favour of the two spouses, Guy Stuart Ritchie and Madonna Louise Ritchie, jointly pursuant to section 2 (3) of the Adoption of Children Act of the Laws of Malawi.

MADE at the High Court at Lilongwe this 28th day of May 2008.

Andrew K.C. Nyirenda

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