REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA ADOPTION APPEAL NO. 28 OF 2009
(Being Adoption Cause No. 1 of 2009,
High Court of Malawi, Lilongwe District Registry)

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

- and -

IN THE MATTER OF CHIFUNDO JAMES (A FEMALE INFANT)
OF C/O POST OFFICE BOX 30871, CHICHIRI, BLANTYRE 3.

BEFORE : **THE HONOURABLE THE CHIEF JUSTICE, MUNLO SC.**
THE HONOURABLE JUSTICE TAMBALA, SC., JA
THE HONOURABLE JUSTICE MTAMBO, SC., JA
M. Msisha SC, Chinula, Counsel for the Appellant
Gulumba, Eye of the Child, *Amicus Curiae*
Kammayani, Human Rights Commission, *Amicus Curiae*
Mwale, Official Interpreter

JUDGMENT

Chief Justice Munlo, SC.

The Appellant in this matter, Ms. Madonna Louise Ciccone, appeals against the decision of Justice Chombo declining to grant the Application for adoption of a female infant CJ. The decision was delivered by the Judge in Chambers on 3 April 2009.

Infant CJ was born on 22nd January 2006 in Kavithiwa Village, Traditional Authority Chikowi in Zomba District. Her mother who got pregnant while she was attending secondary school was 14 years old at the time infant CJ was born out of wedlock. The mother died a few days after giving birth to infant CJ. The father of infant CJ is not known. After the death of her mother infant CJ was instantly transferred to her maternal grandmother's care in accordance with the traditions of that area. The grandmother of CJ who is 67 years old is the maternal head of the family. She is very poor and depends on subsistence farming. The economic environment both at household and community level in the area where the grandmother lives is frugal, squalid and desperate and poses health hazards to normal life for people living in this community particularly, for child CJ's survival, growth and development. This hopeless situation prompted the grandmother and other members of the extended family of infant CJ to seek help from Kondanani Orphanage. Kondanani Orphanage opened its doors to infant CJ and admitted her in the orphanage where she lives up to this day. Since her placement at the orphanage, there has not been any family in Malawi that has come forward to adopt infant CJ. Neither has there been any attempt to place infant CJ with foster parents within the jurisdiction.

The Appellant then petitioned the High Court to adopt infant CJ under the provisions of the Adoption of Children's Act (Cap 26:01). We will refer to this Act as "the Act" throughout this judgment. The Petition was fully supported by an affidavit. There was also a comprehensive report which was filed by the court appointed Guardian *Ad litem* together with a notarized inter-country Adoption Home Study update for the Petitioner prepared by a Home Study Agency called "Vista Del Mar Child and Family Services" which is fully licensed by the Department of Social Services of the State of California. The Appellant had also filed a duly completed consent Order form signed by Mr. Beneti the maternal uncle of infant CJ. The Judge in the court below found that the Appellant had submitted to the court a full and comprehensive report disclosing all the necessary information for the purpose of the adoption proceedings.

In its Ruling the High Court considered at length two provisions of the Act. The first provision which the court considered was section 3(5) which provides that an adoption order shall not be made in favour of any applicant who is not resident in Malawi. After observing that the word "resident" is not defined in the Act and considering what Nyirenda J (as he then was) said on the issue of "residence" in the Adoption Cause No. 2 of 2006 of David Banda, the Judge distinguished the approach that was taken by Nyirenda J with that taken in the decision in **GN and RN, an Application (1985) PNGLR 121** and the decision of Byrne J in **re S (an infant) 1997**. The Judge then referred to information in the global media to the effect that the Petitioner had just jetted into the country during the week-end just prior to the hearing of the application that was before her. She also took Judicial notice of reports in the media that the last time that the Appellant was in the country was 2008 at the time of the final adoption Order for David Banda and concluded that the information from these media reports completely removed the Petitioner from the definition of "resident" as defined by the Oxford English dictionary and adopted in the cited cases.

The second provision which the Judge considered was section 4(b) of the Act which provides that before making an adoption order the court shall satisfy itself that the order, if made, will be for the welfare of the infant due consideration being given to the wishes of the infant, having regard to the age and understanding of the infant. After noting that the Act did not define or interpret what constitutes the welfare of the infant especially where the infant has no capacity to make a decision of its own as was the case in the present matter, the court examined pertinent provisions in two

International Conventions namely, Articles 3(1), 20 and 21 of the Convention on the Rights of the Child (CRC) and Article 24(1) of the African Charter on the Rights and Welfare of the Child which talk about "the best interest of the child being the primary consideration." She observed that in the light of Article 24 of the African Charter on the Rights and Welfare of the Child inter-country adoption of a child may, as a last resort, be considered as an alternative means of a child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. She observed that in the instant case the infant was no longer subject to the conditions of poverty of her birth place as she had been admitted to Kondanani Orphanage and that there was no evidence that Kondanani Orphanage to which the infant is presently being cared for is unable or unwilling to continue looking after the infant. On the basis of these observations she declined to grant the application for the adoption of the infant CJ.

The Appellant being dissatisfied with this decision has Appealed to this court. She has filed the following seven grounds of Appeal:

1. The Learned Judge erred in law in not applying the provisions of section 7 of the Adoption of Children Act.

2. The Learned Judge erred in law in relying on a proposal of the Malawi Law Commission in a Bill that is still before Parliament when in fact the Report of the Law Commission on the Review of the Children and Young Persons Act in fact recommends that section 3(5) of the Adoption of Children Act be deleted and replaced.

3. The Learned Judge erred in law in finding that the sole consideration for allowing an inter-country adoption is "residence".

4. The Learned Judge erred in law in not making a specific finding whether the infant can be placed in a "foster or adoptive family" in Malawi.

5. The Learned Judge erred in law and in fact in finding that since the infant was admitted at Kondanani Orphanage, the infant is no longer subject to the conditions of poverty of her place of birth.

6. The Learned Judge erred in law in making a specific finding that the infant can be suitably cared for in Malawi, her country of origin.

7. The finding of the Learned Judge in declining to grant the application for the adoption of the infant is generally against the weight of the evidence on record.

Before the hearing of this Appeal, the Eye of the Child a local human rights organization registered under the Trustees Incorporation Act (Cap 5:03) of the Laws of Malawi made an application to join these proceedings and be heard as ***Amicus Curiae*** on 28 April 2009 and the application was granted the same day. Two days later, the Human Rights Commission, a body established under section 129 of the Constitution, as read with the Human Rights Act (Cap 3:08) of the Laws of Malawi also applied to join these proceedings and be heard as ***Amicus Curiae*** on 30 April 2009 and the court granted the application the same day.

Amicus Curiae means a friend of the court who assists the court by furnishing information or addressing the court on questions of law or fact that are relevant to the proceedings. Since the two institutions were admitted as ***amici curiae,*** they have made extensive and useful submissions through their skeletal arguments. We are very grateful for the indepth research, and the informative materials that have been brought before the court.

Counsel for the Appellant, Mr. Msisha, submitted in their skeletal argument that the court's decision was based on the issue of the residence of the Applicant. The court was of the view that section 3(5) of the Act prohibited the making of the adoption Order in favour of any applicant who was not resident in Malawi.

In arguing the appeal Mr. Msisha did not follow the grounds of appeal as they appear on the record. In his skeletal argument he submitted that the number of grounds of appeal that have been filed coalesce around the argument that the welfare of the infant to be adopted is the only key factor in determining the question whether or not an adoption order should be made; in this regard section 3(5) of the Act is inconsistent with several provisions of the Constitution and is arbitrary.

Mr. Msisha observes that under section 2 of the Act, the right to adopt is accorded to any person. And if residence was the deciding factor, there should have been a legal requirement against adopting parents leaving the country at all and submits that the arbitrariness of s3(5) of the Act is demonstrated by its requiring the court to ignore the finding and comments of the Guardian *ad litem* regarding suitability.

Mr. Msisha submits that matters in respect of which the court must be satisfied in regard to the welfare of the child are those contained in sections 3(3) and 4(a) of the Act, dealing with consent; section 4(c) of the Act, prohibiting any financial reward or payment to the Applicant and section 4(b) of the Act which expressly requires that if the adoption order is made it will be for the welfare of the child. It is Mr. Msisha's submission that section 3(5) of the Act which prohibits the making of an Adoption order in favour of any applicant who is not resident in Malawi does not deal with the welfare of the child.

We have decided to deal with this appeal by following the skeletal arguments that were adopted by counsel during hearing. We agree with Mr. Msisha that unlike the Adoption Act of 1950 in England where it is provided in section 1 that an application for adoption can only be made by a person who is domiciled in England or Scotland, in Malawi the position is different. Under section 2(1) the right to adopt is not circumscribed, it is accorded to any person. We also agree with counsel that under the Act the welfare of the infant is one of the key factors in determining whether or not to make an adoption order. We would go further to say that it is not only the sections in the Act that have been referred to us by counsel that deal with the welfare of the infant but in fact the whole Act deals with the welfare of the infant. Turning to counsel's submission that section 3(5) of the Act does not deal with the welfare of the child and is not only inconsistent with several provisions of the Constitution but arbitrary, we think that the proper approach with regard to that subsection is to look at what Nyirenda J (as he then was) said in Adoption Cause No. 2 of 2006. He stated:

> "The requirement as to residence, in my view, is also intended to enable the system in Malawi to verify the standing and disposition

> of the applicants with some degree of certainty. But all these considerations in my Judgment are intended to establish that the infant child will be in safe and secure hands."

Viewed this way, section 3(5) is a beacon of protection and safety for an infant against unscrupulous aliens and therefore goes to enhance the welfare of the infant. Section 3(5) cannot therefore be said to be a section that negates fundamental human rights. Neither can the subsection be said to subtract from the other provisions of the Act that deal with the welfare of the infant. Section 3(5) is not inconsistent with the provisions of the Constitution that counsel has referred us to, it is also not arbitrary. In the course of submissions, counsel did concede that the question of residence provided for in section 3(5) of the Act is a factor to be considered in adoption cases though it is not the only factor. We agree with this concession.

Counsel has further submitted that the court below erred in law in arriving at its decision on the question of residence as provided for in section 3(5) of the Act without first taking into account the relevant provisions of the Constitution in order to determine the constitutionality of section 3(5). The Appellant's case is that if the court had borne in mind sections 12, 13 and 14 of the Constitution which contain fundamental principles of national policy and considered the constitutionality of section 3(5) of the Act it would have arrived at a different conclusion. It is argued that the decision is inconsistent with section 16 of the Constitution which deals with the right to life.

The argument by counsel is that a child in dire circumstances has still a right to life. To deny the child the opportunity of adoption on a ground whose relevance or significance in the modern world is doubtful amounts to arbitrary deprivation of the right to life. The decision in the court below is also said to be contrary to section 23 of the Constitution which recognizes that "all children, regardless of the circumstances of their birth are entitled to equal protection before the law."

We have looked at the decision of the court below and we do not find in it anything that would lend support to the submission that when arriving at its decision the court below did not bear in mind sections 12, 13 and 14 of the Constitution. The Constitution of Malawi is the Supreme law of the land which sets the standards to which all statutes must conform. All judicial officers derive their authority from the Constitution. Section 9 of the Constitution clearly spells out the responsibility of judicial officers. Their responsibility is to interpret, protect and enforce the Constitution and all laws in accordance with the Constitution. Sections 10, 11, 12 and 14 actually describe how the judicial officers should go about their functions. In a manner of speaking these sections partly provide the job description that judicial officers have in relation to their appointments. There is therefore a presumption that all judicial officers when performing their functions have the Constitution in the forefront of their mind if not at the back of their mind. This presumption can be rebutted with concrete evidence that shows the contrary. Bare assertions will not rebut the presumption. Counsel has not given us the basis on which we can conclude that when writing her Judgment in this case the Judge in the court below was oblivious of these constitutional provisions.

We do not also subscribe to the idea that by declining to grant an adoption order on the ground of residence the decision of the Judge in the court below is in violation of section 16 of the Constitution which recognizes the right to life with regard to the infant. There is no evidence on

record or from the Guardian *Ad litem* that suggests that the infant will die due to lack of adequate care and nutrition. The Judge in the court below has made the following observation:

> "It is evident however that CJ no longer is subject to the conditions of poverty of her place of birth as described by the probation officer since her admission at Kondanani Orphanage."

There is nothing in counsel's submissions to challenge or contradict this finding of the court. We see no merit in the submissions herein.

Counsel has submitted that the court ought to have given due weight to the decision of Nyirenda J. in the David Banda case where he observed that the period of residence has not been specified in the Act and that neither does it qualify the nature of the residence as "permanent residence" or "ordinary residence". We have looked at the decision of the court below and we have noted that the Judge in the court below spent some time looking at the Judgment of Nyirenda J. She however felt that there was a wealth of authority from different jurisdictions that had dealt with the interpretation of the word "residence" in a way that she found comprehensive. The accepted practice in the High Court is that a Judge is not bound to follow a decision of another Judge if he or she does not agree with it. We do not think that the Judge can be faulted for deciding not to follow the decision of Nyirenda J. and we do not see any merit in this submission.

Mr. Msisha then addressed us on the state of jurisprudence and drew our attention to section 11(2)(c) of the Constitution which provides:-

> "In interpreting the provisions of this Constitution a court of law shall□
>
> **Where applicable**, have regard to current norms of public international law and comparable foreign case law." (emphasis added)

We have looked at this submission and it is clear to us that it is not in all cases that when interpreting the Constitution courts must have regard to current norms of public international law and comparative foreign case law. Section 11(2)(c) makes it clear that the courts will only have regard to current norms of public international law and comparative foreign case law where it is **applicable** to do so.

Counsel also drew our attention to section 211 which provides as follows:-

> "211(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 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."

Mr. Msisha then submitted that the intention of section 211(1) is that any international convention which Malawi signs becomes part of our law and section 211(2) extends the effect of subsection (1) even to conventions signed before the coming into effect of the Constitution in 1994. He emphasized that there is no other reasonable construction that could be placed on the subsection and that if there is an apparent ambiguity in the formulation of subsection (2) it should be resolved by holding that the Convention on the Rights of the Child 1990 (CRC), in so far as it was ratified prior to the coming into effect of the present Constitution, forms part of our law within the meaning of section 211(2).

Counsel has submitted that at the very least the court is entitled to have regard to the provisions of the convention and any other treaty entered into by Malawi when interpreting the provisions of the local law. It is said that Article 3 of the CRC is very important in so far as it affirms the principle of the best interest of the child. The effect of Article 3 was considered in **Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh FC (1995) 69 ALJR 423** Mason CJ and Dean J stated in a joint Judgment at paragraph 34:

> "Junior counsel for the appellant contended that a convention [CRC] ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law is a less than compelling reason …. particularly when the instrument evidences internationally accepted standards to be applied by Courts and administrative authorities in dealing with basic human rights affecting the family and children."

And in paragraph 31 of their Judgment as follows:

> "One other aspect of Art. 3 merits attention. The concluding words of Art. 3.1 are "the best interests of the child shall be a primary consideration" (our emphasis). The article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, required equal, but not paramount, weight."

Toohey, J agreed, holding that:

> "…..by ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities

> or legislative bodies' make 'the best interests of the child a primary consideration."

Mr. Msisha referred us to Articles 20 and 21 of the CRC. Article 20 states:

> "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

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

Counsel then drew our attention to Article 24 of the African Charter on the Rights and Welfare of the Child 1999 which charges the high contracting parties who recognize the system of adoption to ensure that the best interest of the child shall be the primary consideration and shall:

> "(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with

> applicable laws and procedures and on the basis of all relevant and reliable information that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counseling;
>
> (b) Recognize that inter-country adoption in those States who have ratifies or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for the child's country of origin;
>
> (c) Ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) Take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
>
> (e) Promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
>
> (f) Establish a machinery to monitor the well-being of the adopted child."

Counsel has submitted that the provisions in the African Charter on the Rights and Welfare of the Child reinforces those in the CRC. Mr. Msisha drew our attention to two Conventions not yet ratified by Malawi which we do not think we need to consider as Mr. Msisha himself has doubts on whether these have crystalized into norms of customary international law.

Coming to the submission made in regard to section 211 of the Constitution we note that similar questions of interpretation of section 211 exercised the mind of Nyirenda J in Adoption Cause No. 2 of 2006 and the Judge wisely, in our view, declined to enter the debate. He stated:

> "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."

We think that the correct reading of that section is to follow the clear language that has been employed. If one does that one will find that the clear thread that runs through the fabric of all the subsections of section 211 of our Constitution is that all international agreements entered into prior to the Constitution or after the Constitution are only binding if they are not in conflict with the clear provisions of our statutes. Put differently, whether an international agreement forms part of our law, regardless of when it was entered into, will depend on whether there is no Act of Parliament that provides to the contrary. And the question whether customary international law forms part of our law will depend on whether it is consistent with our Constitution or our statutes.

In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution. In doing so the courts will try as much as possible to avoid a clash between what our laws say on the subject and what the international agreements or conventions are saying on the subject, but where this is not possible, the provisions of our Constitution and the laws made under it will carry the day. It should not come as a surprise that this is the state of the law in Malawi because, by their nature, international agreements are a product of compromise arising out of hard bargaining by high contracting parties. They involve a lot of give and take. They are also negotiated by the executive branch of the Government and not by parliament. Our constitutional order clearly defines the role which each branch of the State has to play in the making of the laws that bind our citizens. It is the executive branch of Government that initiates policy and formulates the laws. It is also the executive branch of Government that enters into international conventions. If the executive branch of Government wishes any of the international conventions which it has freely acceded to, to have the force of law, then it should bring such convention before parliament which has the Constitutional mandate to make all laws of this land. In this regard sections 7, 8 and 9 of the Constitution are not only in tandem with what is contained in section 211 of the Constitution, but are also conclusive on the matter. We do not therefore agree with counsel's submission that the intention of section 211(1) is to make any international convention which Malawi signs automatically part of the law of the country.

Coming to the actual provisions of the CRC we note that Article 3 provides that "the best interest of the child shall be a primary consideration. Article 21 of the CRC charges the parties who recognize adoptions in their system to ensure that the best interest of the child shall be the paramount consideration and that the adoption is authorized by competent authorities in accordance with the applicable law in those countries. The best interest of the child is also emphasized in Article 24 of the African Charter on the Rights and Welfare of the Child 1990.

In our Judgment, we think that whether you talk about the best interest of the child as is the case in the above cited Conventions or you talk about the welfare of the child as is contained in the Act, this really is a question of semantics or nomenclature. They mean the same thing, and it is this; a court of law dealing with the adoption of an infant must pay attention at all times that the welfare of the child is not compromised by secondary issues. We therefore find that there is absolutely no conflict between what the Act provides and what Articles 3, 20 and 21 of the CRC provide. The provisions deal at some length with matters that can only be said to be for the welfare of the child which our courts are mandated to protect under the Act. Article 20 of the CRC in fact encourages state parties to deal with adoption cases in accordance with what the national laws provide. The article states in part as follows:

> "State Parties shall in accordance with their national laws ensure alternative care for such a child."

Article 21 of the CRC provides that contracting parties should:

> "(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures."

The Article goes on to dwell on some of the safeguards that are provided in sections 3(3), 4(a), 4(b), 4(c) of the Act and in Rule 12 of the Rules to the Act. Article 21 (b) of the CRC which recognizes that:

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

is not only in harmony with section 2 of the Act which counsel drew our attention to but also with section 4 of the Act which deals with the welfare of the child.

Article 24(a) and (b) of the African Charter on the Rights and Welfare of the Child 1999 is for all practical purposes similar to Article 21(a) and (b) of the CRC and the observations we have made in regard to Article 21(a) and (b) are applicable to Article 24(a). All these provisions compliment and amplify the Act. And courts may take judicial notice of them when they are considering an application under the Act. This is not to say, however, that our own Act is not adequate or comprehensive in dealing with adoption issues, far from it. All we are saying here is that when we look at our Constitution and the Act there is no clash or conflict whatsoever between what is provided for in our own laws and what is provided for in the various conventions that have been referred to us. We will therefore use our own Act and Constitution which are sufficient in deciding this Appeal.

The real issue in this appeal turns on the question of residence. Where a man resides is a question of fact to be determined on proper legal principles. See **Commissioners of Inland Revenue v Lysaght [1928] AC 234 at 241.** The critical date for defining Residence is the date on which the case is called for hearing. In this case the Judge in the court below seemed to have placed a lot of weight in deciding the question of residence on two cases namely the decision of the National Court of Justice in Papua New Guinea in **GN and RN, an Application (1985) PNGLR 121** which quoted, with approval, Ashworth J in **Brokelmann v Barr [1971] 3 All ER 29** at 36 where he stated that:

> "In the Judgment of this court, **there has gradually been developed and established a rule of construction that *prima facie* at least "residence" involves some degree of permanence**. As was said by Lord Wdgery in **Fox v Stirk (9 Supra)**. It is imperative to remember in this context that residence implies a degree of permanence." (emphasis added)

It is important to note that Ashworth J was not talking of an inflexible or conclusive rule of construction but merely a ***prima facie*** rule of construction which can be rebutted by the particular facts of the case under consideration. From the decision of the court below it is clear that when the Judge was dealing with the issue of residence she did not examine the evidence that was on the court record before her in order to make a specific finding on whether that evidence was such that the ***prima facie*** rule of construction was viable in this particular case. Instead she decided to base her decision on residence by taking judicial notice on what she had read in the global media and what reports in the media were saying. Now, this was clearly wrong. The reports in the media were not part of the evidence that was before her. With the greatest respect we think that the Judge fell in error by relying on what was said in the media instead of relying on the evidence that was before the court. A court is not entitled to rely on knowledge gained from extraneous sources as a basis for its decision especially when such knowledge was not made available to the parties during proceedings or communicated to parties before the decision was made. If the Judge in the court below had concentrated on the totality of the evidence that was on the court record it would have been clear to her that the particular facts that were before her could not support this rule of construction.

The Judge in the court below also relied on the decision of Byrne J (as he then was) in **re S (an infant) 1977** FJHC 183 where the Judge quoted with approval the decision of Harman J in **Re Adoption Application No. 52/1951 [1952] 1 Ch. 16**. Justice Byrne also quoted the remarks of Lord Cave L. C. in **Levene v IRC** [1928] AC 217 at 222. In so far as the decision in **re S (an infant)** is based on the decision in **Re Adoption Application No. 52/1951** it does not stand on firm grounds and may not be relied on. We do not therefore find the definition of Residence in these cases helpful in the construction of section 3(5) of the Act.

The facts in the case of In **Re Adoption Application No 52 [1952] 1 Ch. 16** which Byrne J relied on revealed that the actual application to adopt a child involved a family which had its roots in England but the husband was employed in the Nigerian colonial service as a district officer and his duties required him and his wife to live in Nigeria throughout his service. Every fifteen months he had a period of leave of about three months and he and his wife habitually returned to England and lived with their parents for the three months leave periods. In 1951 they bought a house in England apparently intending to return to reside there permanently after about seven years when the husband's term of service would have ended. The husband left for Nigeria before the matter came up for hearing, leaving the wife to continue with the application. The question was whether the wife satisfied the requirement of residence contained in section 2(5) of the Adoption Act 1950 in England. The court decided that she was not resident. At the beginning of his Judgment Harman J made the following observation:

> "The court was not told, except by a pure chance, that the child was to be taken to a part of the world which, prima facie, might be very undesirable for a child."

Two points come to mind. First, the Judge, having observed as he did, that the child was to be taken to a part of the world which might be very undesirable for a child, must have realised that to grant an adoption order in those circumstances would run counter to section 5(1) of the 1950 Act which provided that before making an adoption order the court shall be satisfied that the order, if

made, will be for the welfare of the infant. The second point is that in view of the pertinent observation that the Judge made in that case, it is clear that the facts of that case are completely different from those obtaining in the instant case. There is nothing in this Application which suggests that infant CJ is being taken to a part of the world which *prima facie* might be undesirable for the infant.

In arriving at his decision Harman J considered also the provisions of section 1 of the 1950 Act which provides that an application can only be made by a person who is domiciled in England or Scotland, nothing being said as to residence. This section does not exist in the Act here. He also considered section 27(1) where the adoption society is prohibited from placing an infant in the care and possession of a person resident abroad unless a licence has been granted. He finally looked at section 40. Now, these and the many provisions in the 1950 Act which influenced the Judge in observing that it was not possible for an applicant to be regarded as resident simultaneously in England and abroad, and in his decision that, the Applicant was not resident in England, do not form part of the provisions of the Act here. That case cannot therefore be a basis for the decision in a case brought under the Act here. In any case section 27 and 40 which the Judge relied on in his decision have now been repealed thereby severely shaking the foundation and usefulness of the decision in **Re Adoption Application No. 52/1951.** It cannot be relied on as a basis for the decision on residence in modern times.

The Judge had also encountered a difficulty in arriving at his decision on account of in **re W (1946 unreported)** an application involving yet another Colonial Civil Servant and his wife having roots in Engalnd whose application to adopt a child came for hearing when the husband was not in England. Although the court decided not to grant the absent husband the order, it made it clear that "when the male applicant returns to this country the order can be varied and made in favour of both the applicants". An observation is made in the Judgment that when the male applicant returned on leave in 1948 an order was made in his favour although he intended to go back to Africa shortly after. Based on that case the practice has been to hold that an applicant satisfies the requirement that he should be "resident" if he is physically within the borders of the country at the moment when the order is being made.

It is pertinent to observe that although Harman J had indicated on page 22 of his Judgment that:

> "The crucial matter therefore is the construction of section 2(5) which prohibits an adoption order being made except in favour of an applicant who is resident in England",

and had observed that in **Levene v Inland Revenue Commissioners [1928] AC 217** Lord Cave L.C. cited the Oxford English Dictionary saying "The word "reside" 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 or at a particular place", he himself, did not, however, attempt to construct or define the word residence appearing in section 2(5) of the 1950 Act. After stating that the court must be able to postulate at the critical date that the applicant is resident, and that it is a question of fact, he emphatically declared on page 25 of the Judgment as follows:

> "Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country. **It seems dangerous to try to define what is meant by residence. It is very unfortunate that it is not possible to do so**, but, in my Judgment, the question before the court is in every such case whether the applicant is a person who resides in this country. In the present case I can only answer that question in the case of the wife by holding that she is not resident in this country; she is merely a sojourner here during a period of leave." (emphasis added)

Harman J made no secret of the fact that he regretted the conclusion he had arrived at as it was inconsistent with three decisions that had been previously made two years prior to his decision.

It came as no surprise, therefore, that after looking at Stroud's Judicial Dictionary 4th Edition volume 4 at pp 2358/2366 Byrne J recognized:

> "a formidable if not bewildering body of authority …. concerning the meaning of the words "reside" "residence" and "resident"."

Byrne J then concluded that:

> "From this it is clear that the words have different meanings in different context and in particular in different legislation. Thus for example in fiscal legislation the courts and legislatures have adopted artificial standards in determining what constitutes "residence"."

Bryne J then quoted a passage in the decision of Harman J in **Re Adoption Application No. 52/1951 [1952] 1 Ch. 16** as follows:

> "Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country."

Thus relying on the Judgment of Harman J at p 25 already quoted above he concluded, without really defining the word "residence" in the particular case he was dealing with by stating as follows:

> "Again it seems to me that this passage is also applicable to the facts of the instant case. I am satisfied that the concept of residency involves an element of permanent settlement for a foreseeable period of time and not some temporary period or sojourn, to use the word employed by Justice Harman. There can be no doubt in my Judgment that on the evidence before the court the Applicants have established their roots in Australia for the

> foreseeable future and that any visits they may make to Fiji are simply stays for a particular time."

It is not without significance that Byrne J also expressly regretted his decision. He even invited the attention of the authorities to amend the Adoption of Infant Act to alleviate the hardship caused by the interpretation given to the law by Justice Harman. The decision of Harman J which Justice Byrne relied on was criticized as too narrow by McClean in his article. "The meaning of Residence" 11 1.C.L.Q 1153. These decisions which were clearly admitted to cause hardships cannot be said to have been made for the welfare of the infant, neither can they be relied on as authority in deciding this case.

The unsettling question which comes to mind when one looks at the decision of Bryne J in **re S (an infant) 1977 FJHC** 183 and the decision of Harman J in **Re Adoption Application No. 52/1951 [1952] 1 Ch 16** is this; why should these two eminent Judges lament their own decisions even before they are delivered? Another unsettling question that has exercised our minds is the contradictory decisions in **Adoption Application No. 52/1951 [1952]** 1 Ch 16 and in **Re W (1946) unreported**. In **re Adoption Application No. 52 [1952] 1 Ch 16,** the Applicants had their roots in England, their parents were in England they bought a home in England however their colonial appointment required them to be in Nigeria for 15 months before they habitually returned to England for a period of three months. They applied to adopt a child. The application was not granted on the basis of residence. They were said not to be resident in England because "residence denotes some degree of permanence. In **Re W (1946) unreported** is a case of another colonial civil servant and his wife whose roots were also in England. They had a house in England in which they lived when they were in England on holiday from their colonial service in Africa. They applied to adopt a child. Before the case could be held the husband left for Africa. The court held that the wife was resident as she did not intend to go back to Africa and granted her the adoption order and indicated that when the male applicant returns to England the order would be varied and made in favour of both applicants. In May 1948 an Order was made in favour of the male applicants although it was on record that he intended to go to Africa shortly after.

We have two cases here involving two colonial civil servants at the peak of colonialism. They both have their roots in England. The terms of their colonial employment in Africa allows them to return to England for holidays of three months. Both of them apply to adopt a child. In **Re Adoption Application No. 52/1951** the courts say the Applicants are not resident in England. In **R W (1946)** (unreported) the courts say that the Applicants are resident in England. What is the basis of holding that the Applicants in **Re Adoption No. 52/1951** the Applicants were not resident in England and holding that the Applicant in **R W (1946) unreported** were resident in England when the facts of the two cases are on all fours the same?

It is clear to us that although lip service has been given as to what amounts to residence in the two cases, there has not really been a serious attempt to define what would amount to residence in any particular case. It is this state of the law on residence that prompted Nyirenda J in Adoption Cause No. 2 of 2006 to observe that "it might well be that the definition of residence is at large." We agree with Justice Nyirenda's observation that indeed the definition of residence in the cases that were considered in the court below is at large. We will try to capture it.

It must be observed that these two cases were decided at a time when colonialism held sway. "Overseas territories" and "overseas possessions" were the relics of the day in England with all their legal contradictions. Since then life has moved on. Colonialism and colonial outposts in their original format are things of the past. A new international legal order has taken root. Globalisation and the global village with all its legal ramifications is now what preoccupies legal minds. In the course of hearing this appeal, counsel for the Appellant, counsel for the Eye of the Child and counsel for Human Rights Commission devoted a great deal of their time in addressing this court on the various international conventions that nations have concluded in the past twenty years dealing with the subject of adoption of children. The English Adoption Act of 1950 has itself undergone significant amendments after the decision in **Re Adoption Application No. 52/1951.** This has in turn changed the legal landscape on adoption laws.

Although the courts have from time to time referred to the **Oxford English Dictionary** when trying to define the word Residence the truth of the matter is that the question whether there has been residence is a question which has to be determined on proper legal principles. It is no longer tied to the notion of permanence as a deciding factor. The time when the courts defined the word residence by referring to the Oxford English Dictionary as the standard is long gone.

It has for some time now been the law that a man may have more than one place in which he resides. See **Morgon v Murch [1970] 43 FLR 292.** The legal notion of residence is distinct from that found in the dictionary and is constituted by the fact of such physical presence in a place as is not fleeting or transitory. Any period of physical presence however short may constitute residence if it is shown that the presence is not transitory; if the period has just began, this will be a question of intention of the party. There is even no need for one to own property in a place in order for him to be capable of residing there.

From the case authorities it is clear that even at this time in England there was another legal thought on the definition of residence emerging or developing. **Matalon v Matalon [1952] 1 All ER 1025** is an apt illustration of the modern Approach. It concerned a wife's petition for Judicial Separation, the husband was domiciled and resident at all material times in Jamaica. At the time the wife presented her petition he had been in England for some nine weeks: he had gone there solely for the purpose of conducting business negotiations and of claiming the custody of the child of the marriage, he had no property there and lived in a series of hotels and boarding houses. Neither the limited purpose of his visit to England nor his movement from hotel to hotel prevented a unanimous Court of Appeal decision holding him resident in that country.

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 which held that residence on the facts of that case was satisfied. 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 David Banda 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. It is clear from the evidence on the record that the Appellant's motive in coming to Malawi is a long term motive which started in 2006 when she adopted in this country an infant called David Banda, since then she has invested her time and money in trying to adopt another infant here, namely infant CJ. Further she is not here only to adopt infant CJ but to also implement her long term ideas of investing in the improvement of more children's lives with her projects in Malawi. In our view it is clear that the evidence on the court record establishes that the Applicant was at the time of this application resident in Malawi. She was not in the country by chance or as a mere sojourner.

In her ruling the learned Judge in the court below indicated that she had struggled before she came to her decision. She stated on page 6 of her decision that:

> "Clearly inter country adoption is supposed to be the last resort alternative. In my internal struggle to come to some sane conclusion I asked myself a number of questions. Can CJ be placed in a foster or adoptive family? Incidentally the Act does

> not define what "a foster or adoptive family" is. The answer is neither here nor there. It is evident however that CJ no longer is subject to the conditions of poverty of her place of birth as described by the Probation Officer since her admission at Kondanani Orphanage. In the circumstances can it be said that CJ cannot in any suitable manner be cared for in her country of origin? The answer to my questions are negative."

There are two observations to be made regarding this part of the decision of the court below. We do not think that under the Act inter country adoption is a last resort alternative. Section 2 of the Act clearly gives the right to adopt to any person. Secondly it is a fact that since the case of infant CJ surfaced itself there has not been a single family in Malawi that has come forward to adopt infant CJ neither have there been any attempt by anybody to place infant CJ in a foster family. The only person who has been bold and compassionate enough to come forward and ask the courts to adopt infant CJ is the Appellant. The question whether in these circumstances it can be said that infant CJ cannot in any suitable manner be cared for in her country of origin depends on what options she has on the ground. On the evidence infant CJ can hardly be said to have many options. As a matter of fact there are only two options. She can either stay in Kondanani Orphanage and have no family life at all or she can be adopted by the Appellant and grow in a family that the Appellant is offering. Faced with these two options the decision of Bhagwati J in **Lackshmi Kant Pandey v Union of India, Air 1984 SC 469** is instructive. The relevant part reads:

> "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 … 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….
>
> **If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents** and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness." (emphasis added)

In our Judgment the welfare of infant CJ will be better taken care of by having her adopted by the foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents.

There are two more issues which we think we should deal with before we come to the conclusion of this appeal. The Judge in the court below lamented that it had not been possible for her to consult the Hansard at Parliament and investigate the spirit of the law at the time the Act was passed. We think that where the provisions of the Act are so clear as is the case in this matter, it would be wrong for a court to be looking at what went on in Parliament before the Act was passed because whatever went on in Parliament during debate cannot contradict the clear wording of the Act. The Judge also stated that her conviction in her decision on the question of residence in this matter was further fortified by the proposal of the Malawi Law Commission in a bill which is still before Parliament and which among other things provide that a new section 3(5) be enacted to include the following:

> "(d) The applicant or one of the applicants if not a relative of the child, has, while in Malawi, fostered the child for a period of one year."

For the reasons we have just given above this approach to the issue at hand was also clearly wrong, and with the greatest respect, the court below misdirected itself by placing too much emphasis on a Bill which has not been passed instead of concentrating its attention on the clear language of the Act and the facts of the case that are on the file.

While dealing with the question of residence the learned Judge in the court below also stated the following on page 4 of her decision:

> "Put simply courts do make law by the process of precedents, and Ms Madonna may not be the only international person interested in adopting the so-called poor children of Malawi. By removing the very safeguard that is supposed to protect our children the courts by their pronouncements **could actually facilitate trafficking of children by some unscrupulous individuals who would take advantage of the weakness of the law of the land. It is necessary that we look beyond a particular petitioner, and may be even a particular benefactor but go beyond them, and consider the consequences of opening the doors too wide.** Anyone could come to Malawi and quickly arrange for an adoption that might have grave consequences on the very children that the law seeks to protect."

With the greatest deference to the Judge in the court below we think that she fell in error by looking beyond the particular petitioner and the particular benefactor that were before the court and basing her decision on some imaginary unscrupulous individuals allegedly involving themselves in child trafficking. These unscrupulous individuals were not before the court. They have not applied for an adoption order. The Appellant has. The Judge also fell into grave error in deciding to protect some imaginary children who were not parties to these proceedings thereby ignoring the particular infant CJ who was before the court. The court ought to have based its decision on the particular appellant and the particular infant that were before the court.

It is clear from the evidence on record that the appellant who was before the court is an intelligent, articulate and outgoing individual of strong character. She is also a determined, independent and hardworking person of compassion who comes from a God fearing family. Since the early age of six when her mother died, she took on a maternal role to her younger siblings, assuming responsibility of house cleaning, cooking and babysitting. We see this noble spirit of wishing to assist those that are less fortunate in life than her by her actions in adopting David Banda in 2006, her application to adopt yet another less fortunate child CJ and by her charitable acts of investing and putting in place a long term project in Malawi aimed at the improvement of more Malawian children's lives. The notarized inter country Adoption Home Study update prepared by Vista Del Mar Child and Family Services clearly indicates that by her lifestyle she is herself a child of the world. She maintains two homes in two continents. She has a home in Beverly Hills, California in the United States of America and another home located in London, England where she spends a great deal of time with her children. From her recent income tax returns she is financially stable and will be able to provide for all the basic needs of infant CJ. If the court below had directed its mind on this evidence which was on record rather than on some imaginary unscrupulous individuals, we are sure that the court would have arrived at a different decision. We would therefore allow the appeal and grant the adoption order.

DELIVERED in Open Court this 12th day of June, 2009 at Blantyre.

Sgd.: ……
L. G. Munlo SC, CJ.

Sgd.: ……
D. G. Tambala SC, JA.

Sgd.: ……
I. J. Mtambo SC, JA.