[2019] IEHC 779

THE HIGH COURT

[2018 No. 392 MCA]

IN THE MATTER OF SECTION 92 OF THE ADOPTION ACT, 2010 AND IN THE MATTER OF J.B. (A MINOR) AND K.B. (A MINOR)

BETWEEN

C. B.

AND

P. B.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

AND

THE ATTORNEY GENERAL

AND

THE CHILD AND FAMILY AGENCY

NOTICE PARTIES

JUDGMENT of Ms. Justice Faherty delivered on the 10th day of September 2019.

1. This matter comes before the Court by way of originating notice of motion dated 12th October, 2018 wherein the applicants seek, *inter alia,*

   - A declaration pursuant to s. 92 of the Adoption Act, 2010 ("hereinafter the 2010 Act") that an entry should be made in the Register of Intercountry Adoptions (hereafter "the Register") in respect of the adoption of the said J.B. and K.B. by the second applicant in Country A;

   - An order pursuant to s. 92 of the 2010 Act directing the Adoption Authority of Ireland ("the Authority") to procure the making of the said entry in the register; and

   - An Order that the authority shall issue to the second applicant pursuant to s. 91(1) a certified copy of the said entry on payment to the Authority of the specified fee.

   The application is resisted by the Authority and the Attorney General. The position of the Authority is set out in an affidavit sworn on 22nd October, 2018 by Tara Downes, who is the Authority's Director of Operations. Her affidavit was sworn in response to the grounding affidavit sworn by the first applicant on 12th October, 2018. As the dispute between the parties is set in the judgment by reference to all parties' submissions to the Court, I did not find it necessary to otherwise recite the contents of the aforesaid affidavits. Additionally, the Court has heard the oral evidence of the first and second applicants. As will become clear in the course of this judgment, the adoptions in issue in the within application already have a considerable litigation history in this jurisdiction.

Background

2. The applicants are a married couple who were married in the UK in August, 2008. They have resided in this jurisdiction since October, 2006 and December, 2007 respectively. The first applicant holds citizenship of both the UK and Ireland, becoming an Irish citizen

in March, 2013. The second applicant holds citizenship of Country A and Ireland, having obtained Irish citizenship in October, 2013.

3. The children, J.B. and K.B., were born in Country A and resided there until April 2012.

4. The first applicant is a business executive holding the position of group company secretary in an international company. Previously, he worked as group company secretary for a financial institution that operates extensively across a continent. It was while in Country A in the course of his work that he met the second applicant who at the time was working in Country A's capital city having completed a university degree.

5. K.B. and J.B. are the niece and nephew of the second applicant by virtue of their natural father being her brother. The natural father is not married to the children's birth mother.

6. In November, 2006, the second applicant left her then employment and moved back to her home province in Country A to work with her aunt in the family business. For this (and other purposes) she bought a house in her home province. J.B. was born to the second applicant's brother and his partner on 24th November, 2006. The first applicant stated that he first met the infant J.B. in December, 2006 when she was one month old. At that time the second applicant's mother, nephew (a son of the second applicant's deceased brother), brother and his partner (i.e. the natural parents of J.B. and K.B.) were living and sleeping in a market where the second applicant's mother was working. He testified that he was shocked and concerned about the way the family were living and was thus relieved when in January, 2007 the family unit (including the natural parents of J.B.) moved to the house that the second applicant had purchased.

7. The second applicant remained living and working in her home province in Country A until she moved to Ireland in December, 2007. While living in her home province, the second applicant assisted her family financially, as did the first applicant. They both testified that they continued to assist the family financially after the second applicant moved to Ireland in 2007. They also stated that this assistance was not given to procure an adoption but was rather to help the family, as is the norm in the culture of Country A.

8. K.B. was born to the second applicant's brother and his partner on 30th September, 2008.

9. Following the second applicant's move to Ireland in December, 2007, she and the first applicant travelled regularly to Country A to visit her family.

10. The evidence before the Court is that in or about 2009/2010, difficulties arose in the relationship between the second applicant's brother and his partner. In early 2011, J.B. and K.B.'s birth mother left the family unit in Country A, leaving behind her partner and their children. It appears that by this time she had begun relationship with someone else.

11. The Court heard evidence from the applicants about their attempts, following their marriage, to start a family. The first applicant already had three children from a previous marriage. Following the birth of these children he had a vasectomy which he

subsequently successfully reversed. Despite this, the second applicant did not become pregnant.

12. The applicants then began a series of fertility treatments. IVF treatments in January, 2011 and May, 2011 were not successful. The couple were advised that it was unlikely that the second applicant would be able to conceive. It is the case that the second applicant has since given birth to a baby who was born in 2017.

13. To return however to the events of 2011. The applicants testified that the second applicant's mother was aware of the non-success of the IVF treatments. The first applicant told the Court that by the time J.B. and K.B.'s natural mother left the family unit in January, 2011 their natural father's circumstances were that he was essentially long term unemployed and reliant on the financial assistance which the applicants were providing. He testified that both the children's grandmother and natural father were struggling to look after them by 2011. By this time both children were in school, the younger in pre-school. Their grandmother's daily work at the market necessitated the children spending their post school time with her at the market which meant that it was midnight before they could leave that place. This was the type of "*desperate*" situation the children were in.

14. According to the applicants, the suggestion that they adopt JB and KB emanated from the second applicant's mother in or about May, 2011.

15. Subsequent to the second applicant's mother having raised the issue of the adoption, the applicants made the decision to adopt the children. They did so because they were worried about the children's safety and health, particularly in circumstances where their parents were adolescents. The second applicant spoke to her brother who in turn spoke to the natural mother. The evidence given by the applicants was that both natural parents were receptive to the idea of the children being adopted. The first applicant testified that by 2011 both he and the second applicant had an already established bond with the children. I accept this to be the case.

The steps taken by the applicants to adopt the children

16. The first applicant testified that he made contact with an adoption group connected to Country A which he had come across on the internet. He was duly referred to the Adoption Authority of Ireland (hereinafter "the Authority"). His first contact with the Authority was on 16th June, 2011 by email under the subject heading "intercountry adoption guidance please".

17. The email summarised J.B.'s and K.B.'s then circumstances and the applicants' desire to adopt them. He advised the Authority that he and the second applicant were resident in Ireland since October, 2006 and December, 2007, respectively.

18. Specifically, the email stated:

> "My wife has a 4 year old niece and a 3 year old nephew (brother and sister) in [Country A] who are available for adoption. Her brother's 20 year old girlfriend

(mother of the children; they were not married) has left him and has left the children with him. Unfortunately, he is long-term unemployed and so is finding it very difficult to provide for the children and also to look after them in the absence of their mother. He is helped by my wife's mother at the moment but she is in her late 50s and is herself not in good health and is also working in a market and looking after another 13 year old grandson at the same time (another of my wife's brothers died in his late 20s a few years ago and the mother of the 13 year old boy is away working and so his care is undertaken by his grandmother, my wife's mother. My wife's father also died a few years ago at the same time as their son.

I have 3 sons…from my previous marriage who live with my ex-wife in England, which we have regular contact with through visits to the UK and them visiting us in Ireland.

With my wife being the Auntie of the two children, it would be very straightforward for us to adopt them in [Country A] but obviously this is complicated by our living in Ireland."

19. The email concluded as follows: "we would appreciate any advice you can give on the inter-country adoption process and whether it can be fast-tracked in any way, given that the children are family members and my wife's brother and her mother are really struggling to cope looking after them, given their circumstances."

20. The Authority's response to the first applicant on 16th June, 2011 was in the following terms:

> "In order to adopt, prospective adoptive parent(s) must first be assessed by the local HSE/Adoption Society and must be resident in Ireland legally for at least one year. They would have information on the assessment process, costs and timescales involved. Please contact your local HSE adoption service. If you are living in Dublin the number for your nearest HSE adoption service is 01-6201100. They will invite you to a meeting to explain the adoption process
>
> I enclose some leaflets on intercountry adoption for your information. Please note that these information leaflets contain some information which is NOT up to date, therefore you should contact the HSE or the Adoption Board with any specific queries you might have regarding the content)."

21. The first applicant's immediate reply to this email was to query whether it was the same process for an adoption by relatives, to which the Authority replied that it was and that the first applicant should contact his local HSE.

22. Questioned by counsel for the Authority about the contents of the 16th June, 2011 email, the first applicant reiterated that at the time he wrote the email he had not taken advice from anyone and had spoken only to an adoption group from Country A (sourced on the internet) who had referred him to the Authority. He denied that the reference in the

email to the straightforwardness of an adoption of the children in Country A encapsulated that his and the second applicant's intention from the outset was to effect a domestic adoption in Country A. He stated that if they wanted all along to adopt the children in Country A they would simply have gone to Country A without having made contact with the Authority. However, they had from the outset made contact with the Authority who duly referred them to the HSE from whom, it is alleged, they received misleading advice.

23. The evidence before the Court is that upon receipt of the Authority's email the first applicant commenced immediately to contact the HSE on the contact number he had been given. His evidence was that all calls made went to voicemail. His first call back from the HSE was on 5th July, 2011. He testified that prior to this call, on or about 25th June, 2011, he had made preliminary enquiries of lawyers and adoption agencies in Country A which he sourced from the internet. He stated that he did this in order to understand a little more about how one went about embarking on an intercountry adoption in circumstances where the Authority's website was out of date and where the HSE were not replying to his calls.

24. Ultimately, on 5th July, 2011 the HSE made contact. The first applicant testified that the advice he received on that date from a named official in the HSE official was to the effect that in his and the second applicant's particular circumstances they could not do an intercountry adoption as this process was designed for "not known children". He was also advised that there was no means by which the HSE could establish his and the second applicant's eligibility in the context of "known children", as opposed to children in an orphanage. I note that the evidence given by the first applicant in this regard is consistent with evidence given by him on affidavit in the Case Stated proceedings in 2016 (referred to more particularly later in this judgment) In his affidavit sworn 29th April, 2016, he avers that the official had advised that it was not possible to approve the adoption of specific children. According to the first applicant, the information received from the official was that the HSE had no way of assessing whether the children were available for adoption or if adoption was in their best interests because the HSE could not confirm the suitability of the children for adoption given they were resident in Country A. The first applicant testified that in light of the advices given by the HSE official, the applicants did not therefore apply to the HSE to be assessed.

25. In the course of his oral testimony in the within proceeding, the first applicant, stated that the HSE official suggested two alternative routes to him; the first was to bring the children into Ireland (perhaps for education purposes) and then for the applicants to apply to adopt them in Ireland. The second alternative was for both applicants, or the second applicant solely, to adopt the children in Country A and then bring them back to Ireland. As there were immigration issues regarding the latter option, the HSE official advised the first applicant to speak to a lawyer.

26. As to whether he had asked if the Country A adoption would be recognised in Ireland, the first applicant testified: "I did clarify [with the HSE official], I said, if we adopted in

[Country A] would the adoption be recognised in Ireland, and I was told categorically, yes, it would because [Country A] is also a Hague country".

27. It is common case that the applicants embarked on the second of the two options advised by the HSE official. Questioned as to why he had not taken the first option suggested by the HSE, the first applicant testified that in the course of discussions with lawyers (the solicitor acting for him in the within proceedings and an Irish immigration lawyer) in this jurisdiction in regard to option two, the first option had been discussed. He stated, however, that the advice received was that in the absence of an adoption order, any attempt by him and the second applicant to bring children who were not theirs into the country "wasn't a runner".

28. The first applicant testified that when in Country A for the purposes of the Country A adoption he had looked into the possibility of establishing some kind of guardianship relationship with the children but the advice from lawyers in Country A was that it was not possible for persons to be appointed a guardian in Country A while the children's natural parents were still alive.

29. Under cross-examination by counsel for the Authority, the first applicant acknowledged that the HSE official to whom he spoke had advised him to get a good lawyer. While immediately after that call he spoke to his Irish solicitor, he did not, however, seek advice in relation what had been said to him by the HSE official. Albeit that he had made initial enquiries of his solicitor in July, 2011, the first applicant did not formally engage him until December, 2011. This was in circumstances where he had no reason to question what he had been told by the HSE official: he assumed that the HSE had knowledge of adoption law given their role in dealing with international adoptions.

30. He testified that he understood the HSE official's advice to get a good lawyer in the sense of progressing the options which the HSE official had advised him to pursue. As far as he was concerned, the HSE official was the expert to whom he had been referred by the Authority.

31. The first applicant categorically rejected any suggestion that he had engaged a lawyer in July, 2011 in order to seek adoption advice, stating that he had only made initial inquiries (in the context of pursuing the options advised by the HSE official) of his Irish solicitor in the course of one meeting and intermittent telephone contact in July 2011. He only formally instructed his solicitor in late 2011. He reiterated that the issue of seeking an opinion in July, 2011 as to whether the HSE's advice was correct did not arise. Thus, albeit that he consulted two sets of lawyers in Ireland in or about July, 2011, these consultations were informal and were for the purpose putting the advice given to him by the HSE into effect. This was the extent of the conversations he had with lawyers in Ireland at that time. He stated that the first written advice he received from his Irish lawyers was in September, 2012, by which time the children were in Ireland following completion of their adoption in Country A and when he and the second applicant were seeking advice as to how to progress a joint adoption in Ireland.

32. Asked whether, in mid-2011, the issue of the provincial adoption authority with whom the applicants proposed dealing not being the Central Authority in Country A had been raised with either of his Irish lawyers, the first applicant stated that that issue had not come up as he and the second applicant were dealing with the provincial authorities in Country A in the context of a domestic adoption.

33. Following the interaction with his Irish solicitor in July, 2011, the first applicant did not make contact again with the HSE official prior to embarking on the Country A adoption process. He explained that he did not do so in circumstances where the HSE, to which he had been referred by the Authority, had told him the way to proceed. Questioned as to why, given the initial slowness of the HSE to respond to his queries in June, 2011 he had not gone back to the Authority, the first applicant stated that ultimately the HSE had responded to him and gave him advice upon which he acted, albeit that it had taken some three weeks before his first contact with the HSE had been responded to. Given that the children were in "a desperate situation" he proceeded on foot of the direction given by "the State body". In the view of the first applicant, he had been given a direction by the State body to which he had been referred by the Authority. The advice from the HSE he "thought reasonably, to be correct advice" and he "had no reason to question it".

34. The first applicant testified that if the advice from the HSE had been to proceed with an intercountry adoption he would have been happy to do that, stating: "there is no reason why we wouldn't have done that, that is what we wanted to do … we wouldn't have been in and out of court for the last four years if we had gone for an intercountry adoption".

35. In the course of re-examination by his counsel, the first applicant reiterated that in July, 2011, the advice given to him by the HSE official was (1) to either bring the children into Ireland and attempt a domestic adoption or (2) go to Country A and commence an adoption there. To his mind, the HSE social worker was perfectly clear in July, 2011 that he and the second applicant could not commence an intercountry adoption under The Hague Convention. This information was duly conveyed by the first applicant to his Irish solicitor shortly thereafter, the HSE official having told him to go to a lawyer. He duly advised his solicitor that he wished to proceed on foot of the advice given by the HSE. In that regard, his Irish solicitor advised him to instruct lawyers in Country A which he duly did.

36. He reiterated that he and the second applicant would have preferred to go down the intercountry adoption route. At no point had they set their minds against this route. He had not ignored any advice given or sought to circumvent the 2011 Act or the Convention.

37. In the course of her evidence, the second applicant confirmed that she herself did not speak to anyone in the HSE or to any lawyer in Country A: all that was left to the first applicant.

The commencement of the Country A adoption process

38. The first applicant testified that upon taking up the second option (adopting in Country A) as suggested to him by the HSE, he duly communicated with two legal firms in Country A and ultimately appointed one of them at the end of July, 2011 to commence the process of adopting the children in Country A.

39. He stated that his Country A lawyers explained the adoption process and the significant amount of documentation that was required. The lawyers spoke to the relevant provincial adoption authority.

40. The first applicant testified that he and the second applicant had to produce, *inter alia,* bank records, deeds to properties, a record of their assets, evidence of his employment, letters of reference and medical records. His evidence was that although the authorities in the province where the adoption was being processed would have preferred that he and the second applicant adopt the children jointly, that proved not to be possible because the provincial authorities wanted proof in advance of immigration clearance once the children were adopted. In essence, the provincial adoption authority wanted proof of immigration clearance for the children in Ireland in advance of the adoption process in Country A. Proof of immigration clearance would have required the first applicant to be assessed in Ireland. However, he had already been informed by the HSE that that was not possible as the HSE had advised that an inter country adoption was not open to himself and the second applicant. as the children were "known children". He stated that albeit that he was not to be an adopter of the children in Country A, he was nevertheless required to furnish his consent to the second applicant's application to adopt, as her spouse.

Obtaining the consent of the birth parents

41. According to the first applicant, his Country A lawyers arranged for him and the second applicant to attend on 7th September, 2011 at the City Hall in the relevant province of Country A to apply for the adoption of the children. In attendance on that day also were the natural parents, the children and some referees for the second applicant. According to the second applicant's evidence, the referees were her two aunts. The natural parents' respective consents were obtained on 7th September, 2011. The first applicant's evidence was that the natural parents met independently and separately with the social workers dealing with the case in order to provide their respective consents to the adoptions. In the first applicant's opinion, those consents were freely given. In the course of his evidence he emphasised on a number of occasions that no inducement was given or threat made to the natural parents to procure their consents.

42. The first applicant explained that neither he nor the second applicant were present when the natural parents gave their consents. Nor were they present for the discussions which took place between the Country A social workers and the natural parents, which were conducted in private. The first applicant stated that he had no knowledge of what had been discussed.

43. The first applicant was questioned as to why the consents which were obtained from the natural parents in 2011 made no mention of the second applicant's Irish address. He stated that this was because the adoption was a domestic adoption in Country A. As

advised by her Country A lawyers, the second applicant used her Country A address for the adoption application. The first applicant accepted that the Letter of Consent and Letter of Approval, respectively, from the birth mother and birth father referred to consent being given for J.B. and K.B. to be the adopted children of the second applicant residing at her Country A home. The first applicant explained that the reason the consent documents had listed the first applicant's Country A address was because every citizen of Country A had to have a house registration document and had to be registered at a property. Therefore, as the natural parents' consents documents were official documents they had to include the address to which the second applicant was linked in Country A.

44. Asked whether he and the second applicant had canvassed with their Country A lawyers the issue of habitual residence in Country A as a necessary requirement for the adoption, the first applicant stated: "We specifically asked the question does a [Country A] citizen have to be resident in [Country A] to adopt under a domestic adoption in [Country A] and we were told no."

45. It was put to the first applicant by counsel for the Attorney General that nowhere in the Letter of Consent signed by the natural mother on 7th September, 2011 is there any indication given of the knowledge or information which was imparted to the natural mother for the purposes of obtaining her consent to the adoptions. His response was that the natural mother was always clear as to what she was consenting to. She had known the applicants for many years and knew they lived in Ireland. Both birth parents knew the applicants' circumstances as of 2011.

46. The second applicant's evidence was that she was present at the office of the provincial adoption Authority on the day on which the natural parents' consents were obtained but was not in the room where the consent process was undertaken. She was informed by her mother that consent to the adoptions had been given. She was satisfied that the natural parents had given their consents freely and that they understood what was happening. She stated that she did not make any promise or threat before they gave their respective consents. Nor did she offer the natural parents any money or financial reward.

47. It is the second applicant's belief that the provincial adoption authority's social workers interviewed her brother and his former partner on 7th September, 2011 about the proposed adoption. She had witnessed the natural parents in the company of some social workers. However, she was not allowed into the room where the discussions took place.

48. It is put to the second applicant by counsel for the Authority that given that she was a national of Country A, it would have been natural and expected that she would be the person liaising with the lawyers in Country A in relation to the adoption. The second applicant explained that in 2011 she herself had no discussions with lawyers in Country A and that the first applicant had taken care of everything. This was despite the fact that he did not speak the language of Country A.

49. Cross-examined by counsel for the Attorney General, the second applicant accepted that the residential address given by her in the 2011 Country A adoption process was her

house in her home province in Country A. She did not list her Irish address because she had an address in Country A, having purchased her house there. That fact notwithstanding, she had advised the Country A officials that she was living in Ireland. She stated that the officials had put her Country A address on the consent documents as that was her address according to her Country A identity card. The officials, however, were fully aware that she was resident in Ireland.

50. The Court heard evidence that over a seven-month period from September, 2011 until April, 2012 when the children came to Ireland, the applicants visited Country A for extended periods, with the second applicant staying for longer periods than the first applicant. The assessment of the second applicant by the Country A social workers took place in this period.

51. The first applicant testified that social workers in Country A visited the second applicant at her Country A home. He reiterated however that the Country A officials were not of the impression that the children were to be raised by the second applicant in her home province in Country A. He stated that the officials were aware from the documentation which had been furnished to them that the second applicant was resident in Ireland.

52. The second applicant confirmed that she was interviewed by social workers in Country A, both when they visited her house in her home province and via Skype when she was back in Ireland. The purpose of the interviews was to see whether she could take care of the children. To this end, they checked her financial affairs and did medical and psychological checks also. They knew she was living in Ireland and were happy with that arrangement. The whole process had taken six months. For half of that time period, she was resident in Country A.

53. The adoption by the second applicant of the children was approved by the provincial adoption committee in Country A on 25th January, 2012. This was confirmed by letter dated 6th February, 2012 which advised that the second applicant had six months to register the adoption in Country A. The adoption was registered on 21st February, 2012 and required the first applicant's consent as the spouse of the adopter. On 23rd February, 2012, the children's change of family name was registered in Country A and passports were issued to them in their new surnames. On 28th February, 2012, the applicants applied to the Irish Consulate in Country A for visas for the children for the purpose of bringing them to Ireland.

54. The Visa Office of the Irish National Immigration Service (INIS) granted entry visas for the children on the basis that they were dependants of the first applicant, a British national, and, therefore, "permitted family members" in accordance with the EC "Free Movement of Persons" Regulations 2006 and 2008. In this regard the first applicant testified: -

> "Interestingly… at the time, [INIS] didn't grant the visas on the basis of the children being [the second applicant's] children, they granted the visas on the basis of the children being my dependants.

55. The children arrived in Ireland on 25th April, 2012. Since that time they have lived with in Ireland with the applicants as a family unit. They have obtained Irish PPS numbers, and also residency permits and re-entry visas under EU Treaty Rights.

56. The children's residency in this jurisdiction has never received adverse attention from the authorities. In 2017 they were granted permanent (ten year) residence cards.

57. The testimony of the applicants was that that children know they have birth parents. The first applicant explained to the Court that the children know they have been adopted by the second applicant and the reasons why this came to pass. Since their adoption the children have travelled in the company of the applicants on a number of occasions to visit their family (including their birth parents) in Country A. The children have a connection with their birth parents. According to the first applicant, since 2012 the children have travelled between five and ten times to Country A (where the applicants have a holiday home). On each occasion they have met their birth father and grandmother. They have also met with their birth mother on some of these occasions. He stated that the children love these interactions. However, they regard Ireland as their home.

58. The second applicant advised the Court that the birth mother had sent her pictures of her new baby for J.B. and K.B. to see. Moreover, the second applicant had given the natural mother clothes for her new baby which she had brought with her when last visiting Country A. The second applicant also testified that the natural mother is aware of the present proceedings and has wished the second applicant "good luck", albeit that she does not understand the applicants' present difficulties given her understanding that the children have been adopted by the applicants. The second applicant also testified that, equally, her brother, the children's natural father, continues to be happy that the children have been adopted. He knows that the children are loved. He gave his consent to the adoptions freely as he wanted the children to have a future. The second applicant told the Court that the children are happy. They know that they have two sets of parents and that their natural parents could not take of them but that they love them.

Events subsequent to the children's arrival in Ireland on 25th April, 2012

59. On 12th November, 2012, the first applicant wrote to the Authority advising that the children had arrived in Ireland in April, 2012, having been legally adopted by the second applicant in Country A on 21st February, 2012. The first applicant indicated his and the second applicant's intention to apply for a joint domestic adoption in Ireland. The letter was copied to the HSE. He testified that the indication given in the letter was consistent with the advice he had received from the HSE official in July, 2011.

60. The Authority acknowledged the letter on 14th November, 2012 noting its contents. The first applicant was in telephone and email communication with the HSE on 13th November, 2012. The first applicant testified to a number of emails and calls from him to the HSE some of which were either not returned or were late being responded to.

61. By the time of this correspondence to the Authority and the HSE, the first applicant had been told by his Irish solicitor (in September, 2012) that the advice he had received from

the HSE in July, 2011 (namely that an intercountry adoption of "known children" could not be effected) was wrong. He testified that his solicitor's advice as of September, 2012 was that there were still two options available to himself and the second applicant, namely to apply for a domestic adoption of the children in Ireland once they were resident in the country for twelve months, or to try to register the Country A adoption in Ireland. He was advised that the best course of action was to go down the domestic adoption route. He further stated that although his solicitor had informed him in September, 2012 that the advice received from the HSE in July, 2011 was wrong, the Authority and the HSE did not raise this with him until 2016.

62. On 10th April, 2013, the first applicant apprised the HSE that he and the second applicant were anxious to commence the process of a domestic adoption. On 3rd May, 2013, a HSE official advised the first applicant that he could make an application to adoption.service@hse.ie.

63. Further to the communication with the HSE, the applicants were assigned a social worker in and around the end of May 2013 or the start of June 2013. Over the months of June to August 2013, there were numerous phone calls and emails passing between the first applicant and the social worker for the purpose of providing background information, including confirmation from the applicants' Country A lawyers of the circumstances of the Country A adoption and the provision of a certified copy of the consents of the natural parents. On 13th June, 2013, the applicants met with the social worker in their home. The social worker took copies of relevant documentation and advised that he would submit a report to the Authority.

64. Ultimately, the first applicant became aware of certain communications from the Authority to the HSE which suggested that a domestic adoption of the children could not proceed. The applicants learned of this via a letter of 23rd August, 2013 from their HSE-appointed social worker who advised that the Authority's position was that "the children do not meet the criteria [set out in s.23 of the 2010 Act] and are therefore not eligible to be adopted" and that the applicants "cannot make an application for the adoption of the children under current legislation".

65. There followed a series of correspondence between the applicants' solicitor and the Authority. As of 2nd January, 2014, the Authority was advising that it was of the opinion that s.45 of the 2010 Act, together with s.23 thereof, rendered the children ineligible to be adopted. By letter of 3rd January, 2014, the applicants' solicitor requested clarification as to which part of s.23 of the 2010 Act debarred the children from being eligible for adoption and why they did not comply with the s.23 criteria. In its reply of 8th January, 2014, the Authority's position was that as the second applicant had already adopted the children they could not be re-adopted.

66. It is common case that the Authority's correspondence of January, 2014 contained a series of factual errors. In March, 2014, the applicants commenced judicial review proceedings against the Authority (High Court ref. no. 2014/196 J.R.). Leave was granted on 31st March, 2014. The CFA, as the now statutory successor to the HSE, was a

notice party to those proceedings. Ultimately, the judicial review proceedings were compromised. The terms of settlement included the Authority agreeing to withdraw its prior correspondence of 13th December, 2013 and 8th January, 2014 and agreeing that the applicants' adoption application "will be considered and processed by the Authority in the normal way once the assessment of the Child and Family Agency is complete".

67. The CFA duly carried out the required assessment. On 16th March, 2015, the applicants received a Declaration of Eligibility and Suitability from the Authority, valid for twenty-four months, pursuant to s.40 of the 2010 Act. The first applicant testified that throughout this assessment process, there was no suggestion from any State body that either he or the second applicant had acted improperly at any stage.

The Case Stated to the High Court

68. On 25th May, 2015, the applicants were advised by the Authority that it had decided to refer a Case Stated to the High Court pursuant to s.49 of the 2010 Act, to determine as a matter of law whether it was possible for the Authority to make a domestic adoption order in respect of J.B. and K.B. in circumstances where the second applicant had previously adopted the children in Country A.

69. By reason of the Authority appearing to waver in relation to the Case Stated, by letter dated 24th September, 2015 the applicants' solicitor called on the Authority to refer the matter to the High Court pursuant to s.49(2) of the 2010 Act, which it did.

70. In the Case Stated the Authority asked the High Court to answer five questions. The High Court delivered its judgment on 25th November, 2016. (*C.B & Anor v. Udaras Uchtala na hEireann & anor* [2016] IEHC 73)

In summary, the questions stated and the answers given by the High Court were: -

(a) Whether the Country A adoption was recognisable in Ireland under Part 8 of the 2010 Act or the common law. To this, the High Court Judge responded "no".

(b) Whether, on the facts disclosed, the Authority had jurisdiction to make an adoption order in respect of the children having regard to the pre-existing Country A adoption, s.45 of the Adoption Act, 2010, and any other relevant provision? The High Court judge answered "yes".

(c) Whether, following the passage of the Act of 2010, and specifically the incorporation of The Hague Convention into Irish Law, the common law jurisdiction of the High Court, as identified in *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 339 remained? In light of her previous answers, the High Court judge considered it unnecessary to answer this question.

(d) Whether, on the basis that *M.F.* remained good law, and on the facts disclosed in the Case Stated, and assuming that the Country A adoption was not recognised in Ireland, did the original status of the children remain? To this, the High Court Judge answered "*yes*".

(e) Finally, whether the children were eligible for adoption under s.23 of the Act of 2010, having regard to s.9 and s.45 of the Act of 2010? To this High Court Judge answered "yes".

71. The High Court judgment was the subject of a "leap frog" appeal by the Authority to the Supreme Court. The Supreme Court's consideration of the matter is addressed below.

Events prior to the delivery of judgment by the Supreme Court on 12th July, 2018

72. On 15th August, 2017, the Authority wrote to the applicants advising, without prejudice to its position in its appeal to the Supreme Court (and in the context where the Authority was, without prejudice, progressing the applicants' application for a domestic adoption in Ireland), that it was attempting to address the issue of the natural parents' consents to the Country A adoption. For these purposes, the Authority sought the address of the birth mother. The applicants were advised that the Authority proposed to appoint an authorised person to oversee the signing of the consent by the birth mother.

73. On 25th August, 2017, the first applicant provided the Authority with the contact details for the birth mother. On 7th September, 2017, the Authority advised that it had written to the Central Authority (under The Hague Convention) in Country A seeking its assistance in getting consent from the birth mother and notifying/consulting the children's birth father.

74. On 11th October, 2017, the applicants provided the Authority with updated contact numbers for the birth mother. On 8th March, 2018, their solicitor wrote to the Authority's solicitor requesting an update on progress in obtaining the consent, in particular as to whether the Authority had been able to locate and contact the birth parents. The Authority was advised that the applicants would be in Country A in the Spring of 2018 and that they were willing to assist with the regard to the consents. The Authority was also advised that the Declaration of Eligibility and Suitability previously obtained by the applicants was about to expire and that a new Declaration was now necessary. The letter continued:

> "We are aware that in view of the history of this case, going on now for 7 years that AAI have been keen to do all they can to fast track matters in the event the applications for adoptions orders can proceed. Can AAI assure our clients that in the event of a favourable outcome on the appeal that AAI will intervene on their behalf with TUSLA to carry out the necessary work with a view to the issue [of] a fresh declaration, as soon as a judgement is delivered by the Supreme Court."

75. On 29th March, 2018, the applicants' solicitor was advised that the Authority was liaising with the Central Authority in Country A and that it had written to the CFA to enquire what steps were necessary to obtain a fresh Declaration. On 9th April, 2018, Country A's Central Authority sought the Country A adoption registration papers (in Country A's language) as a perusal of Country A's Central Authority records had failed to yield any such record. The requested documents were duly provided by the Authority. On 25th May, 2018, the applicants were advised that the Authority was continuing to liaise with the Country A Central Authority with regard to the consents, and with the CFA with regard

to the Declaration of Eligibility and Suitability. The Authority's solicitor enclosed a copy of the correspondence which had been sent to the Central Authority in Country A. After setting out the history of the matter, the letter read as follows:

> "[The applicants] have now applied to jointly adopt [the children] under Irish law. In order to do so Irish Adoption Legislation requires that the following steps must be completed before any adoption application can be processed;
>
> 1. The consent of the birth mother to the adoption must be given;
> 2. The giving and taking of the consent of the birth mother must be overseen by an independent person; and
> 3. The birth father must be notified and consulted with regard to the proposed adoption.
>
> Accordingly, I am writing to request your assistance in obtaining the birth mother's consent, appointing an independent person to supervise the giving of that consent, ensuring that the birth mother fully understands what she is consenting to and that it is freely given and to notify and consult with the birth father in relation to the proposed adoption of the children. I enclose contact details for the birth mother and father if you require any further information please do not hesitate to contact me …".

The judgment of the Supreme Court in the Case Stated

76. In the Case Stated proceedings before the High Court, and in their submissions to the Supreme Court, the applicants and the Attorney General argued that it was possible under the 2010 Act and The Hague Convention for the children to be adopted by way of an Irish domestic adoption. The Authority disagreed with this proposition. The Supreme Court delivered four judgments on 12th July, 2018. (*C.B. and P.B. v. The Attorney General* [2018] IESC 30) The Supreme Court unanimously concluded that a domestic adoption was not possible in this case.

77. The Supreme Court was also unanimous in holding that the adoption of the children in Country A was not amenable to recognition under Part 8 of the 2010 Act, or at common law. With regard to the Convention, McKechnie J. (at paras. 45 and 51) and MacMenamin J. (at paras. 50-51 and 75) both emphasised that the facts of the case were clearly captured by the Convention and that there was no compliance therewith. At para. 2 of his judgment, McKechnie J. stated:

> *"… the terms of the Convention had not been complied with … In fact the applicants, who seek only a domestic adoption order in respect of the children concerned, and not the recognition of an intercountry adoption, engaged with the Convention in their submissions solely for the purposes of indicating how and why, in their view, it should be disregarded".*

78. He referred to "*myriad ways*" in which the mandatory requirements for an intercountry adoption had not been made out and stated:

"this is not a case of mere non-compliance with a technical aspect of the Convention regime; … it is common case that there has been practically no engagement with the Convention scheme at all. Accordingly, each and every one of the safeguards which ought to apply has effectively been stood down". (at para. 47)

79. McKechnie J. found total non-compliance with Article 4 of the Convention in that the competent authorities in Country A did not went on to state:

"48. Accordingly there was total non-compliance with articles 4 and 5 of the Convention, in that the competent authorities of Country A did not:

- *Establish that the child is adoptable (Article 4(a));*
- *Determine, after possibilities for placement of the child within Country A had been given due consideration, that an intercountry adoption is in the children's best interests (Article 4(b)) (it being remembered that a foreign adoption is not the preferred means of safeguarding a child's welfare – such is very much a subsidiary option (see Article 21(b) of the CRC and para. 120 of the Explanatory Report);*
- *Ensure that:*
  - *the persons, institutions and authorities whose consent is necessary for adoption had been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the children and their family of origin (Article 4(c)(1));*
  - *such persons, institutions and authorities had given their consent freely, in the required legal form, and expressed or evidenced in writing (Article 4(c)(2));*
  - *the consents had not been induced by payment or compensation of any kind and had not been withdrawn (Article 4(c)(3));*
- *Ensure, having regard to the age and degree of maturity of the children, that:*
  - *They had been counselled and duly informed of the effects of the adoption and of their consent to the adoption, where such consent is required (Article 4(d)(1));*
  - *Consideration had been given to the children's wishes and opinions (Article 4(d)(2));*
  - *The children's consent to the adoption, if required, had been given freely, in the required legal form, and expressed or evidenced in writing (Article 4(d)(3)); and*
  - *Such consent had not been induced by payment or compensation of any kind (Article 4(d)(4)).*

49. Similarly, the competent authorities in Ireland did not:

- *Determine that the prospective adoptive parents are eligible and suited to adopt (Article 5(a));*

- *Ensure that the prospective adoptive parents had been counselled as may be necessary (Article 5(b)); or*

- *Determine that the child is or will be authorised to enter and reside permanently in the State (Article 5(c)).*

50. Moreover, as a consequence on the non-involvement of the competent authorities there was a failure to comply with many of the procedural requirements for an intercountry adoption as contained in Chapter IV."

80. That a common law jurisdiction regarding the recognition of adoptions no longer subsists in this jurisdiction was also the unanimous conclusion of the Supreme Court. That was made clear by MacMenamin J. at para. 137 of his judgment:

> *"The position is now entirely altered as a consequence of the enactment by the State of the 2010 Act. While strictly speaking the issue may not arise for consideration, it is not possible to conceive of a situation where it could be held that a common law power of adoption continues to subsist, in light of the existence and content of that Act. Insofar as there was some form of legislative "vacuum" it has been filled".*

81. This view was echoed by McKechnie J. (at para. 144 of his judgment).

82. It was also the unanimous view of the Supreme Court that *M.F. v. An Bord Uchtála* did not represent the law upon the enactment of the 2010 Act and, therefore, the Country A adoption itself was not rendered a nullity.

83. In its written submissions to the Supreme Court entitled "next steps", it had been suggested by the Authority that the plight of the children might be remedied by either:

(1) An agreement between the Country A and Irish Central Authorities to retrospectively perform their functions with a view to the Country A Central Authority issuing an Article 23 certificate in respect of the Country A adoptions; or

(2) An application to the High Court under s. 92 of the 2010 Act for entry of the Country A adoptions on the Register.

84. These "next steps" were addressed by the Supreme Court. With regard to the first option, the preference of all of the judges in the Supreme Court was that an attempt should be made to effect the type of adoption envisaged under the Convention, in that an effort should be made to procure an Article 23 certificate of compliance with the Convention. Such an approach is contemplated in the Explanatory Report prepared by G. Parra-

Aranguren in relation to the Convention ("the Explanatory Report") in situations where there is non-compliance.

85. In their respective judgments, MacMenamin J. and McKechnie J. agreed that if it were in fact possible, a retrospective solution engineered between the two Central Authorities would be the optimal solution. However, both judges expressed significant doubts and concerns as to the feasibility of such "reverse engineering".

86. In correspondence between the parties following the Supreme Court judgments, it was acknowledged by the Authority that any such process was fraught with difficulties and unlikely to resolve the situation.

87. By letter of 16th July, 2018 the applicants' solicitor advised the Authority that the attempted engagement with Country A's Central Authority would not assist the matters and indicated the applicants' intention to pursue an application under s. 92 of the 2010 Act. In a response of 19th July, 2018, the Authority noted the position with regard to the s. 92 application. The Supreme Court were notified of the non-success of the "reverse engineering" approach.

88. Effectively, the within s. 92 application comes before the Court on foot of the Majority View of the Supreme Court that in "*a truly exceptional" case*, s. 92(1) of the 2010 Act may afford a mechanism whereby an intercountry adoption, albeit that it is not in compliance with the Convention and the 2010 Act, might be recognised and entered on the Register.

The relevant statutory definitions and provisions

89. Before I embark on a consideration of s.92 issue, and the status of the Majority View in the Supreme Court (in issue in these proceedings) it is apposite at this juncture to set out the relevant statutory definitions and provisions which informed the varying views of the Supreme Court on the interpretation s. 92(1) and as to whether s.92(1)(a) can be utilised by the High Court to direct the Authority to enter the within adoptions on the Register. The interpretation and application of s.92(1)(a) to the within adoptions is the crux of the present case.

90. In s.3 of the 2010 Act, "intercountry adoption" is defined as:

"the adoption of a child habitually resident in a state (the "state of origin"), whether a contracting state or non-contracting state, who has been, is being, or is to be transferred into another state ("the receiving state") –

(a) after the child's adoption in the state of origin, by a person or persons habitually resident in the receiving state; or

(b) for the purposes of an adoption, in either the receiving state or the state of origin by a person habitually resident in the receiving state."

91. "Intercountry adoption effected outside the State" is defined as:

"(a) an adoption of a child effected outside the State at any time before the establishment day that, at that time, conformed to the definition of "foreign adoption" in section 1 of the Adoption Act 1991,

(b) an adoption, other than an intercountry adoption, of a child effected outside the State at any time on or after the establishment day that conforms to the definition of "foreign adoption" in section 1 of the Adoption Act 1991 as it read on 30 May 1991, or

(c) an intercountry adoption of a child effected outside the State at any time on or after the establishment day that, at that time, is in compliance with the applicable provisions of this Act and The Hague Convention."

92. Section 1 of the Adoption Act 1991 defines "foreign adoption" as:

> "an adoption of a child who at the date on which the adoption was effected was … under the age of 18 years, which was effected outside the State by a person or persons under and in accordance with the law of the place where it was effected and in relation to which the following conditions are satisfied:
>
> (a) the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with was obtained or dispensed with under that law,
> (b) the adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order,
> (c) the law of the place where the adoption was effected required an enquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian,
> (d) the law of the place where the adoption was effected required the court or other authority or person by whom the adoption was effected, before doing so, to give due consideration to the interests and welfare of the child,
> (e) the adopters have not received, made or given or caused to be made or given any payment or other reward (other than any payment reasonably and properly made in connection with the making of the arrangements for the adoption) in consideration of the adoption or agreed to do so,".

93. Section 49 of the 2010 Act provides:

"(1) The Authority may refer any question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to the High Court for determination.

(2) Notwithstanding subsection (1), the Authority, unless it considers a question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to be frivolous, shall refer the question of law to the High Court for determination if requested to do so by—

(a) an applicant for the order or the recognition of the intercountry adoption effected outside the State,

(b) the mother or guardian of the child, or

(c) any person having charge of or control over the child.

94. Section 90 of the 2010 Act provides:

"90.— (1) In this section, "competent authority" includes a person serving in another state in the capacity of a competent authority for the purposes of a bilateral agreement or an arrangement referred to in section 81.

(2) The Register of Foreign Adoptions maintained until the establishment day under section 6 of the Adoption Act 1991 by An Bord Uchtála shall, notwithstanding the repeal of that section by section 7 (1), continue in being under this Act and, on and after the establishment day, shall be—

(a) known as the register of intercountry adoptions, and
(b) kept and maintained under this Act by the Authority.

(3) The following persons may apply to the Authority to enter particulars of an intercountry adoption effected outside the State in the register of intercountry adoptions:

(a) the adopted person;
(b) a person by whom the adopted person was adopted;
(c) any other person having an interest in the matter.

(4) Not later than 3 months after the date when a child first enters the State after his or her intercountry adoption in another state by parents habitually resident in the State, the adopters shall ensure that an application to the Authority is made under *subsection* (3) to enter particulars of the adoption in the register of intercountry adoptions.

(5) If any of the persons referred to in subsection (3) apply in accordance with this section to enter in the register of intercountry adoptions particulars of an adoption referred to in subsection (4)—

(a) where the applicant is a person mentioned in paragraph (a) or (c) of subsection (3), the application relieves both of the adopters of the duty under subsection (4), or
(b) where the applicant is one of the adopters, the application relieves the other adopter of the duty under subsection (4).

(6) An application under subsection (3) shall be accompanied by the certificate referred to in section 57 issued by the competent authority of the state of adoption.

(7) If the Authority is satisfied that the adoption is an intercountry adoption effected outside the State that complies with the requirements of this Act in relation to such an adoption, the Authority shall enter particulars of the adoption in the register of intercountry adoptions, together with a copy of the certificate referred to in section 57 concerned.

(8) If the High Court so directs under section 92 (1), an entry shall be made in the register of intercountry adoptions concerning a specified intercountry adoption effected outside the State.

(9) An entry in the register of intercountry adoptions shall be in such form and contain such particulars as may be prescribed by regulations made under section 152.

(10) A person making an application to the Authority under subsection (3) is required to furnish the Authority with such information as the Authority may reasonably require and the information shall be in such form (if any) as may be specified by the Authority.

(11) An error in an entry in the register of intercountry adoptions may be corrected and, if the High Court so directs, a specified correction shall be made in the register."

95. Section 92 provides:

"(1) If, on application to the High Court in that behalf by a person who may make an application to the Authority under section 90 (3), the High Court is satisfied that an entry with respect to an adoption in the register of intercountry adoptions should be made, cancelled or corrected, the High Court may by order, as appropriate—

(a) direct the Authority to procure the making of a specified entry in the register of intercountry adoptions,

(b) subject to subsection (2), direct the Authority to procure the cancellation of the entry concerned in the register of intercountry adoptions, or

(c) direct the Authority to make a specified correction in the register of intercountry adoptions.

(2) Unless satisfied that it would be in the best interests of the adopted person to do so, the High Court shall not give a direction under subsection (1) (b) based solely on the fact that, under the law of the state in which an adoption was effected, the adoption has been set aside, revoked, terminated, annulled or otherwise rendered void.

(3) Where the High Court gives a direction under subsection (1) (b), it may make orders in respect of the adopted person that appear to the High Court—

(a) to be necessary in the circumstances, and

(b) to be in the best interests of the person,

including orders relating to the guardianship, custody, maintenance and citizenship of the person.

(4) An order under subsection (3), notwithstanding anything in any other Act, applies and shall be carried out to the extent necessary to give effect to the order.

(5) If the High Court—

(a) refuses to give a direction under subsection (1)(a), or
(b) gives a direction under subsection (1)(b),

the intercountry adoption effected outside the State shall not be recognised under this Act.

(6) The High Court—

(a) may direct that notice of an application under subsection (1) shall be given by the person making the application to such other persons (including the Attorney General and the Authority) as the High Court may determine, and
(b) of its own motion or on application to it by the person concerned or a party to the application proceedings, may add any person as a party to the proceedings.

(7) The Attorney General—

(a) of his or her own motion, or
(b) if so requested by the High Court,

may make submissions to the High Court in relation to the application, without being added as party to the application proceedings.

(8) If the High Court so determines, proceedings under this section shall be heard in private."

The differing views of the Supreme Court as to whether s.92(1)(a) could be employed by the High Court to direct the registration of the adoptions.

96. *In C.B. and P.B. v. The Attorney General* [2018] IESC 30, there was a marked divergence of opinion on the meaning of s. 92 of the 2010 Act. The view of the majority (hereinafter "the Majority View") was elaborated by MacMenamin J. (Dunne, J. and O'Malley, J. agreeing.) in the following terms:

"105. Consideration of a second "fall-back", or alternative, approach begins with ss. 90 and 92 of the Act. Section 90 is contained in Part 10, Chapter 2 of the Act, which is headed "Register of Intercountry Adoptions". This particular chapter deals with the powers and functions of the Authority regarding the Register of Foreign Adoptions. Generally, it sets out that, once the Authority is satisfied with compliance with the Convention, it shall enter particulars of the adoption in the Register of Foreign Adoptions concerning a specified adoption effected outside the State. Section 90(8)

of the Act provides that, if the High Court so directs under s.92(1), an entry shall be made in the register of inter-country adoptions concerning a specified inter-country adoption effected outside the State. I interpret this as referring to a specified inter-country adoption which has been effected outside the State, which may have been referred to the High Court under the case stated procedure set out in s.49(2) of the Act."

97. After citing the provisions of s.92 of the 2010 Act and noting that the section was contained in Part 10, Chapter 3 of the 2010 Act, which refers to "Directions of High Court in relation to the Register of Inter-Country Adoptions", MacMenamin J. went on to opine:

"107. One may then proceed to the definition of "inter-country adoption effected outside the State", contained in s.3, the "definitions" section of the 2010 Act. Included in those definitions is to be found the following:

"(b) An adoption, other than an inter-country adoption, of a child effected outside the State at any time on or after the establishment day that conforms to the definition of "foreign adoption" in section 1 of the Adoption Act, 1991 as it read on the 30th May, 1991 …". (Emphasis added)

108. In s.3 of the 2010 Act, "inter-country adoption" is defined as:

"the adoption of a child habitually resident in a State (the "state of origin"), whether a contracting State or non-contracting State, who has been, is being, or is to be transferred into another State ("the receiving state") –

(a) after the child's adoption in the State of Origin by a person or persons habitually resident in the Receiving State: or
(b) for the purpose of an adoption in either the receiving state or the state of origin by a person habitually resident in the receiving state." (Emphasis added)

109. It is self-evident that the present situation can no longer be properly defined as a classical "inter-country adoption", in the sense that the children are now habitually resident in the receiving state, Ireland. But, the question arises as to whether it can be said that the procedure actually adopted in Country A does correspond with the definition of a "foreign adoption" contained in the Adoption Act, 1991.

…

There is no doubt that Country A is a "place" which comes within that definition.

110. On the basis of the evidence, it would appear, therefore, that the requirements of a foreign adoption, as set out at s.1 of the Act of 1991, might be complied with. The children are prima facie eligible to be made the subject of an order under s.92 of the 2010 Act. That being so, can an order be made under s.92(1) of the Act, it

being accepted that the adoption procedure in Country A was in accordance with the laws of that country?

111. *I would interpret s.92(1) as vesting in the High Court a slightly different and broader power from that to be found in s.90. But this power is to be operated in accordance with the objects of the Act, as informed by the Explanatory Report. In fact, s.92(1) does not make reference to "an inter-country adoption effected outside the State", as in the case of s.90(8). Were the section to refer only to "inter-country adoptions effected outside the State", its scope would be more narrow. In fact, it refers simply to "the Register of Intercountry Adoptions". One may conclude then, that s.92 imparts a slightly wider power to the High Court than that vested in the Authority. This is, in my view, illustrated by the fact that, under s.92(2), the court shall not give a direction to procure the cancellation of an entry based solely on the fact that, under the law of the State in which an adoption was effected, that adoption has been set aside, revoked, terminated, annulled, or otherwise, and is void. This is a power the Authority itself does not have. The intent of that sub-section is, plainly, to protect the safety and best interests of children who have been the subject matter of previous adoption orders. That same intent is, in my view, illustrated by s.93(3), which allows a court to make such orders as may be necessary in the circumstances, which are in the best interests of the person, and relating to the status of the child, including guardianship, custody, maintenance, and citizenship. Undoubtedly, s.92(5) provides that if the High Court refuses to give a direction under sub-section 1(a), or gives a direction under sub-section 1(b), the inter-country adoption effected outside the State shall not be recognised under the Act. However, I do not believe this prevents an order being made in the event that the High Court determines that a "positive" order may be granted, to the effect that an entry with respect to "an adoption" in the Register, "may be made". It seems to me that the intent of the legislature can hardly have been that, in circumstances such as this, children, in the position of JB and KB, should be left in a position where they are denied legal certainty as to their status."*

…

114. *…on the facts of this exceptional case, informed by the provisions of Article 42A of the Constitution, set out later, I would take the view that, all other things remaining equal, and the other legal tests and requirements being satisfied, the High Court, if itself "satisfied" that an entry should be made, might, exceptionally, direct the Authority to procure the making of specified entries in the RICA regarding these two children. This would do no violence to the best interests test. It would be consistent with what I conceive to be the spirit of the Convention in dealing with exceptional cases such as this one. The resolution would be in accordance with internal law of the State. The recognition would be outside the Convention, but in accord with the type of situation envisaged in the Report, to which this Court should have regard."*

98. In expressing their agreement with the view taken by MacMenamin J. as to the potential availability of s.92(1) to the applicants, Dunne J. and O'Malley J. stated:

> *"…if innocent mistakes or misunderstandings by either the applicants or State officials result in an invalid adoption, it is incumbent on the authorities to explore the possibility of official rectification. If that is simply impossible, the question is whether the courts of this State have any mechanism available under which they can vindicate the rights of the children without breach of the Act and Convention.*
>
> *In our view, for the reasons stated by MacMenamin J. the procedure authorised under s. 92 of the Act is capable of meeting this objective."* (at paras. 3-4)

99. The Majority View that the "s*lightly wider power*" of the High Court under s.92(1) could be employed in the present case was arrived at based on certain interpretive principles derived from Article 42A of the Constitution, the Explanatory Report and the Guide to Good Practice. These matters are discussed more fully later in this judgment.

100. Writing for the minority, McKechnie J. concluded that s. 92 did not confer a power on the High Court that was wider than the power of the Authority under s.90. O'Donnell J. agreed with McKechnie J., as a matter of statutory interpretation. (The views of McKechnie J. and O'Donnell J. on s.92(1) will hereafter be referred to as "the Minority View").

101. When looking at the provisions of the 2010 Act, McKechnie J found the most critical provision dealing with the power of the High Court to direct an entry in the Register to be s.92(1)(a). He found subsections (2), (3) and (4) to be consequential measures *"but only on the Court directing the cancellation of an existing entry under subsection (1)(b)."* With regard to the comparison made by MacMenamin J. between s.92(1) and s.90(8) of 2010 Act for the purpose of concluding that s.92(1) conferred on the High Court a "*broader" or "slightly wider*" power than that vested in the Authority, it was not clear to McKechine J. that section 92(1) could be read independently of 90(8) so as to create a comparison between the breadth of the respective powers of the High Court, on the one hand, and the Authority, on the other. He took the view that a proper construction of the sections was that they should be read together. He stated:

> *"Section 90(8) opens by providing that "[i]f the High Court so directs under section 92(1)", an entry shall be made in the register concerning a specified intercountry adoption effected outside the State. Accordingly, when section 92(1) (and section 92(1)(a), in particular) refers to the Court directing the Authority to procure the making of a specified "entry" in the register, this can only relate back to the entry "concerning a specified intercountry adoption effected outside the State" referred to in section 90(8). Rather than containing differing powers, the two sections are in fact opposite sides of the same coin; the High Court directs the making of an entry under section 92(1), but that entry takes effect pursuant to section 90(8), which refers only to "specified intercountry adoption[s] effected outside the State". Thus it is not clear to me that the power of the Court to order the making of entry on the*

register is any wider than that of the Authority. Either way, it is only an intercountry adoption effected outside the State, as so defined in the Act, that can be entered on the register using these provisions". (at para. 125)

102. He went on to opine that even if he agreed (which he did not) with MacMenamin J.'s view that definition (b) of "intercountry adoption effected outside the State" under section 3 was made out, the High Court would be able to make an order directing an entry of the adoptions on the Register on the narrower construction of ss.90(8) and s.92(1) which he himself advocated.

103. McKechnie J. next turned to definition (b) of an "intercountry adoption effected outside the State" as found in s.3 of the 2010 Act. He found the second element of definition (b), namely, that the adoption was effected outside the State on or after the establishment day, was clearly satisfied. For the third element, the five requirements of a "foreign adoption" as defined under section 1 of the 1991 Act which must be satisfied, he thought it "*highly uncertain*" whether the evidence in the case definitively establishes that these criteria were met. He opined that even if they were met there was "*a more fundamental"* difficulty with [MacMenamin J's] reasoning, which centres on the first element of the definition (b) of an intercountry adoption effected outside the State, which requires that it must be "an adoption, other than an intercountry adoption". In McKechnie J.'s view, having regard to this definition of "intercountry adoption" and the wording of Article 2(1) of the Convention which the definition replicates, the adoptions in question could not be conceived of as other than an "intercountry adoption" under the 2010 Act, and thus as being governed by the Convention. He went on to state:

"128 …Whichever view one takes of the facts of this case, it is clear that here the children were habitually resident in Country A and were transferred to Ireland either (i) after their adoption in Country A by Mrs. B, a person habitually resident in Ireland, or (ii) for the purposes of an adoption in Ireland by Mrs. B. (On the facts it seems that (i) is the better description of what occurred, but in the event that the Country A adoption were to be disregarded, (ii) would kick into play and therefore any subsequent adoption in Ireland would, in my view, still clearly be an "intercountry adoption").

129. Thus to my mind it is an inescapable conclusion that what has occurred in this case can only be described as an "intercountry adoption" for the purposes of the Act; I do not believe that any other consideration, such as the passage of time or the children's current habitual residence, can change this position. It follows that, because this is an "intercountry adoption", as defined in section 3, it cannot be an "intercountry adoption effected outside the State" as also defined in that section. Accordingly, I am of the view that no entry in respect thereof can be made under section 90(8) or, based on the above, section 92(1)(a)."

104. At paras.99-113 and para.135 of his judgment, McKechnie J. expressly disagreed with the Majority View that in exceptional cases Article 42A of the Constitution, the Explanatory Report and the Guide to Good Practice could be used as interpretative aids in construing

the extent of the power of the High Court under s.92(1)(a) of the 2010 Act. The reasons given by the learned McKechnie J. for his disagreement with the Majority View are considered later in this judgment.

Considerations

How is s.92 of the 2010 Act to be interpreted?

105. As observed in the Supreme Court, the present case *"from the outset always has been an intercountry adoption situation: a Hague Convention case".* (McKechnie J. at para. 94) The principal question which therefore arise for determination is whether, as a matter of statutory interpretation, s. 92(1)(a) of the 2010 Act imparts what the Majority View in the Supreme Court described as *"a slightly wider power to the High Court than that vested in the Authority*" such that in a "*truly exceptional case*" the High Court may direct that *"an adoption*" be entered on the Register even though it was not made in accordance with the requirements of the Convention. If the Court does have such a power under s. 92(1), then the question that arises is whether the applicants have discharged the onus of satisfying the Court of the exceptionality of their circumstances such that an order pursuant to s.92(1)(a) should be made.

The status of the Majority View

106. The first issue to be determined is the status of the Majority View.

107. It is the applicants' submission, contrary to the submissions of the Authority and the Attorney General, that as a matter of law, the majority in the Supreme Court held that there is a slightly wider power in the High Court under s.92(1) than that of the Authority under s.90 the exercise of which in respect to non-compliance with the Convention is compatible with the objects of the Convention and the 2010 Act in "exceptional" cases.

108. The applicants contend that there are several indicia in the judgments of the Supreme Court which would count against the Majority View being obiter. Counsel submits that the "*actual decision"* of the Supreme Court was the answering of the five questions posed in the Case Stated. That cannot be regarded as obiter, counsel submits, albeit that with respect to some of the answers, the majority and minority view disagreed as to the answers which should be given. It is submitted that the answers given to the five questions are conspicuously the defining manner of the resolution of the issues that were before the Supreme Court. It is thus for the Court here to find what was necessary and essential in the Majority View of the Supreme Court as expressed by MacMenamin J., Dunne J. and O'Malley J.

109. It is submitted that particular support for the applicants' position is found in the answers given by both MacMenamin J. and McKechnie J. to question (a) of the Case Stated. This question asked whether the Country A adoptions were recognisable in Ireland under Part 8 of the 2010 Act or common law. The applicants submit that it follows that it was "*essential and necessary*" in deciding that issue that the Court determine whether or not the Country A adoption can be entered on the Register by a direction of the High Court

under s. 92. They contend that this is plain from the answer given to the first question by MacMenamin J.:

> "*Answer: the "country A adoption" may, in the first instance, be recognisable on foot of decisions arising from the timely conclusion of remedial measures between the Adoption Authority and Central Authority of Country A. Subject to the outcome of those contacts, are, necessary, otherwise the High Court may alternatively, if satisfied, on the evidence and the law, direct the Authority to register the Adoptions, pursuant to s. 92 of the Act. The High Court may, on the basis of the evidence before it, then, consider what order best gives effect to the provisions of the law generally, s. 92 of the Act, the Explanatory Report, the Guide and in light of the requirements of Article 42 of the Constitution. Only if the conditions of s. 92(1) are in the opinion of the High Court satisfied a then direct the adoption be registered pursuant to s. 92."* (at para. 138)

110. The answer given to the first question by the minority was: "*No, the Country A adoption is not recognisable".*

111. It is submitted that it is impossible to conclude from these two answers that the question of a proper interpretation of s. 92 was not "*essential and necessary*" for the "actual decision" by the Supreme Court in the Case Stated. Citing Talbot J. (at p. 154) in *Flower v. Ebbw Vale Steel, Iron & Coal Company* [1934] 2 KB 132, counsel contends that it is manifest from the judgment of MacMenamin J. that his "*deliberate pronouncements*" on s. 92 were "*all made expressly as reasons*" – in conjunction with other arguments –for the decision to which the majority came to in respect of the questions posed in the Case Stated.

112. The applicants contend that the references in para. 138 of MacMenamin J.'s judgment to s.92 of the 2010 Act cannot be viewed as ancillary observations. Albeit that question (a) of the Case Stated was not actually appealed by the Authority, the Authority's own written submissions to the Supreme Court proposed s. 92 as an alternative to a domestic adoption. Thus, the issue of s.92 as a mechanism was before the Supreme Court. It is thus argued that the Supreme Court, as guardians of the Constitution, had the issue of s.92 before them in the context of what should happen to the children if a domestic adoption was not available. Furthermore, what was before the Supreme Court was not an ordinary *lis inter partes* but rather a Case Stated. In this context, given that the individuals whose rights were most affected were not represented, it cannot be that the fact that the Authority did not appeal question (a) could hamstring the Supreme Court from considering the children's rights.

113. It is acknowledged by counsel that both McKechnie J. and O'Donnell J. described the Majority View on s. 92 as obiter and that MacMenamin J. may also have thought this himself. It is the applicants' contention, however, that MacMenamin J.'s comments on the issue are not entirely consistent.

114. The applicants further contend that even if the Majority View's comments regarding s.92 are obiter the Court should express its view on Majority View. It is submitted that whatever way the views of the majority of the Supreme Court are to be interpreted, they must of necessity carry great significance and weight. Accordingly, the Court cannot be uninfluenced by the Majority View on s. 92 even when considering the matter afresh. Counsel contends that even if their judgments in this regard are obiter, they constitute at the very least the sort of *"considered ancillary observations" which "have been accepted subsequently as anticipating developments in the law and expressing principals of value*". (per Clarke J. in *M. v. Minister for Justice, Equality & Law Reform* at para. [2018] IESC 14. (ar para. 10.25)

115. It is the submission of both the Authority and the Attorney General that the views expressed in the judgments of the Supreme Court as to how s.92 is to be interpreted are obiter.

116. Counsel for the Attorney General submits that it is important to note that it was only in the context of the five questions in the Case Stated that the Attorney General made submissions to the Supreme Court.

117. Counsel places emphasis on the fact that there was no appeal to the Supreme Court on the answer given by the High Court to question (a) of the Case Stated. Nor was the Supreme Court asked to rephrase the questions in the Case Stated. The Authority's notice of appeal referred to the mandatory nature of the Convention, the question of consent and issues referable to the eligibility for domestic adoptions, with the remaining grounds of appeal referring to the Authority's jurisdiction. The notice of appeal did not refer to either s. 90 or s. 92. Nor was there a reference to those provisions in the Attorney General's submissions in the Supreme Court or indeed the applicants' response to the appeal. It is accepted however that the Authority's submissions made reference to s. 90 and s. 92 in the context of appropriate "next steps" for the applicants.

118. In all the circumstances, therefore, it is the Attorney General's position that the interpretation of s. 90 and s. 92 was not teased out by the Supreme Court.

119. Albeit that MacMenamin J. went on to consider ss. 90 and 92 of the 2010 Act there was no analysis by him as to why those provisions had a bearing on questions (b) and (d) of the Case Stated. Moreover, his pronouncement in para. 81 would suggest that he had already answered questions (b) and (d) of the Case Stated.

120. It is the Attorney General's contention that ss. 90 and 92 do not have any bearing on questions (b) and (d) of the Case Stated. Those questions as framed were solely in the context as to whether the Authority had jurisdiction to make an adoption order. There were no properly framed questions before the High Court or the Supreme Court as to how the children's position was to be regularised by the application of Irish law. As a further basis for the submission that the comments of the Supreme Court with regard to s. 92 were obiter, counsel for the Authority referred the Court to the judgment of Simons J. in *A Foster Child v. CFA* [2018] IEHC 762.

Discussion

121. It is common case that both the majority and minority judgments of the Supreme Court engaged at length with the merits and demerits of the competing views of s. 92.

122. Although there are references in three of the judgments to the subject matter of the disagreement between the majority and minority being obiter, that is not determinative for this Court as to whether the observations made on s.92 are in truth obiter. As per Clarke J.in *M. v. Minister for Justice, Equality & Law Reform* [2018] IESC 14, "*it is for later courts to determine what portion of the judgment meets* [the test of being] *essential and necessary for the actual decision in the case*". (at para. 10.24.)

123. Bearing in mind the legal test, it is my view, from a consideration of the issues that were before the Supreme Court, and the judgments delivered by the Court, that a number of factors lead to the conclusion that the views expressed both by the majority and the minority on s.92 of the 2010 Act were obiter.

124. Albeit that it was not the decisive factor having regard to the test set out in *M. v. Minister for Justice*, I note the Supreme Court itself opined that its comments on s. 92 were obiter. In this regard I note para. 81 of the judgment of MacMenamin J.:

> *"The High Court appears to have accepted the submission that the children were eligible for a domestic adoption under s. 23 of the Act. The judge was persuaded that it was permissible to adopt a 'flexible' approach to interpretation of the statute, consistent with the broad and generous approach permissible in respect of a remedial statute, such as the Act of 2010. But there are limitations to such an approach. Even a broad and generous interpretation of a remedial Act cannot proceed beyond the objects of that Act. I do not think the answers to the case stated given by the High Court can stand in law. They do not sufficiently have regard to the true intent of the Act or the Convention, nor do they sufficiently address the problem that what happened here might permit circumvention of the Act and the Convention elsewhere. I would set aside the order of the High Court, and substitute the responses to the case stated set out later in this judgment, at para. 138, bearing in mind the obiter dicta observations made here."*

125. At para. 86 of his judgment, there is further recognition on MacMenamin J.'s part that his views on s.92 were obiter:

> *"I preface what follows with a recognition that certain observations as to the interpretation and application of ss. 90 and 92 of the Act, and other legislation referred to below, are, to an extent, obiter dicta, insofar as, to a degree, they go beyond the issues falling for determination here. What is said in this section of the judgment, however, does have a bearing on a response to questions (b) and (d) in the case stated.*

126. In aid of his submission that the Majority View was not obiter, counsel for the applicants asked the Court to note in particular the words *"to an extent*" and "*to a degree*" as appear in para. 86. I do not find, however, that those qualifications are sufficient to transform MacMenamin J.'s comments on s.92 into part of the ratio of the decision of the Supreme Court. This is in light of the learned judge's acknowledgement that his observations as to the interpretation and application of ss. 90 and 92 of the 2010 Act "*go beyond the issues falling for determination* [in the appeal]" (at para. 86)

127. I agree with the submission of counsel for the Authority that if MacMenamin J. intended his remarks on s. 92 to be binding he would have said so. I also note that Dunne and O'Malley J.J. (who agreed with MacMenamin J. on the remit of s. 92) did not demur in relation to MacMenamin J.'s comments that his views on s. 90 and s. 92 were obiter.

128. It is also of note that McKechnie J. (writing for the minority) stated that there was no substantive legal argument before the Supreme Court on the meaning of s. 92. He states, at para. 118:

> *"Even though the discussions had on sections 90 and 92 is rightfully said by MacMenamin J. to be obiter (para. 86), a view with which I fully concur, given that no submissions were made on these provisions, nonetheless I feel I should make some observations on the issue, if only to contribute to the ensuing debate."*

129. Moreover, O'Donnell J., in the course of his judgment, observed that "*all members of the Supreme Court agreed on the answers on the questions posed in the Case Stated*" and noted that the divergence in the Court centred on the "*residual*" issue of s.92, the discussion of which, he noted, was accepted by all to be obiter. (at para. 2)

130. A more fundamental issue to which this Court has regard is that none of the questions in the Case Stated asked if s. 92 was available to the applicants.

131. In summary, the questions posed were:

(a) Whether the Country A adoption was recognisable under Part 8 of the 2010 Act, which all of the members of the Supreme Court effectively held should be answered in in the negative, given the non-compliance with the Convention. While I note that the answer given by the majority of the Supreme Court to question (a) was framed solely in terms of options that may be available by way of retrospective compliance with the Convention, or alternatively an application under s. 92, that does not, to my mind, detract from the fact that all members of the Supreme Court agreed that the adoptions were not recognisable under Part 8 of the 2010 Act. Moreover, in the answer given by the majority to question (a) of the Case Stated, I note that it was for the High Court, if satisfied "on the evidence, and the law", (emphasis added) to direct the Authority to enter the adoptions on the Register. (See MacMenamin J. at para.138) To my mind, this is further evidence that the majority considered their observations on s.92 to be obiter;

(b) Whether on the facts disclosed the Authority had jurisdiction to make an adoption order in respect of the children, a question which the members of the Supreme Court in the respective judgments answered in the negative;

(c) Whether the common law jurisdiction of the High Court to recognise the adoptions survived the passing of the 2010 Act, a question also answered by the Supreme Court in the negative;

(d) Whether, on the basis of a continuing common law jurisdiction and on the basis that of the facts disclosed in the Case Stated, and assuming that the Country A adoption was not recognised in Ireland, the original status of the children remained, a question also answered in the negative by the Supreme Court; and

(e) Whether the children could be the subject of a domestic adoption based on their habitual residence in this jurisdiction at the time of the applicants' application to the Authority, which the Supreme Court in the various judgments also answered in the negative on the basis that at the critical time the children's' situation was captured by the Convention and thus the Convention and the 2010 Act could not be circumvented on the basis of any habitual residence established after they came into the State;

133. I acknowledge the references to s. 92 of the 2010 Act as appear in the answers given by MacMenamin J. to question (a), (b), (d) and (e). Indeed, I note that in his answer to question (e), MacMenamin J. describes the *"main issue*" in the Case Stated as "*whether an order may be made under s.92(1) of the Act by the High Court*". However, notwithstanding the manner in which the answers given by the Majority are framed, to my mind, a consideration of s. 92 of the 2010 Act was neither "*essential*" nor "*necessary*" in order to answer the questions posed in the Case Stated. Accordingly, for the reasons set out above, I find that the views expressed by the majority on s.92 are obiter.

Section 92(1)(a) of the 2010 Act

134. I turn now to the critical issue in this case-whether the High Court is vested under s.92(1) of the Act with jurisdiction to direct the Authority to enter the within adoptions on the Register in circumstances such as present in this case. As envisaged by both the Majority and Minority Views, this issue necessitates, *inter alia*, a consideration of s.92(1)(a) and other provisions of the 2010 Act. In effect, this Court must address what s. 92(1)(a) "*properly means*" (as opined by McKechnie J. writing for the minority in the Supreme Court).

135. The 2010 Act is a piece of remedial social legislation; therefore, it can be interpreted purposefully, in the manner described by McGuinness J. in *NWHB v. An Bord Uchtála* [2002] 4 I.R. 252, at p. 267:

"It is clear that the Act of 1998 is a remedial, social statute designed to permit the adoption of children who had previously been denied the benefits of adoption. A purposive approach should be applied to the interpretation of such a statute".

136. In *G. v. An Bord Uchtála* [1980] I.R. 32, O'Higgins C.J. held that *"the purpose of these [Adoption] Acts that give to these children the opportunity to become members of a family would have the status and protection which such membership entails*."

137. Thus, the 2010 Act falls to be interpreted, in the words of Walsh J. in *Bank of Ireland v. Purcell* [1989] I.R. 327, "*as widely and liberally as can be fairly be done."*

138. This Court also understands that it was the Attorney General's submission to the Supreme Court in the Case Stated that the 2010 Act is a socially remedial statute that should be interpreted in a purposive way.

139. At para. 84 of his judgment in the Case Stated, MacMenamin J. opined that "*a court may legitimately adopt a flexible approach in a remedial statute such as [the 2010 Act].* However, he also stated: *"even a court may only do so within the scope of the Act, as set out in the long title*." The long title to the 2010 Act states, *inter alia*, that it is an Act "to provide for matters relating to the adoption of children", "to give the force of law to [The Hague Convention]" and "to provide for the recognition of certain adoptions effected outside the State".

140. Prior to being addressed by the Majority and Minority Views in the Case Stated, s.92(1)(a) had already been the subject of judicial interpretative comment. In *M.O'C v. Udarás Uchtála Na hEireann* [2014] I.E.H.C. 580, Abbott J., speaking of s. 92(1), referred to *"the less defined wording of the power of the High Court to enter a name on the Register on Intercountry Adoptions*". He stated that from the Convention itself and from the Explanatory Report to the Convention, it was *"clear that in relation to ensuring the broad objectives and fundamental principles of the Convention, co-operation and flexibility may be required*". He concluded that "*the more open-wording of the provision relating to the power of the High Court to enter a name on the Register more fitting to allow for these possibilities so as to allow the High Court to be a second guarantor of the interests of the child and the proper administration of the Act in relation to intercountry adoptions, which the general, standard, automatic registrations effected the Authority would not encompass".*

141. In *J.M. v. The Adoption Authority of Ireland* [2017] I.E.H.C. 320, Reynolds J. noted the findings of Abbott J. in *M.O'C.* and concluded that they were not applicable because *M.O'C* was distinguishable on its facts.

142. *J.M*. arose out of an application by the applicant *(J.M.)* and his wife to the Authority to enter an adoption in the Register of an adoption effected in a third country which was signatory to Convention at the time of the adoption. The application was refused recognition by the Authority on the basis that it was not compliant with Convention and this decision was upheld by Reynolds J.

143. Refusing the application under s. 92, Reynolds J. stated:

> *"The final issue for the Court to determine is whether or not the adoption is substantially compliant with The Hague Convention such that would afford the Court some degree of flexibility or discretion to direct the registration pursuant to Section 92 of the Act. The wording of the 2010 Act is unclear as to whether the powers of the Court under Section 92 are broader than the powers of the Authority under Section 90. The respondent contends that Section 92 could not be interpreted so as to confer a power to dispense with The Hague Convention requirements unless such power was stated in very clear terms.*
>
> *In the case of (MO'C and BO'C v. Udaras Uchtála na hEireann [2014] IEHC 580, also known as the Mexico case, Unreported 30 May 2014), Abbott J. made an order under Section 92 in relation to an adoption that did not comply with all the necessary of The Hague Convention. This decision related to an adoption in Mexico where the adopters had engaged with the Authority and had received the appropriate declaration of eligibility and suitability before travelling to Mexico to adopt a child. The child was placed with the adopters prior to 1st November 2010 but the adoption was not legalised until some months later when the law had changed and The Hague Convention had been adopted into Irish law.*
>
> *In determining the issue, Abbott J. concluded that some flexibility could be adopted with a view to addressing technical issues but only if the adoption sought to be recognised fulfilled the broad objectives and fundamental principles of the Convention*
>
> *...*
>
> *Abbott J. directed the registration of the adoption under Section 92 on the basis of vested rights under the law as it was before adoption of The Hague Convention and in circumstances where the applicants had compiled in all respects with the requirements of a foreign adoption and had secured a declaration of eligibility and suitability before travelling to Mexico to adopt the child.*
>
> *The approach adopted by Abbott J. recognised that some flexibility could be adopted by the Court in situations where the requirements of The Hague Convention are broadly met. However, clearly the facts of that case must be distinguished from the facts in the instant case in circumstances where the applicants had no prior engagement with the Authority and where no declaration of eligibility and suitability had been obtained. In the circumstances, it is simple untenable to suggest that the broad requirements of The Hague Convention have been met or indeed that the Court could properly direct the registration pursuant to Section 90(2) of the Act.*
>
> *The applicant's tenacity in pursuing this application is to be commended but for the forgoing reasons, the Court must refuse the application."*

144. While MacMenamin J. in his comments in the Majority View distinguished the facts of *J.M.* from those then known to the Supreme Court regarding the present situation, he took the view that certain statements of the judgment of Abbott J. in *M.O.C. "cast the net far too widely".*

145. Before embarking on an analysis of the meaning of s. 92(1) there are some general observations that can be made regarding the Convention and the statutory scheme for the making of adoption orders (including intercountry adoptions) and the entry of adoptions on the Register.

146. Section 9 of the 2010 Act provides that "The Hague Convention has the force of law in the State". Article 2(1) of the Convention is unequivocal in that the Convention must apply in circumstances of an intercountry adoption. It states:

> "The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such adoption in the receiving State or in the State of origin."

147. The Convention reflects best practice in the area of intercountry adoptions.

148. I do not consider it necessary to recite the relevant Articles of the Convention such as applied to the within adoptions. I have already cited McKechnie J. in this regard. I also note and adopt paras. 18-35 of the judgment of MacMenamin J.

149. As regards the 2010 Act and entries of intercountry adoptions onto the Register, the first thing to be observed is that it is the Authority who records such entries. To the degree that the High Court (whatever the extent of its powers) grants relief under s. 92 it is in the form of a direction to the Authority to make an adoption order or not, or to make an entry in the Register or not, or to make such amendment as may be required.

150. The legislature has designated the Authority as an entity with specialist knowledge and expertise to carry out the functions created by the 2010 Act in the context of adoptions and intercountry adoptions, with the High Court carrying out a designated statutory role. There is no jurisdiction vested in the High Court itself to make an adoption order or to make an entry in the Register. In both cases, it must direct the Authority to do so.

151. It is trite law to state that as a creature of statute conferred with express powers the Authority cannot operate beyond the provisions of 2010 Act. The central question posed in the present application is whether there exists a greater discretion vested in the High Court when called upon, in the context of an application under s. 92, to direct that an entry be made in the Register where the Authority itself is not enabled to make such an entry based on the provisions of the 2010 Act.

The submission of the Authority and the Attorney General on the meaning of ss.90 and 92 of the 2010 Act

152. In their submissions in the present case, the Authority and the Attorney General both agree that there is some jurisdiction in the High Court under s.92(1) beyond that conferred on the Authority under s.90. There is however a difference in emphasis on their part. The Authority accepts that there is case law support for the proposition that s. 92(1) confers a slightly wider jurisdiction on the High Court than that conferred on the Authority under s.90.

153. In the view of the Authority, this power is confined to technical or minor substantive non-compliance with the Convention which the Authority itself cannot excuse, such as for example using s. 92 for a breach of time deadlines or confined to a minor breach of a substantive matter. It endorses the view of Reynolds J. that the power under s. 92(1) is one which can be utilised where "*technical issues*" arise but where *"the broad requirements of The Hague Convention have been met"*. Counsel submits that it is for the Court to say whether the level of non-compliance in the present case was significant or whether it was more the nature of a technical or minor breach. The Authority's primary submission is that the Oireachtas could not have intended that s. 92 would be used the circumvent the Convention or excuse major non-compliance with it. Albeit that any finding as to the nature of the breach in the present case is for the Court, it is the Authority's submission that the non-compliance as occurred here does not come within the realm of a technical or minor breach or a minor substantive breach.

154. Regarding the Authority's position, counsel for the applicants contends that there is nothing in the 2010 Act regarding non-compliance, be it technical or minor substantive non-compliance.

155. The distinction drawn by the Authority between technical/minor substantive non-compliance and major non-compliance crystallises the difference between the Authority's and the Attorney General's respective positions. The Attorney General's position is that s.92 does not admit of any degree of non-compliance with the substance of the Convention. It is contended by the Attorney General that insofar as non-compliance can be excused it can only relate to the process in the State domestically and not any non-compliance with the Convention. The Attorney General's position is that the Convention itself has no wriggle room or escape clause. I will return to the above arguments in due course.

156. The CFA's submission is that s.92(1) admits of a slightly wider power than that vested in the Authority. As support for this contention, counsel points to the wording of s.92(1) which refers only to "adoption" and "the register of inter-country adoptions".

157. With reference to the actual text of s. 92(1), the Attorney General's position can be summarised as follows. There is nothing expressly set out in s.92(1) to suggest that the High Court has a jurisdiction over and above that which is vested in the Authority under s.90 in respect of entries on the Register. It is submitted that had there been such intent on the part of the Oireachtas to confer such jurisdiction, either expressly or by implication, same would have been made subject to conditions set out s.91(1), which has not been done. By way of comparison, counsel points to the provisions of s. 92(2) and

(3) where conditions attach to the powers given to the High Court. With regard to s. 92(1) there are no conditions put in place to explain the basis upon which the High Court might exercise any residual jurisdiction. It is submitted that the silence in this regard suggests that it was not intended that the High Court would have any implied jurisdictions such as the applicants contend for.

158. It is thus submitted that the jurisdiction vested in the High Court can be no greater than that contained in the Act, without an express provision to that effect.

159. It is also contended on the part of the Attorney General that for the purpose of understanding the parameters of ss. 90 and 91 of the 2010 Act, it is necessary to have regard to the provisions of s.57(1) and (2) of the 2010 Act, in particular s.57(2)(b)(i) and (ii).

160. Section 57 provides:

"(1) In this section, "competent authority" includes a person serving in another state in the capacity of a competent authority for the purposes of an intercountry adoption effected outside the State.

(2) Subject to subsections (3) and (4), an intercountry adoption effected outside the State that—

(a) if effected at any time before the establishment day—

(i) is an adoption that, at that time, conformed to the definition of "foreign adoption" in section 1 of the Adoption Act 1991, and

(ii) has been certified under a certificate issued by the competent authority of the state of the adoption as having been effected under and in accordance with the law of that state, or

(b) if effected on or after the establishment day, has been certified under a certificate issued by the competent authority of the state of the adoption—

(i) in the case of an adoption referred to in paragraph (b) of the definition of "intercountry adoption effected outside the State" in section 3 (1), as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption under and in accordance with the law of that state, and

(ii) in any other case, as having been effected in accordance with the Hague Convention or with a bilateral agreement or with an arrangement referred to in section 81, as the case may be,

unless contrary to public policy, is hereby recognised, and is deemed to have been effected by a valid adoption order made on the later of the following:

(I) the date of the adoption;

(II) the date on which, under section 90, the Authority enters particulars of the adoption in the register of intercountry adoptions."

161. As can be seen, for the purpose of s.57(2) of the Act and the power of the Authority to give recognition to intercountry adoptions effected outside the State, adoptions comprise three categories. First are what can be called "legacy adoptions" which predate the establishment day of the 2010 Act, and which must conform with the legal definition of a foreign adoption under the 1991 Act. (Section 57(2)(a)) It is accepted that s. 57(2)(a) has no applicability to the present case given that the adoptions were made after the establishment day.

162. The second category of recognisable adoptions are those effected on or after the establishment day which, as per s.57(2)(b)(i) of the 2010 Act, occur in another country and which must also conform with the 1991 Act definition of "foreign adoption" and which relate to situations where the adopting parties were habitually resident in that country at the time of the adoption and where the adoption was made in accordance with the law of that country. The definition of this category is achieved by identifying what it is not, which is to say that it is not an adoption covered by the definition of "intercountry adoption". An "intercountry adoption" is defined in s. 3 of the 2010 Act by reference to the fact that the child and the adopting parents habitually reside in different countries.

163. The third category of recognisable adoptions are those under s.57(2)(b)(ii), namely Hague Convention compliant adoptions or adoptions explicitly provided for in the Act such as those based on a bilateral agreement or with reference to a specific child as provided for in s. 81 – to which Hague Convention standards must also apply.

164. Counsel for the Attorney General submits that for the purposes of the Court making an order under s. 92(1)(a), the applicants must establish that the adoptions in question come within s. 57(2)(b)(i) or (ii) of the 2010 Act. He states that s. 57(2)(b)(i) can be excluded from consideration as it is not suggested that the second applicant was habitually resident in Country A at the time of the adoptions.

165. Section 57(2)(b)(ii) provides that in order for the adoptions in the present case to be recognised they must be in accordance with the Convention or the bilateral agreement or an arrangement referred to in s. 81 of the 2010 Act. As Country A is a contracting State for Hague Convention purposes, the bilateral agreement or the s. 81 arrangement cannot apply here. Again, all concerned acknowledge that the applicants cannot satisfy s. 57(2)(b)(ii) as the adoptions did not comply with the Convention requirements. Counsel thus submits that in the absence of the applicants being able to satisfy the requirements of s. 57(2)(b)(i) or (ii) of the 2010 Act, the relief under s.92(1)(a) is not open to them.

166. The Attorney General's principal argument is that there is no power to dispense with the requirements of s. 57 of the Act, whether on the part of the Authority or on the part of the High Court. It is the Attorney's contention that a plain reading of the provisions of ss. 90 and 92 of the 2010 Act bear out this argument.

167. Certain provisions of s. 90 of the 2010 Act are crucial to the position being adopted by the Attorney General as to how s.92(1)(a) is to be interpreted. Section 90(3) and (4) provide:

> "(3) The following persons may apply to the Authority to enter particulars of an intercountry adoption effected outside the State in the register of intercountry adoptions:
>
> (a) the adopted person;
> (b) a person by whom the adopted person was adopted;
> (c) any other person having an interest in the matter.
>
> (4) Not later than 3 months after the date when a child first enters the State after his or her intercountry adoption in another state by parents habitually resident in the State, the adopters shall ensure that an application to the Authority is made under subsection (3) to enter particulars of the adoption in the register of intercountry adoptions."

168. It is contended by the Attorney General that s. 90(3) and s. 92(1) must be read in conjunction with each other. Section 90(3) identifies the scope of persons who may apply to register intercountry adoption effected outside the State. Section 92(1) provides that those persons who are entitled to apply under s. 90(3) may also apply for a direction from the High Court. As to what s. 92(1) is directed towards, counsel cites, by way of an example, a circumstance where the adopters do not apply to the Authority within the time limit provided for in s.90(4) and where the Authority refuses to consider the application. It is suggested that pursuant to s.92(1)(a), the High Court could in effect extend the time by directing an entry in the Register, assuming all proofs are in order. Counsel draws a distinction between major and minor contraventions of the adoption requirements. A minor contravention could be logistical, such as missing the aforementioned three-month deadline, in particular if it was unavoidable or inadvertent. It is also suggested that a further example of a minor contravention in respect of which the High Court could direct an entry would be if the adopters provided the required information but not in the form required. A major contravention would be that the adoption itself did not comply with Hague standards or other requirements under the 2010 Act which, it is submitted, cannot be the subject of an order under s.92(1)(a).

169. It is further contended that the words "… a person who may make an application to the Authority under s. 90(3)" as contained in s.92(1) refer to the list or category of persons who are eligible to make an application under s. 90(3); thus, the words are descriptive rather than temporal in nature. I note that counsel for the applicants agrees that the words in question are descriptive.

170. It is also submitted on the part of the Attorney General that the words "should be made, cancelled or corrected" as set out in s. 92(1) suggests that the import s. 92(1) is that it encompasses a supervisory jurisdiction in the High Court over the Authority and the Register. It is argued that the provision does not say anything about the issue of the jurisdiction of the High Court as against that of the Authority. It is contended that the

High Court jurisdiction in s.92(1) is "supervisory" and that such jurisdiction is not "extra-statutory".

171. Counsel contends that the supervisory jurisdiction of the High Court is underscored by the provisions of s. 92(2) and (3) such that in the event that the Authority was directed to procure the cancellation of the entry in the Register, the High Court could in the exercise of an express statutory power make necessary provision in the best interest of the child concerned relating but not limited to the identified items.

172. Based on the contention that the range of persons who may apply under s. 92(1) are the persons listed in s. 90(3), it is the further contention of the Attorney General that the power of the High Court under s. 92(1) is to direct the entry on the Register of an "intercountry adoption effected outside the State". It is submitted this is what a cohesive reading of the law means.

173. Counsel points to s. 20(2) of the 2010 Act which provides that the Authority is empowered to make an adoption order for a child who has been "adopted in an intercountry adoption effected outside the State" and that once satisfied as to the relevant certification from the State of adoption the Authority may recognise such adoption and register same. Thus the Authority's power to recognise an intercountry adoption is confined only to intercountry adoptions effected outside the State. It is argued that the list of persons who may apply to the Authority under s. 90(3) to enter particulars on the Register is inextricably tied to an application based on an "intercountry adoption effected outside the State".

174. It is submitted that it is of significance that the High Court's power to entertain an application to direct the Authority to make an entry on the Register pursuant to s. 92(1) is by reference back to the list of persons in s. 90(3). Counsel suggests that reference to the range of persons who may apply under s. 92(1) must refer to the list or category of persons who are eligible to make an application under s. 90(3).

175. The Attorney General's contention is that the necessary implication of this is that no such application to the High Court pursuant to s.92(1) is available to that list of persons if applying in respect of "intercountry adoptions".

176. He asserts that in order for the applicants to avail of the jurisdiction of the High Court under s. 92(1) to direct the Authority to make an entry in the Register, the adoptions must first of all come within the classification to which s. 90(3) relates.

177. In further support of his argument that the powers of the Authority and High Court are coterminous, counsel refers to s. 90(7) and (8) of the 2010 Act. With regard to s. 90(7) (which empowers the Authority to enter an intercountry adoption effected outside the State on the Register once satisfied that it complies with the 2010 Act), counsel posits that the need for the power vested in the High Court under s. 92(1) could be if for example the Authority was not satisfied to direct an entry into the Register. Thus a

person dissatisfied with that decision may seek an order from the High Court under s. 92(1) directing the Authority to enter the adoption on the Register.

178. It is thus contended that the power of the High Court under s. 92 is a corrective/advisory jurisdiction and is not a broader/wider power than that of the Authority. It is acknowledged that the description of the High Court's powers as suggested by the Attorney General are more akin to an appeal jurisdiction, which is not provided for in the 2010 Act

The applicants' submissions

179. The applicants' position can be summarised as follows: they acknowledge that there is an interpretative question for the Court to answer with regard to s.92. It is accepted that s.92 is not so self-explanatory and obvious that it alleviates the necessity for interpretation of the section. They urge the Court to adopt the Majority View of the Supreme Court as to how s.92(1)(a) is to be interpreted. They contend that the High Court's remit under s.92(1) is not just to duplicate or mirror the powers of the Authority under s.90.

180. They also argue that the jurisdiction conferred on the Court under s.92(1) is not an appellate one. Nor is it there to correct the Authority in circumstances where judicial review would be the more appropriate remedy. They further submit that insofar as the Attorney General concedes a wider jurisdiction for the High Court under s.92(1) than that afforded to the Authority under s.90 but argues that such jurisdiction is confined to instances of minor non-compliance in respect of procedural matters in the 2010 Act, that approach creates its own difficulties. Counsel for the applicants poses the question as to where does one draw the line between major and minor non-compliance?

181. While the Attorney General places much emphasis on the language used in s.92(1) as to who may apply under the subsection, it is the applicants' contention that the reference in s.92(1) to the list of persons who can apply under s.90(3) is there only to circumscribe the list of people who may apply under s.92(1). Clearly, the applicants fall within the range of persons permitted to make such an application. Counsel argues that there is no requirement under s.92(1) that the applicants also be people who are applying to the Authority to register an inter-country adoption effected outside the State.

182. Notably, the phrase "an intercountry adoption effected outside the State" is not used in either s. 92(1) or s. 92(2) of the 2010 Act. This is in contrast to its repeated use in s. 90 and in s. 92(5). Counsel for the applicants also point out that ss. 92(1) and 92(2) speak only of "an adoption" rather than "intercountry adoption effected outside the State", an observation also made by MacMeniman J. in the Majority View. It is thus submitted on behalf of the applicants that, in effect, s. 92(1) allows for a foreign adoption as defined by the Adoption Act, 1991 to be entered on the Register on the direction of the High Court.

183. Counsel contends that the reason for and legal significance of the omission of the phrase "an intercountry adoption effected outside the State" from s. 92(1) is neither clear nor

obvious. It requires an exercise in statutory interpretation. Such an exercise has been carried out, with divergent outcomes, by the learned judges of the Supreme Court. The Majority View is that there is a slightly wider power granted to the High Court under s. 92(1) than is granted to the Authority under s. 90. It is argued that no similar power to that granted to the High Court under s. 92(1) has been granted to the Authority under the 2010 Act.

184. In aid of his submission as to the wider remit given to the High Court under s.92 as opposed to that of the Authority under s. 90, counsel points to s. 92(2) which provides that the High Court (in the best interests of the children) has the power to leave on the Register an adoption that has been annulled, terminated or revoked in another country. Importantly, this is a wide power which the Authority does not have.

185. The applicants dispute the Attorney General's assertion that in order for the within adoptions to be able to be entered on the Register they must conform to s.57(2)(b)(i) or (ii) of the 2010 Act. It is not the applicants' case in the within proceedings that the adoptions fall within the definition of an inter-country adoption effected outside the State. If the adoptions fell within s.57(2)(b) (i) or (ii), then there would be no need for an application under s.92(1); the applicants would merely have to apply to the Authority under s.90(3) to have the adoptions entered on the Register.

186. With regard to the provisions of s.90(8) of the 2010 Act, counsel urges the Court not to accept the view expressed by McKechnie J. in the Supreme Court, and submits that if ss. 92(1) and 90(8) are to be read "*as opposite sides of the same coin*" then the question must be asked as to why the High Court was given a power at all under s. 92(1)?

187. It is submitted that the three paragraphs in s. 92(1) conferring powers on the High Court cannot be read as merely correlative (or mirror provisions) to the subsections which confer duties on the Authority or otherwise qualify the powers of the Authority as set out in ss. 90(8), 90(11) and 92(5) of the 2010 Act. The applicants contend that that if s. 92(1) was intended to be merely a correlative provision then one would expect to find a related provision in s. 90 expressly authorising or requiring the Authority to cancel an entry on the Register. However, no such provision exists save as directed by the High Court.

188. Counsel queries the point of s.92(1) of the 2010 Act if not to permit scope for the Authority to be directed by the High Court to register the adoptions in issue here in the particular exceptional circumstances in which the applicants find themselves.

Discussion

189. With regard to the statutory provisions in issue in this case, in the first instance, I agree with counsel for the applicants' submission that a plain reading of s. 90(3) and s.92(1) of the 2010 Act does not lend support to the Attorney General's argument that an applicant under s.92(1) has to establish that the adoption in respect of which the application is made is an "intercountry adoption effected outside the State". What s.90(3) does is to identify the persons entitled to apply to the Authority seeking the exercise by the

Authority of its powers under s.90(7). Insofar as s.92(1) refers to s.90(3), to my mind it does so for the purpose only of identifying the range of persons who may make an application to the High Court under s.92(1). I do not find, therefore, a basis solely upon a comparison of s.90(3) and s.92(1) by which it can be concluded that the powers of the Authority and the High Court regarding entries on the Register are coterminous.

190. I turn now to a comparison of provisions of s.90(7) and (8) with s.92(1).

191. In the Supreme Court's judgment in the Case Stated, McKechnie J. (the Minority View) opined (at para. 125) that s.92(1) and s.90(8) of the 2010 Act must be read together. This is also the submission of the Attorney General in the present proceedings.

192. It seems to me that the basic premise of the learned McKechnie J.'s analysis (his being satisfied that the adoptions in issue were "intercountry adoptions") is that as s.92(1)(a) and s.90(8) are "*opposite sides of the same coin"* the power of the High Court under s.92(1)(a) is restricted to what is prescribed in s.90(8) of the 2010 Act, namely that the High Court is vested with the power to direct the Authority with regard to an entry in the Register "*concerning a specified intercountry adoption effected outside the State",* which McKechnie J. found could not be satisfied in this case given his finding that the adoptions in issue conformed to the definition of "intercountry adoptions".

193. I do not believe, however, that the fact that McKechnie J. classified the adoptions in issue here as "intercountry adoptions" or that he identified the scope of s. 90(8) as confined to the High Court directing the Authority to register a specified intercountry adoption effected outside the State necessarily defines the scope of s.92(1) of the 2010 Act. Clearly, s.90(8) has to be read in light of s.90(7), the section which empowers the *Authority* to register intercountry adoptions effected outside the State.

194. The Authority has an express statutory obligation under s. 90(7) to enter on the Register "an intercountry adoption effected outside the State", once satisfied that it complies with the requirements of the 2010 Act. To my mind, the direction provided for in s.90(8) harkens back to the *Authority's* statutory power as set out in s.90(7).

195. Thus, the rationale for the High Court to have a power under s. 92(1)(a) to direct the making of an entry on the Register in respect of "an adoption" would be unclear, and the power redundant, if that power was confined to directing the entry of only an intercountry adoption effected outside the State made with full compliance with the Act. To my mind, counsel for the applicants' query as why there would be a need for such a power in the High Court when such power exists within the Authority is well made. The 2010 Act provides that if the requirements of s. 90(7) are satisfied then the Authority is already obliged to make the entry before and without any direction from the High Court.

196. I agree with the interpretation put on s.90(8) by MacMenamin J., namely that s.90(8) may refer to a specified intercountry adoption effected outside the State which may have been referred to the High Court under the case stated procedure set out in s. 49(2) of the 2010 Act. I will return to such further meaning as s.90(8) may have in due course.

197. To my mind, the salient element of the remit of the powers of the High Court under s.92(1), compared to those of the Authority under s.90, has to be the manner in which the provision is framed. As observed by MacMenamin J., s.92 is found in a different chapter of Part 10 of the 2010 Act to that which provides for the Authority's power to make entries on the Register. Unlike s. 90(8), s.92(1) does not make reference to "intercountry adoptions effected outside the State". As was the case with MacMenamin J., I accept that were s.92(1) to refer only to "intercountry adoptions effected outside the State" its scope would be much more narrow. However, s.92(1) refers only to an entry of "an adoption" in the "register of intercountry adoptions".

198. The phrase "intercountry adoption effected outside the State" is a somewhat cumbersome one. Counsel for the applicants submits that its use wherever it appears in the 2010 Act is clearly deliberate. I find merit in the applicants' submission in this regard. In my view, in circumstances where the 2010 Act is replete with references to the phrase "intercountry adoption effected outside the State", where this phrase is omitted in the 2010 Act, or a different phrase is used, that has to be plainly construed as the deliberate intent of the legislation. I also consider it noteworthy that the powers of the High Court under s.92(1) equate to those which the Court had under s.7(1) of the 1991 Act. I note that the Oireachtas did not see fit to alter the provisions of s.92(1) in any way consequent on adopting the Convention into Irish law.

199. At para. 111 of his judgment (already quoted herein), MacMenamin J. found support for the slightly wider power of the High Court regarding entries in the Register than that vested in the Authority by looking to s.92(2) and (3) of the 2010 Act. He noted the reference therein that any directions given by the High Court must have regard to the best interests of the adopted person. While I note that McKechnie J. found no basis in ss.92(2) or (3) to support a freestanding power in the High Court under s.92(1) to direct an entry in the Register, and found the omission of any reference to best interests in s.92(1) "*highly surprising",* I nevertheless agree with the observations of the learned MacMenamin J. with regard to these provisions.

200. In Part 4 of the 2010 Act, entitled "Domestic Adoptions and Intercountry Adoptions", s. 19(1) provides that in "any matter, application or proceeding" under the 2010 Act "the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter application or proceedings". Section 19(2) sets out the relevant factors or circumstances to be considered, including, inter alia, "the child's views on his or her proposed adoption". Noting that s. 19 is applicable to any order the High Court might make under s.92(1)(a), I do not regard the observation of the learned McKechnie J. with regard to the omission of "best interests" from s.92(1) as a necessarily persuasive factor when construing the breadth of the subsection.

201. I also adopt the view of the learned MacMenamin J. as expressed in para. 111 of his judgment in relation to s.92(5) of the 2010 Act. Section 92(5) provides that if the High Court refuses to give a direction under s. 92(1)(a), or gives a direction under s.92(1)(b),

the intercountry adoption effected outside the State shall not be recognised under the Act. The learned judge opined that this did not prevent an order being made under s.92(1)(a) *"in the event the High Court determines that a "positive" order may be granted, to the effect that an entry with respect to 'an adoption' in the Register 'may be made'".* To my mind, from the interpretation perspective, the learned judge's conclusion in this regard logically follows from his observation that s. 92(1) of the 2010 Act speaks only of "an adoption" and not "an intercountry adoption effected outside the State".

202. I also accept the applicants' submission that if the Oireachtas intended merely to grant applicants a right of appeal under s.92(1) against the Authority where "an intercountry adoption effected outside the State" should have been registered by the Authority under s. 90(7) but it erroneously fails to do so, then that would have expressly been set out. However, s. 92(1) is not framed as a power of appeal from a failure by the Authority to satisfy its obligation under s. 90(7); it is formulated as a stand-alone power to direct an entry on the Register – and one which makes no mention of "an intercountry adoption effected outside the State" but speaks rather of "an adoption".

203. Moreover, I am also satisfied that the purpose of s.92(1)(a) cannot be for the purpose of corrections since s.92(1)(c) expressly provides the High Court with such power.

204. I now turn to the view expressed by MacMenamin J. (at para. 110 of his judgment) that if the requirements of a "foreign adoption" as defined in s.1 of the 1991 Act were found to complied with as regards the adoptions in issue here, the children are *prima facie* eligible to be made the subject of an order under s. 92 of the 2010 Act.

205. Counsel for the Attorney General contends that the learned judge's view in this regard was based on an incomplete assessment of the relevant provisions of the 2010 Act.

206. A "foreign adoption" as defined in s.1 of the 1991 Act means an adoption where the child is under eighteen and the adoption is in accordance with the laws of the place where it is effected in relation to which a number of conditions are required to be satisfied, as set out in the definition. All of the proofs therein contained are mandatory. It is the Attorney General's submission that the *sine qua non*, according to the requirements under s. 57(2)(b)(i) of the 2010 Act, is that as well as each of the requirements of the definition of "foreign adoption" having to be complied with, it must also be established that the adopter or adopters were habitually resident in the State granting the adoption at the time the adoption order was made, that the adoption order accorded with the law of that State and that that State certifies the adopters' habitual residence. As acknowledged, the applicants cannot satisfy the requirements of s.57(2)(b)(i) as the second applicant was not habitually resident in Country A at the time of the adoptions. Accordingly, the Attorney General's position is that the applicants cannot rely on the concept of "foreign adoption" as defined in s. 1 of the 1991 Act without also satisfying the habitual residence requirement of s.57(2)(b)(i), which they cannot satisfy. Counsel submits that there is no power either in the Authority or the High Court to dispense with the requirements of s. 57(2) of the 2010 Act. In essence, it is contended on behalf of the Attorney General that, in the absence of the applicants being able to satisfy the habitual residence requirement

of s. 57(2)(b)(i), MacMenamin J.'s conclusion that the children are *prima facie* eligible to be made the subject of an order under s.92 if the adoptions conform to the definition of "foreign adoption" as it stood in 1991 cannot be considered as a correct interpretation of the relevant statutory provisions.

207. I accept counsel for the Attorney General's submissions on this issue insofar as they relate to the power of the *Authority* under s.57(2) to recognise intercountry adoptions effected outside the State. It is clear from a reading s.57(2)(b)(i), in conjunction with s. 20(2), s. 90(7) and s.90(8) of the 2010 Act, that the Authority cannot recognise or enter on the Register the particular intercountry adoption effected outside the State which s.57(2)(b)(i) provides for unless all of the requirements of the latter subsection are met, including habitual residence in the State of the adoption.

208. Do these strictures necessarily prevent the High Court (on the assumption, for the purposes of the present argument, that the adoptions in issue here come within the definition of s.1 of the 1991 Act) from making an order under s.92(1)(a)? In my view this question has to be answered in the negative. To my mind, the Attorney General's argument is predicated on the High Court's power under s.92(1)(a) being coterminous with the powers of the Authority under s. 90. This Court, for the reasons already stated, has found this not to be the case. Accordingly, from a perusal of the relevant provisions, I do not find, on a plain reading of the Act, the type of interaction between s.92(1) and s.57(2) of the 2010 Act as contended for by the Attorney General in his submissions.

209. I am satisfied that a plain reading of the relevant provisions of ss.90 and 92 do not suggest that the power granted to the High Court in s.92(1)(a) is coterminous with the powers of the Authority under s.90 (3), (7) or (8) and/or s.57(2), or that the power of the High Court under s.92(1) is otherwise curtailed or constrained by those provisions.

210. I am also of the view that the learned MacMenamin J.'s reliance on the concept of a "foreign adoption" as it read on 30th May, 1991 does not equate to a finding by the learned judge that the definition of "intercountry adoption effected outside the State" is made out in this case. If an "intercountry adoption effected outside the State" was made out, then there would be no need to consider, for the purposes of this case, whether there was a wider power in the High Court under s.92 than that vested in the Authority as the applicants could apply to the Authority for recognition and registration of the adoptions, or in the event of a refusal of recognition concerning a specified intercountry adoption effected outside the state, invoke s.92(1) for the High Court to direct the Authority to enter the adoptions on the Register *in accordance with the Authority's obligation to do so under s.90(7) of the 2010 Act*.

211. If the High Court so directs, then the Authority must enter the intercountry adoption effected outside the State on the Register. (Section 90(8) refers)

212. To my mind, in the knowledge that any recognition of the adoptions in question would be "*outside the Convention"* the basis of the learned MacMenamin J.'s focus on the definition

of "foreign adoption" as it read as of 30th May, 1991 was to ascertain if a *prima facie* basis for the within adoptions to be considered under s.92 could be established.

213. For all of the reasons set out above, upon a plain reading of the relevant provisions, I am in agreement with, and find more persuasive, the Majority View (albeit obiter dicta) that s.92(1) admits of "*a slightly wider*" power with regard to the entry of adoptions on the Register than that vested in the Authority under s.90 of the 2010 Act.

Is this "slightly wider" power of the High Court under s.92(1)(a) capable of being used in this case without doing violence to the objects of the 2010 Act or the Convention?

214. The essential question which now arises in this case is whether in light of the overall objective of the 2010 Act (the incorporation of the Convention into Irish law), the slightly wider power vested in the High Court under s.92(1)(a) can be construed so as to allow s.92(1)(a) be utilised to direct the Authority to enter the within adoptions on the Register notwithstanding the wholesale non-compliance with the Convention evident in this case. The Majority View of the Supreme Court was that if the High Court was *itself* satisfied that an entry should be made, pursuant to s.92(1)(a) it could "*exceptionally*" direct the Authority to procure an entry of the adoptions in the Register.

215. Albeit that the varying views of the Supreme Court in the Case Stated on the interpretive tools available to a court when construing s.92(1)(a) were obiter dicta, this Court takes as its starting point those views as they encompass the issues with which this Court must grapple in considering whether the slightly wider power which I have found the High Court has, as compared to the Authority, allows for the utilisation of s.92(1)(a) in the present case.

216. The Majority View of the Supreme Court (in reliance on *HI v. MG (Child Abduction): Wrongful removal* [1999] IESC 89) was that the proper starting point in ascertaining whether s.92(1) could be utilised in an exceptional case was that the Court should interpret the 2010 Act in a manner informed by the Convention and the Explanatory Report, bearing in mind the need to protect "*the spirit and wording of the Convention.*" (MacMenamin J. at paras. 88, 98) While MacMenamin J. noted the Authority's submission that the Oireachtas had laid down that all children's best interests rights should be vindicated through the 2010 Act and the Convention, the learned Judge did not believe that this meant that the 2010 Act or the Convention *"is a legally self-contained, or ring fenced, area of law, immune from constitutional interpretation or analysis." This was because the Convention "has the status of domestic statutory law enacted under Art. 29.6 of the Constitution" and was "subordinate to the Constitution".* (at para. 88)

217. Thus, the Convention "*could not be elevated to a quasi-constitutional status*". (at para. 88) This being so, in the view of MacMenamin J., Article 42A of the Constitution came into play and *"the courts are bound to observe the best interests test for children in adoption cases."* He accepted however that any process of constitutional interpretation had to be conducted in harmony with the Convention so as to ensure that "*it does not run the risk*

of defeating the object of the legislation, which is itself intended to protect the best interests of children." (at para. 88)

218. Noting the provisions of s.10 of the 2010 Act which provides that "judicial notice shall be taken of the Explanatory Report", MacMenamin J. first considered this instrument in his quest to find harmony between a constitutional interpretation of s.92(1) and the mandatory nature of the Convention to which pursuant to Article 40 thereof no reservation is permitted. In the first instance, he noted that the Explanatory Report was replete with references to "best interests", citing in particular paras. 63 and 64 of the Report. Para. 63 states that one of the main objects of the Convention is "the establishment of safeguards to ensure the best interests of the child and the respect for his or her fundamental rights, as recognised by international law" (found in the Preamble to the Convention). MacMenamin J. also cited para. 65 of the Explanatory Report which recognised that "the Convention does not pretend to solve all the problems related to children's intercountry adoption, in particular, to determine the law applicable to the granting of the adoption, or its effects."

219. The learned Judge found para. 411 of the Explanatory Report "*directly relevant*". It states:

> "411 The Convention does not specifically answer the question as to whether an adoption granted in a Contracting State and falling within its scope of application, but not in accordance with the Convention's rules, could be recognised by another Contracting State whose internal laws permit such recognition. Undoubtedly, in such a case, the Contracting State granting the adoption is violating the Convention, because its provisions are mandatory such conduct may give rise the complaint permitted by Article 33, [the reporting function of the Authority in cases of breaches of the Convention] but the question of the recognition would be outside of the Convention and the answer should depend on the law applicable in the recognising State, always taking into account the best interests of the child."

220. MacMenamin J. noted the contents of para. 412, where the Explanatory Report describes a concrete case where in a situation of non-compliance with the Convention denial of recognition of an intercountry adoption might not be in the best interests of the child.

221. Para. 412 states:

> "412 Working document No 104, submitted by Spain when discussing Article 22, suggested to add a new paragraph prescribing: "Equally, any Contracting State may declare to the depository of this Convention that child adoptions will not be recognised in that State unless the functions conferred on the Central Authorities have been carried out in conformity with the first paragraph of this Article". The idea behind the proposal was the guarantee that has to be made by the State of the habitual residence granting the adoption, to prevent the risks of fraud. However, it was observed that such denial of recognition may not be in the best interests of the child, as is exemplified by Canada with the case of a Spanish

professor habitually resident in the United States who obtains a legally valid intercountry adoption without the intervention of the Central Authorities, continues to reside there for ten years or more only afterwards returns to Spain, and the proposal failed. Undoubtedly, it would be very difficult to accept the denial of recognition of the adoption, just because the Central Authorities did not intervene.'"

222. MacMenamin J. understood the observation in para. 412 that it "would be very difficult to accept the denial of recognition of the adoption" as "*giving effect to the best interests test in a truly exceptional case".* (emphasis added)

223. MacMenamin J. next considered whether the Guide to Good Practice, albeit that that instrument is not referred to in the 2010 Act, could be a "*helpful 'signpost'"* as to the approach to be adopted by a court when, as in the present case, there is non- compliance with the Convention. He noted the contents of para. 531-533 of the Guide, which consider what might be done when mistakes are made, for example where courts in a receiving country "perhaps because of unfamiliarity with the Convention" have made national adoption orders where the Convention procedures and safeguards should have applied (para. 531) thus leading to a circumvention of the safeguards in the Convention (para. 532).

224. Para. 533 of the Guide states:

"533. Can the situation be rectified? It would be in the spirit of the Convention, and of the Convention on the Rights of the Child as well as in the best interests of the child concerned, for the two countries involved to try to find a pragmatic solution. They might wish to consider "healing" the defects which occurred by trying to do what should have been done, had the provisions of the Convention been respected. If it were possible for the Authorities of the country of origin to make the determinations required by Article 4 of the Convention, and those of the receiving country to verify if the provisions of Article 5, in particular Article 5 a) and b), have been respected, and if the two authorities could agree to an exchange of the required reports under Articles 15 and 16, then the two countries might agree that the requirement of Article 17c) has been satisfied retrospectively, that the appropriate authorities would be in a position to make out the certificate referred to in Article 23(1) of the Convention."

225. As already referred to, the pragmatic approach referred to in the Guide to Good Practice was attempted in this case in the aftermath of the Supreme Court judgments, without success.

226. While MacMenamin J. accepted the Authority's argument that a constitutional interpretation of the 2010 Act cannot be utilised to defeat the Act's clear legislative intent (i.e.to give effect to the Convention) especially where the Act is itself "*informed by the best interests test",* he was of the view that the facts of the within case could be viewed from the perspective of para. 411 of the Explanatory Report and paras. 531-533 of the Guide to Good Practice. He considered that had the provisions of the Convention been

adverted to by the HSE, and the Authority, when contact was first made in June 2011, then the applicants could have been assessed as to their eligibility and suitability. He opined that at that time there was "*clearly*" unfamiliarity with the Convention, in the manner articulated by para. 411 of the Explanatory Report and paras. 531-533 of the Guide to Good Practice. On the basis of the affidavit evidence then before the Supreme Court, MacMenamin J. opined that there was nothing to suggest had the Convention procedure been adverted to, that declarations would not have been made in the usual way and that, thereafter, the applicants' application to jointly adopt the children "*could, on the face of things, have been dealt with by the Authority and the Country A Central Authority."* (at para. 97)

227. MacMenamin J. went on to state:

> *"There are certain consequences which must be acknowledged. If there is to be some legal recognition of this adoption, it would be, 'outside the Convention'. In my view, it would also necessarily take place against the background of an acknowledgement of a constitutional duty imposed on this Court under Article 42A of the Constitution, described below. It would recognise that, to paraphrase para. 412 of the Report, the continued denial of recognition of the adoption of these two children would not be in their best interests. It would take place in an area where the framers of the Convention have actually chosen to remain silent. Any judicial resolution of the issues, if it can be done, must, insofar as possible, protect the 'spirit and the wording' of the Convention. The questions in the case stated must be answered both as issues of law, having broader application, but also in the concrete circumstances of this case. The question, therefore, comes down to whether the Act of 2010, properly interpreted and applied, provides a route forward which guarantees the future status and wellbeing of the children, in accordance with the Constitution? In my opinion, it can. I consider the way forward involves a number of steps, each having regard to the legislation, the Report, the Guide to Good Practice, and the overarching requirements of the Constitution. I do not conceive these objectives as being divergent."* (at para. 98)

228. As earlier referred to, at para. 111 of his judgment, MacMenamin J. opined that the "*slightly different and broader power*" of the High Court from that found in s. 90 "*is to be operated in accordance with the object of the* [2010 Act], *as informed by the Explanatory Report*."

229. As is also clear from his judgment, MacMenamin J.'s support for the proposition that the powers of the High Court under s.92(1)(a) could be applied to meet the exigencies of the present case was informed by Article 42A of the Constitution. He stated:

> *"122. An article of the Constitution, such as Article 42A, cannot be "stood-down" or placed at naught by a statute simply because the statute translates an international agreement into part of domestic law. The Act cannot circumscribe, or derogate from, the Constitution, or any part of it. Nor can this statute "free" the Oireachtas from the constraints of the Constitution, or any part of it. (See the statements to*

this effect in the judgments of Walsh and Henchy JJ. in Crotty v. An Taoiseach [1987] IESC 4, [1987] I.R. 713, as approved and applied by this Court in Pringle v. Government of Ireland [2012] IESC 47, [2013] 3 I.R. 1). It is the function of the courts to interpret and apply the Constitution and the law, including this Act, which has no connection with measures necessitated by membership of the European Union. If it had been the intention to elevate the Convention to a constitutional status, this would have required a decision of the People. It is, therefore, to my mind, entirely constitutionally proper that the Constitution should at least be an interpretative point of reference. As such, one cannot, I consider, set to one side the explicit provisions of Article 42A, which not only recognise and affirm the natural and imprescriptible rights of all children, but guarantee that the State will, so far as practicable, by its laws, protect and vindicate those rights in the resolution of all proceedings of this type. (Article 42A.1). Nor can one ignore the wording of Article 42A.4.1º, which provides that:

> *"Provision shall be made by law that in the resolution of all proceedings -*
>
> *...*
>
> *ii concerning the adoption, guardianship or custody of, or access to, any child,*
>
> *the best interests of the child shall be the paramount consideration."*
>
> (Emphasis added)

The emphasised words speak for themselves, and require no explanation.

123. *The provisions of Article 42A.4.2º must also be borne in mind:*

> *"Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child." (Emphasis added)*

124. *This case does concern "adoption". The Act, and Article 42A, refer to the paramount consideration of "best interests"; the Constitution refers to the child, as an individual, not in the collective sense of children as a category of person. The duty is in my view specific to each case. Even though the children were not separately represented, there is no controversy as to what their views are. These views are to be given "due weight", having regard to their ages. The jurisprudence of the courts makes clear that considerable weight should be given to the views of children of their ages, absent any indication of some other countervailing factor.*

125. *The Act makes extensive reference to the "best interests" principle. I do not, in fact, accept that there should be a conflict between the Constitution and the principles set out in the Act, and in the Convention when interpreted in light of the Report and its Guide. Even if there were such a conflict, the provisions of the*

Constitution should be seen as informing the interpretation of the Act. The question, as it arises, is not, I think, one of some absolute, interpretative, "exclusionary principle", but rather whether Article 42A speaks to the interpretation of this adoption statute in this adoption case? Of course, as the corollary to that, a court must engage in a harmonious interpretation of the Constitution."

228. I turn now to the Minority View, firstly as expressed by McKechnie J.

229. As with MacMenamin J., McKechnie J. opined that the question of statutory interpretation involved was one which must be seen "*through the prism of its international context*". (at para. 42) With regard to the MacMenamin J.'s focus on the Explanatory Report, McKechnie J. saw no reason for reliance thereon and opined that both the Convention and the 2010 Act of and by themselves recognised the best interests of the child.

230. Furthermore, McKechnie J. did not believe that it was necessary to have regard to Article 42A of the Constitution as an "*external source*" for the protection of the best interests of the child. In his view, the Convention and the 2010 Act *"provide the framework through which the best interests of the child are to be protected in a given case*". (at para. 107) Thus, he found the constitutional obligation contained in Article 42A.4.1 and Article 42A.4.2 had been discharged. He went on to state:

"109. Furthermore, I do not believe that it is appropriate, for interpretive purposes, to import a totally free-standing concept of "the best interests of the child" from an external source, even from the Constitution itself. To permit this single consideration to stand removed from the system put in place by the Act and Convention, with the capacity to supersede all of the other requirements contained in those instruments, would be to open the entire regime up to abuse. "Paramount" consideration cannot mean "sole" consideration. As the Authority has stressed, allowing the best interests of the children to become the only consideration in a given case runs the risk of setting at nought the protections of the Convention and of encouraging non-compliance therewith by adopters who feel that their actions will not be met by adverse consequences. This would have the capacity to jeopardise the entire structure of the Convention. Although the bona fides of C.B. and P.B. are not in doubt, the Court must be vigilant not to decide these proceedings in a way which rewards, even encourages, inappropriate conduct on future occasions, or which undermines the Convention. Accordingly, whilst ever mindful of the best interests of the children, meaning these children specifically, I am of the view that the same must nonetheless be achieved within the ambit of the Convention and Act, insofar as it is possible to do so.

110. These observations do not, in my view, stand down Article 42A of the Constitution. That Article cannot, of course, be rendered obsolete, nor would I endeavour to do so. Neither can it be subjugated to the requirements of either the Convention of the Act. It retains its place at the top of our legal hierarchy. Rather, the point is that what the Constitution commands has in fact been complied with: laws have been put in place to secure the best interests of the child, and to ascertain the views of

the child, in all adoption proceedings. The relevant provisions of the Constitution require no more than that. The duty so imposed having been discharged, I believe that the focus must remain on the Act, which gives effect to this obligation and which governs adoption law in this country. By this I mean that as the legislation faithfully corresponds to the constitutional requirement, it is not necessary to consider Article 42A as an additional layer or further test to be navigated. To otherwise characterise my views on Article 42A, as MacMenamin J. has, is to completely misunderstand them."

231. With regard to paras. 63 and 64 of the Explanatory Report and the reference therein to "best interests", he did not accept *"any suggestion of a free standing right over and above the Convention or the 2010 Act by which the situation of these children can be determined on the basis of their best interests*". (at para.113)

232. On the question of a purposive approach to s.92(1), McKechnie J. opined:

"130. Even with a purposive approach, the High Court, before it can exercise the powers under subsection (1)(a) of section 92, must be "satisfied that an entry with respect to an adoption in the register of intercountry adoptions should be made" (emphasis added). The most obvious question is how and on what basis it can be so satisfied in the circumstances of this case. This Court unanimously agrees that the making of a domestic adoption order is foreclosed upon: it is not an option. It is therefore the recognition of an intercountry adoption, or nothing. There must be real uncertainty, at least, as to how the High Court can in practice be "satisfied that an entry … should be made". The section is silent as to what factors the Court must take into account. How would it approach the evaluation required under the section? Indeed, what is the evaluation required? Would it be necessary to make any further findings or will the situation be assessed as is? Unlike sections 92(2) and 92(3), section 92(1) makes no specific reference to the best interests of the adopted person, so is the Court to be primarily guided by that criterion alone or do other considerations come into play? As stated, there is, at best, serious ambiguity as to how the High Court is to carry out the function entrusted to it under section 92(1)."

233. The learned Judge went on to state that s.92(1)(a) should *operate "in a manner which reflects the general aims and objectives of the 2010 Act as a whole*". He found no scope to operate its provisions in a manner "*which would be likely to undermine the scheme of the Convention".*

234. Like McKechnie J., O'Donnell J. did not believe that the invocation of Article 42A.4.1 could usefully be called in aid in the case. He agreed with McKechnie J. that the obligation contained in that Article had been complied with by the 2010 Act. He went on to opine:

"6. …The best interests test involves both broad societal judgments and individualised determinations in a particular case. In the context of a statute, it does not authorise the court to exceed the statutory limitations of the decision making process: rather, it means that, within the area in which a court has to make a

decision, where there is a discretion, the decision should be made on the basis that the paramount consideration should be the best interests of the child, rather than the interests of parents, relatives, or the State itself. Article 42A.4.1° now underpins that. However, the area for decision making in which those considerations apply is defined by the statute.

7. If it were otherwise, then the effect of Article 42A.4.1°, far from being modest, would be dramatic, since it would mean that in the area of adoption, guardianship, custody and access, the legislation could be reduced to a simple provision that orders may be made or refused whenever it would be in the best interests of the child to do so, in the view of a court. This would be undesirable at a practical level, and also at the level of principle, since it would remove the Oireachtas almost entirely from the area."

235. He further opined that he did not understand the Majority View to give support to such an approach and went on to state:

> *"The fact that the Court has expressed differing views on the question of the breadth of the jurisdiction under s. 92 should not obscure the fact that all judgments conceive of such jurisdiction as narrow, and as not extending to permitting the Court to make an order recognising a foreign adoption which does not comply with the requirements of the Convention and the Act, simply on the basis that the Court considers it would be in the interests of the children to do so. If so, it does not appear to me that Article 42A.4.1° is a necessary or, indeed, a useful guide on the interpretative issue."* (at para. 8)

The applicants' submissions

236. Counsel for the applicants submits that as the 2010 Act enjoys a presumption of constitutionality. It must thus be presumed that all proceedings, procedures, questions and adjudications permitted or prescribed by the 2010 Act are intended to be conducted in accordance with the principles of constitutional justice. First and foremost, where there are two interpretations of s. 92(1), the one consistent with the Constitution is to be preferred, especially in the context of the vindication of the best interests of children. It is submitted that the best interests of the child principle is the constitutionally paramount position, as is reflected also in the 2010 Act.

237. It is submitted that the above interpretative rules must be borne in mind when the Court weighs the merits of the competing views of the Supreme Court regarding the interpretation of s. 92(1) and, in particular, the very different outcomes which they have for the vindication of the best interests and rights of the children in this case.

238. The applicants urge the Court to adopt the view of the majority in Supreme Court that s.92(1)(a) when construed against Article 42A, the Explanatory Report and the Guide to Good Practice, allows the Court to make the order sought in the present case, if satisfied that the applicants' case is exceptional. By following the Majority View the Court does not

derogate from The Hague Convention as it is posited by the Majority View that given the exceptional circumstances of the present case, an order under s. 92(1)(a) would protect the wording and spirit of the Convention and would be consistent with the spirit of the Convention in dealing with exceptional cases.

239. It is submitted that while the Convention is silent on the issue of the consequences of non-certification, on the facts of the within case, that does not bar the remedy which the applicants seek. This is clear from the Explanatory Report, to which the Court must have regard when interpreting the Convention, pursuant to s.10 of the 2010 Act.

240. Counsel points to para. 410 of the Explanatory Report which states that Article 23 of the Convention does not provide for automatic recognition of a decision to refuse recognition of the adoption. It was considered that such a ruling would diverge too far from the objectives of the Convention.

241. By virtue of what is contained in paras. 411 and 412 of the Explanatory Report, the Court is not precluded by the Convention from adopting the Majority View. Equally, the Court is not required by the Convention to adopt the Minority View. As put by MacMenamin J., recognition of the Country A adoption by way of an Order under s. 92 would be done *"outside of the Convention but in accord with the type of situation envisaged in the [Explanatory Report] to which this Court should have regard".* (at para. 114)

242. It is thus the applicants' contention that s. 92(1) provides the Court with ample scope to direct the entry of the Country A adoptions on the Register as s. 92(1) is the provision that applies where the adoption is not in accordance with the Convention. As stated in the Explanatory Report, such situations are a matter for the domestic law of the Contracting State in question. This is in circumstances where the Explanatory Report states that a denial of recognition even where the functions conferred on the Central Authorities had not been carried out may not be in the best interests of the children in question.

243. Counsel also points to para. 529 of the Guide to Good Practice which states: -

> "Non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of fundamental rights of the natural family. Recognition may be refused, under Article 24, only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child."

244. As stated in the Supreme Court, the Guide to Good Practice can be looked to as a helpful "signpost" as to the approach to be adopted by a court where there is non-compliance with the Convention.

245. It is the applicants' contention that the Majority View of the Supreme Court does not breach Article A 40 of the Convention. Article 40 does not debar a *"purposive and flexible construction"* of the Convention. It is submitted that support for this argument is found in

the dictum of Keane C.J. in *H.I. v. M.G. (Child Abduction – Wrongful Removal*) [2000] 1 I.R. 110 at p. 132 where the objects of the Convention are therein set out to be:

> *"(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law; (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention".*

246. Given the objects of the Convention, Article 40 cannot be invoked to exclude the possibility of a purposive construction of the Convention's silence on the question of recognition of non-compliant intercountry adoptions. The interpretation of s. 92(1) as advocated by the applicants would ensure that the Convention is given effect in accordance with its objects and not in a way that would undermine them, for example, by needlessly prejudicing the interests or rights of the particular children affected in an exceptional case such as the present.

247. It is further submitted that the Court in interpreting s. 92(1) must take into account not only 42A of the Constitution but also Articles 40, 41 and 42. Article 42A.1 requires a court to prefer where possible an interpretation of s.92(1)(a) that will at least permit some scope in exceptional cases for consideration of the best interests and constitutional rights of children over an interpretation which will preclude such protection and/or severely prejudice such children. Counsel emphasises that he is not advocating a question of results – driven jurisprudence whereby Article 42A.1 obliges the Court to interpret s. 92(1) contra legem, rather the approach advocated is that in a choice between two possible interpretations of the statutory text, the question that must be asked is that whether it could ever have been the intention of the Oireachtas that the Court would be left without a mechanism to address an exceptional case.

248. As endorsed by the Majority View in the Supreme Court, Article 42A.1 is not "a free-standing concept". Thus, s. 19 of the 2010 Act, which the Court must take account of in adoption cases, must vindicate the natural and imprescriptible rights of the children. It is submitted that if the Court finds that it cannot direct the Authority to make an entry in the Register with regard to this case under s. 92(1) this means that s. 19 of the 2010 Act has failed to observe the constitutional requirements of Article 42A.1. It is submitted however that s. 19 has to be read consistent with Article 42A.1, as the Majority View in the Supreme Court requires the Court to do.

249. In interpreting and applying s. 92(1), regard must be had, inter alia, to the rights of J.B and K.B. under Article 8 of the European Convention on Human Rights (ECHR). In this regard counsel refers to s. 2(1) of the European Convention on Human Rights Act, 2003.

250. In aid of his Article 8 argument, counsel cites the decision of the UK High Court in *S. v. S. (No. 3) (Foreign Adoption Order: Recognition*) [2017] 2 WLR 887.

251. Albeit that it is not concerned with adoption, reliance is also placed on *Mennesson v. France* (65192/11) 26th June, 2014 where the European Court of Human Rights (ECtHR) stated:

> *"The Court can accept that France may wish to deter its nationals when going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory … having regard to the foregoing, however, the effects of non-recognition in French law the legal parent – child relationship between children thus conceived the intended parents are not limited to the parents alone, but chosen a particular method of assisted reproduction prohibited the French authorities. They also affect the children themselves, his right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal – parent child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children's best interest, in respect for which must guide any decision in their regard."* (at para. 25)

252. It is submitted that there are echoes of the foregoing reasoning the judgment of MacMenamin J. where he states, at para. 21:

> *"The applicants did not comply with the Act or the Convention. The agencies on the face of things have not performed as they might have. But, having regard to the philosophy and intention of the 2010 Act: whose rights are now most affected by the outcome of this case? I think this allows for one answer, the children's rights, even taking into account, as one must the actions of the applicants."*

253. It is also the applicants' contention that the Majority View is consonant with English case law on the recognition of non-compliant intercountry adoptions. In this regard, reliance is placed on *Re R. (a child) (adoption abroad*) [2012] EWHC 2956 (Fam) and *Re J. (a child) (foreign adoption order)* [2012] EWHC 3353 (Fam).

The Attorney General's submissions

254. Counsel for the Attorney General contends that allowing the applicants to use the 2010 Act when they are outside the Convention would constitute a backhanded and collateral slap in the face to the integrity of Convention and the Contracting States. This is in the context of Article 40 of the Convention which admits of no reservation.

255. Insofar as the applicants seek to rely on Article 42A of the Constitution, and the best interests of the children, it is submitted that such reliance would run counter to the spirit of Ireland having entered into and signed up to the Convention. It would set at nought the establishment of the Convention and the Convention adoption architecture put in place by the 2010 Act. Any deviation from this would have significant repercussions for the reciprocity that forms the bedrock of the Convention system internationally.

256. It is noted that the applicants urge upon the Court that it is unfair that the children in this case, and their circumstances, are not covered by the legislation. While that may be a difficult for the applicants to accept, that is in fact the case. What the applicants are contend for is that if the High Court is satisfied that the adoptions in question are broadly in terms of domestic legislation and broadly in terms of the Convention, and that their circumstances are exceptional, then the High Court should direct the Authority to enter the adoptions on the Register. It is submitted, however, there is no such "catchall" provision in the legislation which permits such a direction by the Court.

The Authority's submissions

257. As already referred to, the Authority's core submission is that on no view of s. 92 can it be said that the Oireachtas intended that s. 92 would be used to circumvent or override the Convention. It is submitted that the elaborate scheme for the regulating of recognition of adoptions as set out in the 2010 Act is inconsistent with a remedial power in the High Court to excuse a fundamental departure from compliance. Counsel submits that if indeed such a power exists, the question to be asked is what are the limits and conditions of such power?

258. It is submitted that there are alternative rights mechanisms available to the applicants and the children in this case, not least the provisions of the Guardianship of Infants Act, 1964 as amended by the 2015 Act, and the Succession Act 1966, as observed by O'Donnell J. in the Supreme Court.

The CFA's submissions

259. In reliance on the *dictum* of MacMenamin J. (para. 98), counsel for the CFA submits that there can be compliance with the spirit and wording of the Convention by the application of s. 92 of the 2010 Act. It is submitted that the purpose of s.92 is to cure difficulties that may have arisen, bearing in mind the obligation to look at the best interests of the children as the paramount consideration. The Court can take account of the 2010 Act, the Explanatory Report, the Guide to Good Practice and the overarching requirements of the Constitution, in conjunction with the best interests of the children in granting the relief sought in this very particular case. This route has been set out for the Court by the Majority View of the Supreme Court.

260. It is accepted by the CFA that the interpretation and application of s. 92 of the 2010 Act must be in line with the Convention and with the Explanatory Report and with the Guide to Good Practice.

261. Counsel further submits that the provisions of Article 42A of the Constitution enhance the argument that the best interests of the children should be the focus in this case, all other matters being equal and provided that other legal tests and requirements have been satisfied such that the Court could then exceptionally direct the Authority to procure the making of a specific entry in the Register regarding the children.

Discussion

262. Having given due consideration to the obiter views expressed by the Supreme Court in the Case Stated, and the submissions of the parties in these proceedings, overall, I find the Majority View, that in a "*truly exceptional case*" s.92(1) of the 2010 Act is capable of being invoked for the purposes of recognition of an intercountry adoption which is not in compliance with the Convention, to be more persuasive that the view expressed by the minority, or indeed the submissions made by the Authority and the Attorney General in this case. My reasons for so finding are set out hereunder.

263. I am in agreement with the Majority View that the Explanatory Report and the Guide to Good Practice provide assistance in interpreting the scope of s.92(1) for recognition purposes where there is, in the words of MacMenamin J., a "*truly exceptional case".*

264. As noted by MacMenamin J., paras. 65 and 66 of the Explanatory Report, together with paras. 531-533 of the Guide to Good Practice, acknowledge that the Convention is not the answer to all issues that may arise in intercountry adoptions. To my mind, contrary to the view expressed by the learned McKechnie J., the focus of the Majority View was not just on the best interests references in these instruments, but, more fundamentally, on the recognition by the authors of the Explanatory Report that the Convention itself is silent on the question as to whether an adoption granted in a Contracting State and falling within the scope of the Convention (but not in compliance therewith) could be recognised by another Contracting State "<u>whose internal laws permit such recognition</u>". (emphasis added) As noted by MacMenamin J. (and indeed at para. 411 of the Explanatory Report), any recognition given by a court in a Contracting State would be "outside the Convention". It would thus constitute a resolution in accordance with the internal law of the receiving State.

265. For the reasons already set out in this judgment, I have found from a reading of the relevant provisions of the 2010 Act that "an adoption" other than "an intercountry adoption effected outside the State" is capable of being the subject of an order under s.92(1)(a). Thus, the type of recognition envisaged by the Explanatory Report for exceptional cases is not foreclosed on by the manner in which the 2010 Act is framed. Applying a purposive approach to s.92(1), and bearing in mind the provisions of s. 10 of the 2010 Act, it seems to be that the framers of the 2010 Act left in place a mechanism available in the domestic law of the State capable of giving effect to recognition of a non-Hague compliant adoption, which recognition would be, in the words of the Explanatory Report, "outside of the Convention" and "always taking into account the best interests of the child". It bears repeating, however, given the objects of the Convention and the 2010 Act, that s.92(1) must be construed narrowly, hence the formulation by the Majority View of the "a truly exceptional case" test, which this Court endorses.

266. Any domestic resolution of a "*truly exceptional case*" must thus ensure that, in the words of MacMenamin J.*, "it does not run the risk of defeating the object of the legislation*". As I read his judgment, the learned judge took the repeated references to the best interests' principle in the Explanatory Report as an indication that the objects of the Convention

(including Article 40), or the legislation, would not be defeated if recognition "outside the Convention" of a non-compliant intercountry adoption was to be afforded to *"a truly exceptional case"*.

267. There is no suggestion in MacMenamin J's judgment that the best interests principle trumps every other consideration. Were that the case, I would have to respectfully disagree with the obiter comments of the learned judge in order to ensure the efficacy of the Convention system in cases of intercountry adoptions; but that is not the case, as indeed noted by O'Donnell J. in his judgment where he opines that he does not understand the Majority View as promulgating a best interests trumps all approach.

268. Clearly, MacMenamin J.'s invocation of the best interest principle is predicated on there being exceptional circumstances of a very high order surrounding the adoptions in question against which a court, in considering what is to be done, will, *inter alia*, weigh the best interests of the child or children concerned. This being my understanding of the approach of the majority in the Supreme Court, I am satisfied to adopt such an approach in interpreting s. 92(1) of the 2010 Act as capable of being utilised in the present case, subject to the Court being satisfied that the circumstances surrounding the adoptions of the children concerned meet the truly exceptional test demanded by the Majority View.

269. There was much debate in the Supreme Court on the invoking of Article 42A of the Constitution as an interpretative aid when construing s.92(1) of the 2010 Act. The Minority View observed that the obligations contained in Article 42A.4.1 and Article 42A.4.2 have been given legislative effect in the 2010 Act (via ss.19 and 24(2) of the 2010 Act), and that it was thus not necessary to refer back to Article 42A (McKechnie J. at para. 106). However, I am minded to agree with the Majority View that Article 42A cannot be "*stood- down or placed at nought*" by a statute, even one that implements an international instrument. (MacMenamin J. at para. 122)

270. While I accept that the provisions of Article 42A.4.1 and Article 42A.4.2 have been enacted in legislation, it is nevertheless the case that MacMenamin J. also placed reliance on "*the explicit provisions of Article 42A, which not only recognise and affirm the natural and imprescriptible rights of all children, but guarantee that the State will, so far as practible, by its laws, protect and vindicate those rights in the resolution of all proceedings of this type."* (at para. 122)

271. I agree with the learned MacMenamin J. that the word "all" in Article 42A includes the children in this case. The circumstances of these children is that their status as the adopted children of the second applicant is not capable of recognition under the Convention because the adoption was properly one to which the Convention applied and where all agree there was no compliance with the Convention. By the same token, the non-compliance with the Convention did not render the Country A adoption a nullity, as found by the Supreme Court. The consequences are that the legal relationship between the second applicant and the children remains in limbo for the purposes of recognition in this jurisdiction (short of an entry of the adoptions on the Register). The first applicant as the spouse of the second applicant cannot apply to the Authority to adopt the children of

foot the present adoptive relationship between the second applicant and the children because the Authority, in the words of MacMenamin J., is bound to give *"faithful adherence*" to the Convention in cases of intercountry adoptions.

272. Noting the constitutional promise that *"the State will, in so far as practicable, by its laws, protect and vindicate* [the natural and imprescriptible rights of all children] *in the resolution of <u>all</u> proceedings*", (emphasis added) to my mind, there is a constitutional imperative on the Court when construing the limits of its residual discretion under s.92(1)(a) to have regard to the welfare principle that permeates Article 42A of the Constitution. I so find given that the applicants and the children are living as a family unit in the context of an adoption the consequences of which, as found by the Supreme Court, are that the children's pre-adoption status no longer remains, and where no one doubts but that the children now view the applicants as their parents.

273. I am, however, conscious of the duty on this Court to construe s.92(1) in a manner that will not "stand-down" or "place at nought" an international Convention to which the State has given the force of law and which permits of no reservation. As already stated, the powers of the High Court under s.92(1) must be construed narrowly, ensuring that any interpretation or application of such powers is not to interpret the 2010 Act *"contra-legem*". To my mind this can be achieved by setting a "*high bar*" for the applicants to overcome in seeking to establish that their case is "*truly exceptional*", as envisaged by MacMenamin J. at para.113 of his judgment. Assuming the aforesaid conditions are met, and the Court *itself* being satisfied that an entry should be made, it is, I believe, also noteworthy that any recognition given in this case would not be a Convention recognition but one rather in accordance with the laws of the State, as indeed envisaged by the Explanatory Report. To my mind, this approach would ensure harmony with the objects of the Convention.

274. I am satisfied that any concern (such as that expressed by McKechnie J.in the Case Stated proceedings) as to how the Court is to carry out an assessment of this case for the purposes of considering making an order under s. 92(1)(a) is alleviated by the guidance found in the Joint Judgment of Dunne and O'Malley J.J., and in the respective judgments of MacMenamin J. and O'Donnell J. The respective judgments outline the factors to which the Court should have regard for the purpose of establishing whether the within case is *"a truly exceptional case"* such as might allow the Court to direct an entry of the adoptions on the Register without fear of impugning the integrity of the Convention system.

275. Drawing on that guidance, I am satisfied that the applicants (who, in the words of Dunne and O'Malley J.J., "*bear the onus of satisfying the court that an order should be made*") must discharge the onus of satisfying the Court:

(i) That they are suitable to be adoptive parents;

(ii) That there was no intentional circumvention of the law and that the mistakes made were completely unintentional. A "rigorous" approach to these issues is required. (If the above requirements are not satisfied then the Court should refuse to make any order).

Furthermore, the Court must have regard to the following matters:

(iii) The circumstances surrounding the breaches of the statutory requirements;
(iv) The role of official error on the part of a State Agency in potentially contributing to the mistaken approach of the applicant;
(v) The applicants' *bona fides*;
(vi) he general excusability of the deviation from what was contemplated by Convention and the Act;
(vii) How exactly the children came to be in this jurisdiction;
(viii) The relationship of the children to the applicants;
(ix) Whether the adoption satisfies the requirements of a foreign adoption under the Adoption Act, 1991;
(x) The views of the children affected; and
(xi) The best interests of the children affected and their constitutional rights.

276. I now turn to a consideration of the evidence in this case, against the backdrop of the foregoing factors and bearing in mind that, pursuant to s.92(1), the Court must *itself* be satisfied that an entry be made in the register.

Factor (i) The eligibility and suitability of the applicants

277. The criteria for determining eligibility and suitability to adopt are set out in s.34 of the 2010 Act. There is no dispute but that the second applicant (the sole adopter in Country A) and the first applicant were deemed eligible and suitable by the Authority in 2015 to adopt the children. They underwent an assessment under the 2010 Act following which they were issued with a Declaration of Eligibility and Suitability dated 16th March, 2015. This Declaration was renewed for the maximum time permitted under the Act. It expired on 16th March, 2018. It is common case that the applicants have applied for a fresh assessment. As I understand matters, the CFA have deferred the continuation of that assessment until the outcome of the within proceedings. Without trespassing on the statutory functions of the CFA, on the basis of the evidence before the Court there is nothing to suggest that the applicants would not again meet the criteria set out in s.34.

Factors (ii), (iii), (iv) and (v) Can the Court be satisfied that the circumvention of the Convention in this case was completely unintentional?

278. The first and most fundamental question with regard to factors (ii), (iii), (iv) and (v) is whether the Court can be satisfied as a matter of high probability that there was no intentional circumvention of the law, and that the mistakes which were made in this case were completely unintentional.

279. Both applicants have testified that they had no intention or reason to seek to circumvent the requirements of the Convention or the 2010 Act. I accept this to be the case. First and foremost, I have had regard to the fact that within a short time after deciding to adopt the children the first applicant advised the Authority of this intention. Accordingly, it cannot be said that the applicants as prospective adopters sought to evade the relevant Irish authorities. The Court is also satisfied that there is no question that the applicants were involved in any of the activities which it is an expressly stated object to prevent, namely, "the abduction, the sale of, or the traffic in children."

280. Moreover, the first applicant's email of 16th June, 2011 to the Authority is headed "intercountry adoption guidance please". He sought advice from the Authority on the intercountry adoption process. The contents of the email suggest that the applicants' focus was on the correct process for an intercountry adoption. Quite properly, after doing some general internet enquiries, the first applicant's first port of call was the Authority.

281. Albeit that by return email of 16th June, 2011, the Authority properly directed the first applicant to the HSE, I note that at the same time it also suggested that the applicants consult an Adoption Agency, advice that was not correct. This would appear to be the first of a series of errors made by officials in State authorities in this case. It is also the case that websites to which the first applicant was referred by the Authority were out of date. In fairness, this was brought to the first applicant's attention by the Authority and he was advised to contact the HSE or the Authority if he had any queries in this regard. It would certainly appear to be the case that the message being given to the first applicant vis a vis the HSE was that the HSE would have the answers to any queries the applicants had about the adoption process upon which they were about to embark.

282. It is not in dispute but that having been directed to the HSE, the first applicant immediately made contact with this Agency. When he finally got to speak to a HSE official on 5th July, 2011, he was advised that he and the second applicant could not adopt "known" children who were resident in another Hague Convention country (Country A being such a country). Accordingly, the applicants were advised by the HSE official that they could not be assessed by the HSE. It is accepted by all concerned that the HSE official's advice that the applicants could not adopt "known" children within the Convention framework was wrong. The evidence given by the first applicant as to what the HSE official advised in this regard has not been challenged, either in cross-examination, or by calling the HSE official concerned or any other witness to give evidence to contradict his testimony.

283. It is clear to me that from the word go, the applicants were set on the wrong path. This was not, however, the extent of the erroneous advice given to the applicants by the HSE official on 5th July, 2011. The first applicant was further advised that two options were open to him and the second applicant. Firstly, they could bring the children into Ireland, perhaps for education purposes, and then apply to adopt them in this jurisdiction. Alternatively, either both applicants, or the second applicant solely, could adopt the children in Country A and then bring them back to Ireland. As observed by MacMenamin J. in the Case Stated proceedings, these advices ran expressly counter to the provisions of the Convention and the 2010 Act. Again, the first applicant's evidence that he received such advice has not been challenged, either in cross-examination or by the calling of evidence to counteract his version of events. Accordingly, I am satisfied to accept the evidence which the first applicant has given as to what was advised to him by the HSE official on 5th July, 2011.

284. I accept that the mistaken advices given by the HSE official occurred at a time when the 2010 Act had only recently commenced (November, 2010). As already noted, much of the

information available to the public in 2011 was out of date and had not been updated. It is the case that the Authority's Country A information pack as recommended by the Authority to the first applicant was dated 2003.

285. As stated by MacMenamin J., *"one might surmise that officials charged with [the Act's] administration were not as familiar as they might have been with the meaning and effect of the new legislation on what was in issue in this case: inter-country adoption."* (at para. 1) To my mind, it is highly unlikely that such mistaken advice as was given to the applicants would ever again arise. This is so given the time that has elapsed since the 2010 Act was commenced. One can reasonably assume that by this stage, all relevant State agencies are familiar with the provisions of the Convention and the 2010 Act and that their websites have been updated accordingly.

286. It is by this stage well-rehearsed in this judgment that the applicants acted upon the second option advised by the HSE official and thus put themselves on a collision course with the requirements of the Convention and the 2010 Act, the consequences of which are that unless this Court is satisfied to grant relief under s.92(1)(a) of the 2010 Act, recognition of the adoptions will remain in legal limbo.

287. Could the collision course with the Convention to which I have adverted have been avoided at any time between 5th July, 2011 and the making of the Country A adoption orders? The first applicant has testified that he was counselled by the HSE official on 5th July, 2011 to get "a good lawyer". His evidence was that he understood this advice in the context of the two options which the HSE official had advised were open to him and the second applicant.

288. In oral evidence to this Court, the first applicant testified that although he did not formally engage his current solicitor until December, 2011, he did have some discussion with his solicitor, and indeed with an immigration lawyer, in July, 2011 in the aftermath of the advices given by the HSE official on 5th July, 2011. He testified that the discussion with his solicitor (and the immigration lawyer) concerned how the two options advised by the HSE official could be progressed. The first applicant testified that he had not asked for legal advice as to the correctness or otherwise of the advices he had been given by the HSE official, hence his discussions with his lawyers did not address whether the HSE official's advice was mistaken as a matter of law.

289. With regard to the contact he had made with his Irish solicitor in July, 2011, the first applicant's testimony was as follows:

> "I was referred to my solicitor by one of the adoption agencies and I explained the direction or the advice I had been given by the HSE. What I was getting advice on, you know, was basically how we adopt in Ireland after we have gone down the route that the HSE had proposed to us. His advice to me was that I should instruct [Country A] lawyers obviously. I would need to get immigration advice, which I did, and that it should be possible once the children had been resident in Ireland for 12 months to apply for a domestic adoption in Ireland".

290. In the course of legal submission, counsel for the applicants conceded that it was highly regrettable that the HSE official's errors were not identified in the course of the first applicant's meeting with his solicitor in July, 2011. He submits, however, that the first applicant's evidence makes it clear that he had no reason to doubt the correctness of what he had been advised by the HSE official.

291. It is undeniably the case that the first applicant had discussion with his current solicitor and an immigration lawyer prior to the applicants embarking on the Country A adoptions. Counsel for the Authority points to para. 49 of MacMenamin J.'s judgment where the learned judge was clearly of the belief at the time of the judgment that the applicants had not sought legal advice from a lawyer familiar with adoption law before embarking on the Country A adoptions. The learned judge opined that this omission was *"foolish and unfortunate"*, noting that by his own business experience the first applicant should have been familiar with the need to take legal advice "*in an area of doubt and uncertainty".*

292. Clearly, the learned MacMenamin J.'s belief that the applicants had not consulted lawyers in this jurisdiction was based on the contents of the affidavit sworn by the first applicant on 29th April 2016 in the Case Stated proceedings. That affidavit did not specifically set out that the first applicant had discussions with Irish lawyers in July 2011. Insofar as the affidavit refers to actions taken by the applicants in the immediate aftermath of the advices received from the HSE official, it states as follows:

> "Following [the HSE official's] phone call, I looked into the feasibility of bringing JB and KB to Ireland. I discovered that there would be problems securing immigration clearance for JB and KB in the absence of an adoption order. That appeared to us to rule out the first of the options suggested to us by the HSE.
>
> In respect of the second option suggested by the HSE, we corresponded with the two [Country A] legal firms in which we had the greatest confidence on foot of our preliminary inquiries…We reported to them the HSE's representation to us that an intercountry adoption would not be possible in Ireland in our circumstances. Both firms confirmed to us that, with my consent as spouse and the consent of the natural parents, it would still be possible for [the second applicant] solely to adopt JB and KB in [Country A] in accordance with [Country A] law." (at paras. 22-23)

293. In light of the first applicant's oral testimony that he in fact had discussions with lawyers in this jurisdiction prior to embarking on the adoption process in Country A, this Court must consider whether its finding that the HSE official's erroneous advice set the applicants on a collision course with the Convention should now be tempered in light of the fact that the first applicant accessed lawyers in this jurisdiction, as he had been advised to do by the HSE official.

294. Albeit that in July, 2011 there was an opportunity for the applicants to set themselves on the right path vis a vis the proposed adoptions had they queried with their Irish lawyers the correctness of the advice given by the HSE official, I am satisfied that the first applicant has adequately explained why this was not done. I accept his evidence that post

5th July, 2011, his and the second applicant's focus was on how to process one or other of the two options advised to them by the HSE official. To my mind, post 5th July, their focus was no longer on an intercountry adoption, they having been diverted from that path by the erroneous advices received from the HSE; rather their attention turned to the pros and cons of either bringing the children to this country and adopting them here, or adopting in Country A and then bringing the children into the State. In circumstances where the first applicant had in the first instance been referred to the HSE (a State agency) by another State agency (the Authority) and where the Authority had told him that the HSE would "explain the adoption process" and that the HSE would be able to address "specific queries he had", I am not persuaded that the first applicant's failure to raise with his Irish lawyers the validity or otherwise of the advice received from the HSE official is of such magnitude as to detract from the exceptionality of this case, all other matters, of course, being equal.

295. In arriving at my conclusions, I took into account the fact that the first applicant is a highly experienced executive used to dealing with corporate lawyers and is someone who appreciates the role corporate law plays in the discharge of his executive functions. Thus, it could be said that seeking legal advice in the face of an unfamiliar legal sphere would be something which would have been in the first applicant's contemplation. However, for the reasons already stated, the first applicant cannot be criticised for the fact that he did not seek legal advice on the options given to him by the HSE official.

296. In all the circumstances, I am satisfied that official error in this jurisdiction was a substantial factor in the applicants' (who had commenced their endeavours by seeking advice from the Authority and the HSE on intercountry adoptions) non-compliance with the Convention and the 2010 Act.

297. I am also satisfied that the applicants' non-compliance was further caused or contributed to by the willingness of Country A's authorities to process the adoptions, contrary to the requirements of the Convention. As a Contracting State, Country A should not have allowed a domestic adoption in all of the circumstances which were known to them, including that the adopter, the second applicant, was resident in Ireland at the time of the adoptions. (I will return to the issue of the second applicant's residency later in the judgment) Accordingly, the Country A lawyers and the authorities should have directed the applicants to the Irish and/or Country A Central Authority, which was not done.

298. It was the first applicant's belief that the lawyers had in fact spoken to the Central Authority in Country A. His understanding, however, of the reason for contact with Central Authority in Country A having been made was that his Country A lawyers wished to get guidance on the issue of whether, although the children's birth father's name was on their birth certificates, it was necessary for the birth father to be legally registered as their father. While the provincial adoption authority was of the view that the birth father had to be legally registered (and had stated that this registration process would take a number of months) the applicants' lawyers were of the view that Country A's Central Authority took a more liberal view of this requirement.

299. Having regard to the first applicant's testimony, on balance, I am satisfied insofar as contact with Country A's Central Authority might have occurred, that it was made in the course of the domestic Country A adoption then underway and in the context of an enquiry about a procedural rule regarding the registration of birth fathers in Country A. Certainly, as of 9th April, 2018, Country A's Central Authority did not appear to have record or knowledge of the adoptions, as is clear from email correspondence it sent to the Authority on that date.

300. It is also the case that the Country A provincial authorities knew that the applicants wished to adopt jointly. The evidence given by the first applicant is that this would have involved an assessment of his eligibility and suitability by Irish authorities as part of immigration clearance requirements of the Country A authorities. He testified that he considered that assessment process closed to him because of the advice received from the HSE, namely that the applicants could not be assessed in Ireland in respect of "known" children resident in Country A. I have already stated that I accept his evidence in this regard.

301. The evidence from the applicants is that they first became aware that the Country A adoptions were not Convention compliant in September, 2012, when they received written advices from their solicitor to this effect. I accept that to be the case.

302. As already referred to earlier in this judgment, in November, 2012, by which time the children were in this jurisdiction for a number of months, the applicants intimated to the Authority their intention to apply for a joint domestic adoption of the children, an application actually commenced by letter of 3rd May, 2013 to the HSE. It is noteworthy that in the period November, 2012 to June, 2016 the Authority did not raise with the applicants their non-compliance with the Convention (the Court accepting of course, on foot of the first applicant's testimony, that the applicants were advised of the position by their solicitor in September, 2012). The first mention of non-compliance by the Authority was in written submissions dated 1st July, 2016 in the Case Stated proceedings.

303. Furthermore, notwithstanding that a domestic adoption was ultimately found by the Supreme Court not to be open to the applicants, it is again noteworthy that in the intervening period, the applicants had, it would appear, engaged faithfully with whatever was being asked of them with regard to the domestic adoption process then ongoing, including subjecting themselves to the assessment process required by s. 34 of the 2010 Act. I refer to these matters as further evidence of the applicants' bona fides vis a vis engagement with State agencies in this jurisdiction.

304. By reason of all of the foregoing, the Court is satisfied that that there was no intentional circumvention of the law by the applicants and that such mistakes as can be ascribed to them were unintentional in circumstances where they were expressly pointed towards the wrong path by the HSE.

305. This was not a case where from the outset the applicants went on a frolic of their own. Moreover, it is not a case of ignorance of the law on their part. To my mind, ignorance of

the law per se could not fall under the type of truly exceptional circumstances whereby a court might be minded to make an order under s. 92(1)(a) of the 2010 Act. As already stated, the applicants in this case were alert to the concept of an intercountry adoption from the beginning but were diverted from that route by misguided advice from a State agency. That is the salient feature in this case for the purpose of considering the excusability of the circumvention of the Convention which occurred in this case. Accordingly, to my mind, the applicants' circumstances can be distinguished from those of *JM v. The Adoption Society of Ireland* [2017] IEHC 320, where not only were the applicants in that case unaware of the Convention, but no engagement with State agencies took place prior to the adoption.

Factor (vi) The general excusability of what occurred in this case from what is contemplated in the convention and the 2010 Act

306. In urging upon the Court the general excusability of the myriad ways in which the Convention was not complied with in this case, counsel for the applicants, in addition to pointing to the breadth of official error which permeated the circumstances of the within adoptions, also contended that the circumstances of the within case of themselves preclude the possibility of any relief granted by the Court presenting a precedent, which, in the words of McKechnie J. "*rewards, even encourages, inappropriate conduct on future occasions, or which undermines the Convention*." (at para. 109) Having regard to the applicable test as formulated by the Majority View in the Supreme Court, and the findings I have made, I am satisfied that this case is unlikely ever to be regarded as a precedent for judicial acceptance of disregard for the Convention, or the 2010 Act.

307. Counsel also submitted that there is no reason to doubt, had the applicants not been misdirected by the HSE in July, 2011, and had the HSE processed their request for an intercountry adoption as it should have done at the time, that the Convention process would have proceeded without event and the applicants would have been successful in adopting J.B. and K.B. in accordance with all of the requirements of the Convention and the 2010 Act. Based on the factual matrix as presents in this case, I am satisfied as a matter of high probability that had the applicants not been misdirected in the manner described, the adoptions would have proceeded and been approved under the Convention system.

Factor (vii) How the children came into the jurisdiction

308. Albeit the adoptions in issue here are not Convention compliant, there is no suggestion that there was anything underhand in the way the children were brought into the State. An application for visas for the children was made on foot of the Country A adoptions. I am thus satisfied that the applicants processed the children's entry visas applications in an open and forthright manner, including by the provision of the Country A adoption documents to the Irish visa authorities.

309. It is common case, however, that the children came into the jurisdiction on the basis that they were "dependants" of a British EU citizen (the first applicant) and therefore "permitted family members" in accordance with the European Communities (Free

Movement of Persons) (no. 2) Regulations 2006 and 2008 (as they then stood). It is the case that INIS was not satisfied to deem the children "qualifying family members" i.e. "a direct descendant" of the second applicant notwithstanding she was the spouse of the first applicant and had produced the Country A adoption orders.

Factor (viii) The relationship of the children to the applicants

310. The second applicant is the children's natural aunt who has effected a domestic adoption of the children under Country A law. Prior to their adoption in February, 2012, both applicants were involved in the children's lives. The second applicant had provided housing for the children, their birth parents and other family members. This was done within a couple of months of J.B.'s birth as a token of familial love and affection. I am satisfied that adoption of J.B. was not in the contemplation of the applicants at that time. The applicants provided financial assistance to the second applicant's family prior to the question of the adoption of the children ever arising. The second applicant testified that she had a close bond with her family and wanted to help them. I accept her evidence in this regard. I also accept that both applicants had developed a close bond with the children prior to the adoptions. The Court has earlier set out the applicants' evidence as to the circumstances in which the question of the adoption of the children first arose. I accept this evidence.

311. I have also heard the applicants' evidence in relation to life with the children since their coming to Ireland. It is patently clear that the applicants love and provide for all of the needs of the children, including bringing them to Country A for holidays where they meet with their natural father, their grandmother and their natural mother.

312. Altogether, there is no question but that for the past seven years or so, the children have a loving home with the applicants where all of their needs, physical, psychological, emotional, educational and otherwise are being met. The Authority, the Attorney General and the CFA have not suggested otherwise.

Factor (ix) Whether the Country A adoptions conform to the definition of "foreign adoption" as contained in s. 1 of the 1991 Act?

313. Pursuant to the guidance given by MacMenamin J., the Court must consider whether the adoptions effected in Country A satisfy the requirements of a "foreign adoption" as defined in s. 1 of the 1991 Act. That definition has been set out earlier in the judgment.

314. Counsel for the applicants submits that the Court should regard as persuasive the approach of the English courts when considering whether Country A's laws substantially complied with the requirements of "foreign adoption" as defined in s.1 of the 1991 Act. He cites In *Re J. (a child) (foreign adoption order)* [2012] EWHC 3353 (Fam).

315. In *Re.J.,* the factual position was that an Indian couple living in the UK were unable to conceive a child of their own. They offered to adopt the husband's relatives' new baby who was born in India. They took part in a religious adoption ceremony, in India, with the child's biological parents. Four days later the adoption was registered by deed by the Registrar in the local court. The child travelled to the UK with the birth parents on a visitor's visa and when they returned to India the applicant couple took over the child's

care in the UK. They then applied pursuant to the UK court's inherent jurisdiction for recognition of the Indian adoption, in order to apply for the child's indefinite leave to remain.

316. Moor J. addressed the issue of recognition in the following manner:

> *"This is a non-Convention adoption but I can recognise it pursuant to the common law. I must apply the adoption welfare test in s. 1 of the Adoption and Children Act, 2002 in which AJ's welfare throughout her life is paramount. As a result of Re Valentine's settlement [1965] 1 Ch 831, [1965] 2WLR 1015 I am not entitled to recognise a foreign adoption order unless the adopting parents were domiciled in India at the relevant time. Pursuant to the decision of Hedley J. in Re T and M (Adoption) [2010] EWHC 964 (Fam), [2011] 1FLR 1487, when I have to consider the question whether to recognise a foreign adoption under the common law, there are three questions which I must ask myself:*
>
> *(i) Was the adoption order obtained wholly lawfully in the foreign jurisdiction;*
>
> *(ii) did the concept of adoption in that jurisdiction substantially conform to the English concept; and*
>
> *(iii) If so, was there any public policy consideration should mitigate against recognition?"*

317. In the light of a legal opinion which had been provided on the validity of the adoption in India, Moor J. was satisfied that the concept of adoption in that jurisdiction substantially conformed to the English concept. He opined that although the Indian adoption did not exactly conform to the way adoption was done in the English system, he found that following the Indian adoption, the children were deemed to be children of the adopting parents and that the legal ties regarding, for example, inheritance rights as between the birth parents and the children had been severed. (at paras. 13-16)

318. It is the applicants' contention that the criteria to which Moor J had regard are not unlike the definition contained in s. 1(a) – (e) of the 1991 Act.

319. McKechnie J., writing for the minority in the Supreme Court in the Case Stated, was not prepared to rely on Re T or Re J. Having discussed them for some length, he found that the basis for the decisions had not been fully explained and that the results arrived at in the cases may have their basis in complicated provisions within the relevant English legislation "*which may well relate to the relationship England has, inter alia, with "overseas countries", as understood in English constitutional law…"* (at para.58)

320. Counsel for the applicants contended that the views expressed by McKechnie J. have to be seen in their context, namely the argument made by the applicants to the Supreme Court that the Country A adoptions could be recognised here by the application of common law, which was rejected by the Supreme Court. Counsel submits, however, that the English case law nonetheless provides clear support for the majority view in the

Supreme Court, namely that recognition of non-Hague compliant country adoptions in exceptional cases can be permitted under the domestic law of this State, in effect via s.92(1) of the 2010 Act.

321. Notwithstanding the applicants' arguments, I consider that it would be unwise to regard *Re T or Re J.* as persuasive authority for the purposes of the exercise upon which the Court is presently embarked. This is so because under the "*truly exceptional case"* test formulated by the majority in the Supreme Court, compliance by the Country A domestic adoption with the requirements of the definition of "foreign adoption" is but one of the myriad factors to which this Court must have regard in determining whether an order under s.92(1)(a) should be made.

322. I now turn to the question whether the Country A domestic adoption can be said to meet the requirements of a "foreign adoption" as defined in s.1 of the 1991 Act. Consistent with that definition, based on the factual matrix in this case, the task of this Court is to ascertain:

(a) Whether the consent of every person whose consent to the adoption was, under the law of Country A, required to be obtained, was obtained;
(b) Has the adoption in Country A essentially the same legal effect as respects the termination and creation of parental rights and duties as an adoption order in this State?
(c) Whether Country A's laws required an inquiry to be carried out into the adopters, the children and the birth parents;
(d) Whether Country A's laws required due consideration to be given to the interests and welfare of the children;
(e) That the adopters have not received, made or caused to be given any payment or other reward in consideration of the adoption.

323. The applicants have furnished evidence of adoption law in Country A by way of two Legal Opinions. No application was made by either the Attorney General or the Authority to cross- examine the author of either Legal Opinion, albeit that certain submissions were made by the Authority in relation to same, which are referred to below.

The first Legal Opinion

324. The first Legal Opinion is dated 25th October, 2018 and emanates from the Country A lawyer who acted for the second applicant with regard to the adoptions of J.B and K.B. This Opinion was furnished in response to four queries posed by the applicants' Irish solicitor in a letter dated on 19th October, 2018.

325. Query 1 related to whose consent to the adoptions was required according to the relevant law in Country A. The Legal Opinion set out that the relevant provisions of the Civil and Commercial Code (CCC) in Country A required the consents of the natural parents. It makes reference to what has to occur if either parent is deceased or has had his or her parental power revoked. It refers also to the powers of a Country A court to grant approval in circumstances where the natural parents cannot give consent. The Country A court may also grant approval where there is a refusal to give consent, if the

court is satisfied that such refusal is unreasonable and detrimental to the health, interest and welfare of the child. The Opinion went on to state:

> "In this matter, the father and mother of the two adopted children…gave their consent to [the second applicant's] adoption of them; [the second applicant] is also the aunt of these two children. The father of the children is the younger brother of [the second applicant]. Thus, the said adoptions have been completed in accordance with [Country A] law."

326. Query 2 asked what was the legal effect of the adoptions as respects the termination of the parental rights and duties of the natural parents and the creation of parental rights and duties of the adopter. The Opinion advised that the parental rights and duties of the natural parents terminated on the date of the adoption and passed to the adopter, in accordance with the provisions of the CCC.

327. Query 3 asked what, if any, enquiries were required under the laws of Country A relating to (a) the adopter, (b) the children and (c) the natural parents prior to the adoptions.

328. The Opinion advised that Country A required a prospective adopter to be deemed eligible and suitable pursuant to the relevant provisions of the CCC. It referred to the criteria which rendered an adopter qualified to adopt, namely

that the adopter be married, have secure financial status and "live in a good environment and have time to take care of the adopted child." The rules also provided for probationary placement of the child for a period of six months. This requirement could be waived where the adopter was a family member and that, therefore, this rule had been waived in the case of the second applicant. The Opinion stated that children over fifteen years of age were required to give their consent to the adoption. It stated that the law also provided that before the Child Adoption Committee would consider the adoption application, the adopter, the children and the natural parents were required to be interviewed by the Provincial Office of Social Development and Social Security. It is also required that the relevant officer visit where the child is to be raised by the adopter and interview the adopter's neighbours following which a report is submitted to the Child Adoption Committee, which considers whether to approve the adoption application or not.

329. Query 4 asked whether the applicable laws governing adoptions in Country A required the courts or other authorised parties to give due consideration to the interests and welfare of the children. The Opinion stated that only the Department of Social Development and Welfare can grant approval of an adoption. That department authorises the Child Adoption Committee of the Office of Social Development to "conduct interviews, and examine the facts concerning the interests and welfare of the children to determine whether the child adoption shall be approved". The Opinion goes on to state:

> "In this case, the Child Adoption Committee has approved [the second applicant's] adoption application to be the adopter of [J.B. and K.B.]."

330. In the course of the Authority's written legal submissions dated 16th November, 2018, issue was taken with the Legal Opinion. Counsel for the Authority cited McGrath on Evidence (2nd ed., 2014) that expert evidence "is mandatory in respect of matters of foreign law" and that "foreign law can only be proven by the evidence of a suitably qualified lawyer". Although not taking issue with the qualifications of the author of the Legal Opinion dated 25th October, 2018, counsel queried the independence of the author given that the applicants had tendered a Legal Opinion from the lawyer who had acted for the second applicant in relation to the Country A adoptions. Counsel further submitted that the Legal Opinion diverted on occasion into giving pure factual evidence rather than expert opinion. Counsel also noted that the issue of whether Country A law required an adopter to be habitually resident in order to effect a domestic adoption had not been not addressed.

The second Legal Opinion

331. On 30th November, 2018, the applicants' solicitor wrote to a named lawyer in a named law firm situated in Country A's capital city, requesting her professional opinion on the same four queries as previously made of the second applicant's Country A lawyer. He further requested that that the Legal Opinion address the legal requirements as regarding citizenship and/or place of habitual residence that are required to be satisfied by a prospective adopter in order to avail of a domestic adoption under Country A law. As with the earlier request, the applicants' solicitor enclosed the Country A adoption papers relating to the adoption of the children.

332. The second Legal Opinion is dated 21st December, 2018. In her "Affidavit of Foreign Law", the author of the Legal Opinion sets out her professional qualifications and areas of expertise, which include adoption law. She avers that she is "independent of the parties in this matter". She avers that her Legal Opinion constitutes her evidence in the case.

333. By and large, the second Legal Opinion aligned with the first Legal Opinion in its response to queries 1 and 2 of the applicants' solicitor's letter. Accordingly, I am satisfied that Country A's laws required the consent of the natural parents to the adoption of the children in this case. As regards query 2, it is clear that Country A's laws are in line with the laws of this State as to the legal effect of an adoption order vis- a-vis the termination and creation of parental rights and duties on foot of an adoption. Accordingly, I am satisfied that requirement (b) of the definition of "foreign adoption" as set out in s.1 of the 1991 Act has been met.

334. In answer to query 3 (whether Country A's laws required an enquiry to be carried out into the adopters, the child and the parents), the response set out in the second Legal Opinion was more expansive than in the first. As regards the adopter, it confirmed that the law required an examination of the living conditions and suitability of the adoption applicant. This was to be ascertained by examining the adopter's family history, living conditions, career and economic situation, psychological and mental state. A criminal background check is also required. The ability of the adopter to look after the child and provide him or her with an education is also to be examined. The Legal Opinion also confirmed the requirement for a probationary placement of the child with the adopter but confirmed that

this requirement is not required where the adopter is a relative of the child, for example an aunt. As regards the natural parents, the Legal Opinion confirmed that upon receipt of an application for adoption, the relevant officials must enquire into the natural parents' living circumstances, their ability to give consent and the reasons for giving the child up for adoption. With regard to the child to be adopted, the Legal Opinion referred to the requirement for the relevant official to ascertain the history of the natural family, examine the living conditions of the child and his or her suitability for adoption and ascertain the views of the child in relation to the proposed adoption.

335. The second Legal Opinion's response to query 4 (whether Country A's laws required the court or the adoption authority to give due consideration to the interests and welfare of the children) is, to my mind, somewhat opaque. By and large, the response reprises the law as to who are the relevant decision-making bodies in adoption cases and again reiterates that enquiries are to be made of and about the adopter, the natural parents and the child before the adoption is submitted for approval. It is not expressly stated that the relevant law provides for due consideration to be given to the interests and welfare of the child before an adoption order is made.

336. However, I note that it is expressly stated in the first Legal Opinion that the Child Adoption Committee has to "conduct interviews, and examine the facts concerning the interests and welfare of the children to determine whether the child adoption shall be approved" (emphasis added). I am satisfied, therefore, that consideration of the best interests principle is part of Country A's adoption laws. Therefore, requirement (d) of the definition of "foreign adoption" as set out in s.1 of the 1991 Act has been met.

337. The second Legal Opinion's answer to query 5 (whether habitual residence in Country A was a requirement in order for a prospective adopter to avail of a domestic adoption) was as follows:

> "The laws of [Country A] do not restrict a foreigner or a person whose domicile or habitual residence is not in [Country A] from adopting a child.
>
> Therefore, an adopter does not have to be a [Country A] citizen or [have] a domicile in [Country A]."

338. I am satisfied that the evidence before the Court, as given in the second Legal Opinion, is, therefore, that the second applicant did not have to establish habitual residence in Country A in order to adopt the children. I note that the first applicant testified on Day 3 of the hearing that he had asked his Country A lawyers whether it was necessary for the second applicant to show habitual residence in Country A in order to adopt and that his lawyer's response was that habitual residence was not required. Thus, the evidence tendered by the first applicant is consistent with the second legal Opinion.

339. The second Legal Opinion response to query 5 also includes the following:

> "However, some legal requirements and documentations are different for an adopter who has a domicile in [Country A] and who has a domicile in foreign country such as required documents and the authority to accept the adoption application and approval for the probationary placement.
>
> Please note that under Section 5/1 of the Child Adoption Act, a child adoption in foreign countries, which is a party to [the Convention], in which a competent authority of that country certifies that the child adoption complies with the Convention and such child adoption is not conflicted with the law, public order or good morals, shall be considered as the adoption made in accordance with the Child Adoption Act of [Country A]."

340. I do not regard the first part of the above extract as germane to the within case since as the probationary placement requirement did not apply to the second applicant given that she was the children's aunt.

341. As regards the latter part of the extract, there, the author of the second Legal Opinion is clearly outlining that Country A (itself a Hague Convention country) will recognise Convention compliant adoptions effected outside Country A. It is thus clear that there was awareness by the author of the second Legal Opinion of the Convention.

342. As is well rehearsed at this stage, the second applicant's adoption of J.B. and K.B. was one to which the Convention applied. The evidence given by the applicants to this Court was that in the course of the adoption process in Country A, neither their Country A lawyers nor the Country A provincial authority with whom they dealt adverted to the fact that the adoptions fell within the remit of the Convention. As already indicated, I am satisfied to accept the applicants' evidence in this regard. Given their approach at the outset of the adoption process (which was to immediately seek the advice of the relevant Irish agencies), I have no reason to not to believe that had they been alerted by their Country A lawyers or the Country A provincial authority that the adoptions fell within the Convention that they would not have reverted to the relevant agencies in this jurisdiction, or gone to Country A's Central Authority, or at that point sought legal advice as to the way to proceed.

Were enquiries made and consents obtained in the present case in 2011, in line with the requirement of Country A's adoption laws?

343. The Court has heard the evidence of the applicants as to the enquiries made by the Country A authorities of the second applicant (and indeed of the first applicant) over a six-month period between September 2011 and March, 2011. The applicants have outlined the nature of the enquiries made of the second applicant and the documentation which they both were required to produce. This evidence is set out in detail earlier in this judgment. I am thus satisfied that the enquiry into the second applicant (and the first applicant) which Country A's law required has been completed. I note that these enquiries included not just financial checks but also checks with the police in this jurisdiction (as required by Country A's adoption law) in relation to the second applicant. The enquiries also included visits to the second applicant at her Country A home. I am also satisfied as

a matter of probability that the necessary enquiries into the natural parents were completed. The applicants testified that the natural parents met with the Country A provincial adoption authorities on 7th September, 2011. I also accept as a matter of probability that the enquiries carried out by the Country A authorities encapsulated the children and their particular circumstances as they stood in 2011. Accordingly, I am satisfied that requirement (c) of the definition of "foreign adoption" as set out in s.1 of the 1991 Act has been met.

344. The question which next falls to be addressed is whether for the purposes of requirement (a) of the definition of "foreign adoption" as set out in s.1 of the 1991 Act, the consents of every person whose consent was required under Country A's laws was in fact obtained. The Court must also satisfy itself that such consents were informed consents and fully and freely given. On this latter issue, I note that the Authority's written legal submissions advance the argument that if a natural parent thought they were consenting to a domestic adoption, but in fact the adoption was an intercountry adoption, such consent would not be full, free and informed. In fairness to the Authority, it did not argue that that is what occurred here, rather it left the issue of consent for the Court to consider on the evidence. For the purposes of the Court's assessment, however, I took note of the Authority's submission. This was in circumstances where consents of the natural parents, on their face, made reference to the second applicant residing at a named address in her home province (in fact the house she had purchased in late 2006). However, for reasons more particularly set out below, I have concluded that the natural parents were not of the impression that the second applicant intended to reside in Country A with the children following the adoption.

345. It is of course the case that the domestic adoption effected in Country A on 25th January, 2012 (and made law on 21st February, 2011 on foot of the registration of the adoptions) was properly an intercountry adoption that fell to be processed substantively and procedurally with the Convention, which was not done. That being so, it follows that the parental consent process mandated by the Convention was not adhered to in this case. The fact of non-compliance with the Convention does not, however, negate the efficacy of ascertaining whether there was compliance with Country A laws on the giving of parental consent in domestic adoptions. It is into this which the Court must enquire, using the definition of "foreign adoption" as set out in s.1 of the 1991 Act.

346. The applicants' evidence as to the giving by the natural parents of their respective consents to the adoptions is set out earlier in this judgment. In essence, they state that the natural parents' consents were obtained on 7th September, 2011, an occasion when they were independently interviewed by the relevant social workers of the provincial authority that was processing the second applicant's application. Both applicants testified that they saw the natural parents in the company of the officials but that the applicants themselves were not present in the room where the consents were obtained.

347. Counsel for the Authority points to the following exchange which took place between the first applicant and his counsel on Day 2 of the within hearing:

"Q. Right. Can you tell me when the question of adoption was raised did you have an opportunity, or to your knowledge did [the second applicant] have an opportunity to speak to the natural mother and father about it and the ramifications of it?

A. I understand, and again she will clarify, because obviously I don't speak [the language of Country A] …After her mother had raised [the issue of the second applicant adopting the children] with her I understand that [the second applicant] spoke to her brother who in turn spoke to the natural mother. Now I don't know, you know, if we…when we visit [Country A] if we want to get in contact with the natural mother normally we have to do that through her mother because that is the one constant in terms of phone number and things like that. So the natural mother…changes her phone very regularly. So if we ever wanted to…I don't know how [the natural father] contacted the natural mother, but he did, they discussed it, they were agreeable and understood the ramifications as I understand it and after that [the second applicant] spoke directly to the natural mother."

348. Albeit noting the hearsay nature of some of this evidence, overall, I am satisfied as a matter of high probability that the consents furnished by the natural parents on 7th September, 2011 were informed consents which were provided willingly. In the first instance, there is the evidence tendered by the applicants that the natural parents were agreeable to the second applicant adopting the children. Secondly, the Court has before it a certificate from the Office of Social Development and Human Security of the relevant provincial authority which certifies that the natural parents "have signed the Letter of Consent from the Authorized Person in front of the officer on the 7th of September 2011 willingly, without being threatened, tricked or induced by obtaining wages or compensation as well as not being forced in any other unlawful practice by [the second applicant] or any other persons". As is clear from the Legal Opinions, the consent of the natural parents is a legal pre-condition for the Country A adoptions unless dispensed with by court order). Thirdly, the Court has before it certified copies of the natural parents' respective consents. Having regard to the evidence given in the second Legal Opinion as to what Country A's laws required with regard to consent to domestic adoptions, I am satisfied as a matter of probability that there was compliance with the legal requirements.

349. While I note that it was put to the first applicant in cross-examination by counsel for the Attorney General that the consent document signed by the natural mother does not give any indication of the knowledge or information which was imparted to her for the purposes of obtaining her consent to the adoptions of the children by the second applicant, I am satisfied on balance of probability, given the involvement of the officials of the provincial authorities and the nature of the document signed by the natural mother, that the natural mother knew the import of the document she signed, namely that she was giving her children up for adoption. I also take into account the applicants' evidence as to their periodic ongoing contact with the natural mother and their evidence that she has never sought to resile from the consent given in 2011.

350. It is the case that the consent documents signed by the natural parents described the second applicant as resident in the house in her home province which she had purchased some years earlier. The consents made no mention of the fact that as September 2011, the second applicant's habitual place of residence was Ireland.

351. Both applicants were questioned by counsel for the Attorney General as to why this was the case. They both testified that the reason for the inclusion of the second applicant's Country A address was because pursuant to Country A's laws, every Country A citizen had to be registered at an address in Country A. The evidence of the second applicant was that the officials had put her Country A address on the consent documents as that was her address according to her Country A identity card. They also testified that at all relevant times, both the natural parents and the Country A officials knew that they were resident in Ireland and that the children would be residing in Ireland following the adoption. I am satisfied to accept the applicants' testimony in this regard. As a matter of high probability. I am satisfied that the natural parents were aware since December, 2007 the that second applicant was resident in Ireland. I note in particular the evidence given by the second applicant that she left her home province for Ireland in December, 2007. This was a time when the birth parents were residing in the house which the second applicant had purchased.

352. Moreover, there is evidence that, thereafter, she and the first applicant only returned to Country A for holidays, a fact that must have been known to the natural mother as well as the natural father, at least up to early 2011 when the natural mother left that residence. I am also satisfied that it was the understanding of the Country A officials dealing with the adoptions that the second applicant was resident in Ireland.

353. The applicants have given uncontroverted evidence regarding the range of documentation which they were obliged to provide as part of the second applicant's assessment process. There can be no doubt but that the officials were aware from this documentation that she was resident in this State. I also take account of the fact that during half the assessment process the Country A officials communicated with the second applicant at her Irish address, via Skype. Furthermore, given that the laws of Country A do not restrict a person whose domicile or habitual residence is not that of Country A from adopting a child, I am satisfied that there was no ulterior motive for the inclusion of the second applicant's Country A address on the consent documents.

The 2018 Consents

354. In August 2018, the applicants were instrumental in procuring further consents to the adoptions from the natural parents. The first applicant's evidence was that this step was taken in order to assist the Authority in circumstances where the Authority had been seeking to obtain the consents of the natural parents as part of its efforts to progress the applicants' application in this jurisdiction to jointly adopt the children. I accept the first applicant's evidence in this regard in so far as it relates to the period prior to the delivery of the Supreme Court's judgment in the Case Stated. As set out earlier in this judgment, the contents of correspondence between the Authority and applicants in the period

August, 2017 to May, 2018 disclose that the Authority (on a without prejudice basis, given its appeal of the High Court judgment in the Case Stated) was attempting, for the purposes of the applicants' domestic adoption application, to appoint an authorised person to oversee the signing of the consent by the children's birth mother. To this end, in August, 2017 and October, 2017, the applicants provided the Authority with contact details for the birth mother. In March, 2018, the applicants' solicitor was told that the Authority had written to Country A's Central Authority seeking its assistance in procuring the birth mother's consent and notifying and consulting the birth father. The first applicant testified that the HSE social worker who had been assigned to the applicants had asked if he and the second applicant could assist with regard to effecting contact between the Authority and the birth mother. In this regard, the first applicant's evidence is unchallenged.

355. It is however the case that post the delivery of the Supreme Court's judgment on 12th July, 2018, there was no basis for the Authority to pursue the natural parents' consents in the context of a domestic adoption in this jurisdiction, albeit the Authority at that time was continuing to try and liaise with Country A's Central Authority for the purpose of the "reverse engineering" solution which the Authority had suggested to the Supreme Court, and indeed as contemplated in the Explanatory Report.

356. While the procuring of the August, 2018 consents could on one level be said to be something of a solo run by the applicants, I accept that the 2018 consents were obtained against a backdrop whereby the applicants had been requested by the Authority to provide assistance in this regard in the period October, 2017 to May, 2018 (for the "without prejudice" domestic adoption process then ongoing).

357. The first applicant told the Court that in August, 2018, he and the second applicant were in Country A on holiday and accordingly in a position to procure consents from the natural parents. In the course of his evidence he stated that when first contacted by the HSE social worker in the context of the domestic adoption application, he had been asked if "it would be possible to have the [2011] consents redone in the Irish form…" He stated that the form used in August, 2018 was that which Authority had outlined in its letter of 29th March, 2018 to Country A's Central Authority.

358. The consent forms which were provided to the natural parents in August, 2018 by the first applicant consisted of a document entitled "Form 1 The Adoption Society of Ireland Affidavit of Consent to Adoption" which the first applicant had endeavoured to translate into in Country A's language for the benefit of the natural parents.

359. The "Affidavit of Consent to Adoption" document was signed by the birth mother on 19th August, 2018 in the presence of a notary. The notary was verified by Country A's Ministry of Foreign Affairs. A similar document was signed by the birth father on the same date, again in the presence of a notary. Both documents included a paragraph that the respective signatories understood the nature of an adoption order and that they would lose all parental/guardianship rights upon the adoption. Moreover, the 2018 documents contained a statement that the birth parents had been informed that their respective

consents could be withdrawn at any time before the making of the adoption order. These were caveats which were absent from the "Letter of Consent from the Authorized Person" which the birth mother had signed on 7th September, 2011.

360. Under cross-examination by counsel for the Attorney General, it was the first applicant's belief that notwithstanding the absence of the aforesaid safeguards in the 2011 consent form which the natural mother as the "Authorised Person" under Country A law had signed on 7th September, 2011, the consent of the birth mother had been fully and freely obtained. He stated that this was evidenced by the fact that in August, 2018, both birth parents could have refused to consent to the adoptions when again requested to do so but they had not refused. As further proof that the birth mother had freely provided her consent in 2011, the first applicant referred to a text message which the second applicant received from the birth mother on 25th October, 2018 thanking the applicants for everything they have done for the children and sending a video of her new baby for J.B. and K.B. to view. The second applicant gave similar testimony.

361. In the course of his evidence, the first applicant acknowledged that the consent forms which were provided to the birth parents in August, 2018 were prospective in nature and not a ratification of an earlier adoption process. The first applicant explained that he had used this format in order to follow and emulate the steps which the Authority had outlined in its letter of 29th March, 2018 to Country A's Central Authority.

362. Notwithstanding my view that the applicants' actions in August, 2018 added a further layer of complication to the adoptions in issue in these proceedings, I am satisfied that the applicants' actions were not a retrospective attempt to obtain consents from the natural parents which should have been obtained in September, 2011. For the reasons already set out, I am satisfied that the natural parents gave their consent to the adoptions in September 2011 and that those consents were freely given. I am fortified in this conclusion by the natural parents' readiness to assist the applicants in August, 2018. On balance, I accept the first applicant's evidence that the 2018 consents were obtained in an effort by the applicants to emulate what the Authority had previously proposed. The applicants clearly believed that it would assist if the birth parents signed the consents again "in the Irish form". Furthermore, I find no reason to disbelieve the first applicant's testimony that the natural mother position in August 2018 was that the children had been adopted in Country A some seven years previously.

363. In all the circumstances, I am satisfied that requirement (a) of the definition of "foreign adoption" as set out in s.1 of the 1991 Act has been established in this case.

364. For the purposes of requirement (e) of the definition of "foreign adoption" as set out in s.1 of the 1991, I should say at this juncture that I am satisfied from the evidence adduced, that the applicants "have not received, made or given or caused to be given any payment or other reward…in consideration of the adoption…" of J.B. and K.B.

365. There is one aspect of this case where there is perhaps less factual clarity that might have been. I note that in the first Legal Opinion it is stated that the adopter, the child and the

natural parents are required to be interviewed by the Provincial Office of Social Development and Social Security. It is also required that the relevant officer visit where the child is to be raised by the adopter and interview the adopter's neighbours following which a report is submitted to the Child Adoption Committee, which then considers whether to approve the adoption application or not. I have already stated that I am satisfied, on balance, that appropriate enquiries were made of the second applicant and the birth parents for the purposes of the Country A domestic adoption process. However, there is no evidence before the Court as to whether the second applicant's neighbours were spoken to. This may be because of the fact that they provincial authorities were aware that the second applicant resided in Ireland. I note, however, her evidence that she had referees (her two aunts) in attendance on 7th September, 2011. No evidence was given by the applicants as to whether the provincial authorities interviewed the children, as appears to be required by Country A law. At the time of the Country A domestic process, J.B. was five years old and K.B. was three years old. It may be that interviews with the children were not pursued because of their young ages at the time of the adoptions. I hasten to add that this is just surmise on my part. In any event. given that the children have by now lived well more than half their lives with the applicants, the issue as to whether they were spoken to in 2011 cannot be the determining factor as to whether the domestic adoption comes within the parameters of "foreign adoption" as defined in the 1991 Act.

366. In summary, for all the reasons set out above, I am satisfied the Country A domestic adoption substantially complies with the definition of "foreign adoption" as set out in the 1991 Act.

Factor (x) The children's views

367. For the purposes of the within application, the Court has heard informally from J.B. and K.B. about their wishes for the future. They presented as extremely happy, bright and articulate children whose description of their home, school and social life reflect their view of themselves as the children of the applicants. They talked about their half-brothers who are the sons of the first applicant from his first marriage and their baby brother born to the first and second applicant in 2017. They are aware of and know their birth parents (their other "mum and dad") and extended family in Country A whom they visit. They talked about their birth mother's new baby, their half-sister. It is clear to the Court, however, that these children do not see themselves as other than as the children of the applicants.

Factor (xi) The best interests of the children

368. The Court has heard the evidence of the applicants regarding their life together with the children since the children's arrival in this jurisdiction in April, 2012. I have also heard informally from the children in this regard.

369. The prejudice to the adoptions not being recognised in this jurisdiction was identified by the majority in the Supreme Court in the following terms:

> *"In the absence of a clear identification of their legal status, the children may encounter difficulties once they are no longer dependent on CB in obtaining passports, in the area of succession law and possibly their continuing long term right to residency status. Moreover, a question may arise as to whether, at present, even PB enjoys a parental relationship with the children which is legally cognisable as a matter of Irish law. CB has no such status, even after the lapse of five years or more. The two adults, who see themselves as the children's parents are not…their parents in the eyes of the law, or the State generally."* (MacMenamin J. at para. 99)

370. I accept the above dictum as a correct reflexion of the legal dilemma that arises in this case. It arises, in the first instance, consequent on the fact that the adoptions did not conform to the Convention rules, as they should have. The dilemma arises also by reason of the fact that, for all the reasons set out by the Supreme Court, neither a domestic adoption in this jurisdiction nor a return to the children's original legal status is possible.

371. Submissions have been made by the Authority to the effect that any present or future difficulties regarding the children's status in this jurisdiction could be alleviated by alternative rights mechanisms such as non-parental guardianship, as provided for in s.6C of the Guardianship of Infants Act 1964, and by provision being made for the children in the applicants' wills. This was also the view of the minority in the Supreme Court. (See O'Donnell J. at para. 9 and McKechnie J. at para. 148.) I note however that while O'Donnell J. did not believe that "*a humane decision-maker*" would determine that the children leave the country once no longer dependent on the applicants, he acknowledged that the spectre of the children being required to leave the country when they are no longer dependent remained "*a possibility".*

372. Counsel for the applicants submits that when in 2027 the children's current residency permits expire, at that point they will be two adult Country A citizens with no clear legal relationship with any Irish or EU citizen, save being the natural niece and nephew of the second applicant.

373. Overall, while I agree with the view expressed by O'Donnell J. that it is neither "*desirable*" nor "*sensible*" to use the law of adoption to solve problems which may or may not occur regarding the children's future residency status, what presents here is, to my mind, a more fundamental issue, namely that, as matters stand, the children's and the applicants' *recognisable* legal status remains "in limbo". This is so given that a domestic adoption in this jurisdiction cannot be tolerated and because the Country A domestic adoption (which should have been treated as an intercountry adoption under the Convention) is not considered a nullity (by reason of non-compliance with the Convention) and thus remains extant. This is all in the context where, as stated by MacMenamin J. *"the human reality [is] that the children see the applicants "as their father and mother, based on the bonds of attachment which have been formed over the last six years."* (at para. 140)

374. In all the circumstances, therefore, I accept as considerably more persuasive the applicants' arguments that it would be in the best interests of these children that the

Country A adoption would be entered on the Register, as opposed to their best interests being met by means of other legal mechanisms such as guardianship. My reasons for this conclusion are further set out below. I wish to emphasise that I am not saying that the best interests principle of itself is sufficient to trump the Convention. In the absence of truly exceptional circumstances, the best interests of the children of itself could not be a sufficient basis for an order to be made under s.92(1)(a) where there has been wholesale or substantial non-compliance with the Convention. This is so in light of the State's commitment to implementing the Convention and upholding the integrity of the intercountry adoption process provided for in the Convention and the 2010 Act. Any contrary approach would be tantamount to judicial forgiveness of non-compliance, which the Court cannot countenance.

375. What distinguishes the present case is firstly, the series of unfortunate events which I have described earlier in this judgment which, I am satisfied, diverted the applicants from the path they had initially embarked on, namely their invocation of the assistance of agencies of this State for the purpose of an intercountry adoption of the second applicant's niece and nephew. Secondly, the Court is satisfied as to the applicants' bona fides at all relevant times. Thirdly, during the entirety of the processes which the Authority sought to put in place in the period 2012 to 2018 (including a domestic adoption in this jurisdiction), the applicants co-operated willingly and wholeheartedly. Moreover, this Court has found that the Country A domestic adoption meets the criteria for a "foreign adoption" as set out in s.1 of the 1991 Act as it read on 30th May, 1991. This being so, there is an "adoption" for the purposes of any order the Court might make under s.92(1)(a) of the 2010 Act. As earlier referred to, pursuant to Article 42A of the Constitution, the State recognises the natural and imprescriptible rights of all children and undertakes so far as practicable, by its laws, to protect and vindicate those rights in the resolution of all proceedings concerning, *inter alia*, the adoption of a child. Bearing this constitutional promise in mind, this Court, in considering whether to direct an entry of an "adoption" in the Register in all the exceptional circumstances of this case, is impelled to conclude that the vindication of these children's rights requires some mechanism to give legal recognition to their status as the adoptive children of the second applicant. Such mechanism is available to the Court via s.92(1)(a) of the 2010 Act.

Conclusion

376. The Court has considered factors (i) to (xi) above for the purpose of determining whether the circumstances of the within case meets the test of being, in the words of the Majority View in the Supreme Court "*a truly exceptional case".* In view of the findings of this Court under the relevant headings, as set out above, I am satisfied that the applicants have met that test.

377. The Court, therefore, proposes to make an order pursuant to s. 92(1)(a) of the 2010 Act directing the Authority to enter the adoptions of J.B. and K.B. on the Register. I am satisfied that such an order will not give rise to any public policy concern. The Court is cognisant of the public policy criterion. A decision to effect recognition of "an adoption" which was properly an intercountry adoption to which the Convention was not applied

raises an issue of public policy. There is public interest into maintaining the State's commitment to the Convention. In particular, I note the Attorney General's submissions in this regard. I am satisfied however that the order the Court proposes to make can exist in harmony with both the letter and spirit of the Convention. This is so by virtue of the careful test formulated by the majority in the Supreme Court which this Court had adopted in assessing the evidence in this case, in order to ascertain whether the circumstances met the "*truly exceptional*" test, and by reason of the guidance set out in the Explanatory Report.

378. Furthermore, in my consideration of the public policy concern, I also take into account para. 529 of the Guide to Good Practice which states, *inter alia*, that "[r]ecognition may be refused, under Article 24, only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child." As is clear from the findings of fact made by this Court, there is no suggestion in the present case that the children were trafficked into this jurisdiction or adopted by the second applicant for any nefarious purpose.

379. I will hear the parties' submissions on the timing of the proposed order,

given that the applicants' current application to the HSE for assessment remains on hold pending the outcome of the within proceedings. I will also hear submissions on the exact wording to be used for the purpose of entry on the Register, to reflect the "*truly exceptional*" nature of this case.

380. By way of postscript, I should acknowledge that in their legal and oral submissions to the Court, the applicants argued that in interpreting and applying s.92(1)(a) of the 2010 Act, the Court should have regard to the children's rights under Article 8 ECHR. Counsel for the Authority resisted any reliance on Article 8 on the basis that there was no violation of Article 8 rights given the range of alternative remedies (other than recognition of the adoptions) available to the applicants.

381. In view of the findings made by this Court with reference to the Constitution, I did not find it necessary to consider the parties' respective arguments with regard to Article 8 ECHR.