THE HIGH COURT

FAMILY LAW

[2021] IEHC 53

[2020 No. 75 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)
AND IN THE MATTER OF S.H., A MINOR [DOB REDACTED]

BETWEEN:-

THE CHILD AND FAMILY AGENCY &
M.H. & I.A.H. (OTHERWISE A.H.)

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

-AND -

[2020 No. 76 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)
AND IN THE MATTER OF T.S., A MINOR BORN [DOB REDACTED]

BETWEEN:

CHILD AND FAMILY AGENCY AND W.M. & R.M.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

-AND-

[2020 No. 77 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)
AND IN THE MATTER OF S.S., A MINOR
BORN ON THE [DOB REDACTED]

BETWEEN:

CHILD AND FAMILY AGENCY AND N.S. & U.S.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

-AND-

[2020 No. 78 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)
AND IN THE MATTER OF S.S., A MINOR
BORN ON THE [DOB REDACTED]

BETWEEN:

CHILD AND FAMILY AGENCY AND N.S. & U.S.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered electronically on the 27th day of January, 2021

1. These proceedings concern four applications brought by the Child and Family Agency ('the Agency') pursuant to s. 54(2) of the Adoption Acts 2010 – 2017 (as amended) seeking in

each an Order authorizing the Adoption Authority of Ireland ('the Authority') to make adoption orders :

- concerning S.H., born on __ __ 2009, in favour of the Second and Third Named Applicants in proceedings bearing Record Number 2020/75M, M.H. and I.A.H. (otherwise A.H.);

- concerning T.S., born on _ ___ 2008, in favour of the Second and Third Named Applicants in proceedings bearing Record Number 2020/76M, W.M. and R.M.;

- concerning S.S., born on the _ ___ 2005, in favour of the Second and Third Named Applicants in proceedings bearing Record Number 2020/77M, N.S. and U.S.;

- concerning S.S., born on the __ __ 2006, in favour of the Second and Third Named Applicants in proceedings bearing Record Number 2020/78M, N.S. and U.S.

2. The proceedings relate to four children of Indian origin, the prospective adoptive parents of whom, are all Irish couples habitually resident within the jurisdiction. They were granted guardianship orders in respect of the children in India in 2011. No Indian adoption orders were made in respect of the children and the prospective adoptive parents have each made an application for a domestic adoption order in Ireland.

3. The child, S.H., is aged eleven and has been in the care of her prospective adoptive parents, M.H. and I.A.H., since the 28th October 2011, having been brought to Ireland by the prospective adoptive parents soon after. She has lived in Ireland with her prospective adoptive parents since in or around the end of 2011 and is habitually resident within the State.

4. The child, T.S., is aged eleven and has been in the care of her prospective adoptive parents, W.M. and R.M., since the end of 2011, having been brought to Ireland by the prospective adoptive parents soon after. She has lived in Ireland with her prospective adoptive parents since then and is habitually resident within the State.

5. Siblings, S.S., and S.S., are currently aged fifteen and fourteen respectively. They have been in the care of their prospective adoptive parents, N.S., and U.S., since the 2nd November 2011 and they were brought to Ireland by their prospective adoptive parents in November 2011. They have lived in Ireland with their prospective adoptive parents since that date and are habitually resident within the State.

6. The factual circumstances arising in each case are broadly similar and raise identical legal issues.

7. The background of each of the four children is detailed in full in the affidavits of Mr. Mark Kirwan, Manager of the Domestic Adoption Unit of the Authority, sworn in relation to each case on the 8th day of December 2020.

8. On the 14th January 2020, the Authority made a declaration in respect of each child pursuant to s. 53(1) of the Acts, namely that if an Order is made by this Court pursuant to s. 54(2) in respect of the children in favour of the prospective adoptive parents, then it will, subject to the provisions of s. 53(2) of the said Acts, make the adoption orders sought.

9. These applications raise issues concerning compliance with the provisions of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, more commonly known as 'The Hague Convention', as well as the interpretation of domestic law.

Factual Background

S.H., born in 2009

10. The first application concerns the child, S.H., believed to be born on the __ __ 2009. There is no original birth certificate available in relation to S.H.

11. The prospective adoptive parents in this case, M.H. and I.A.H., were granted a declaration by the Authority on the 27th October 2009, stating that they were eligible to adopt by virtue of s. 10 of the Adoption Act, 1991 and were suitable to effect an adoption outside the State by virtue of section 13 of the Adoption Act, 1952. This Declaration was subsequently renewed and was thus valid until the 26th October 2011.

12. On the 4th December 2009, the Child Welfare Committee (hereafter the 'CWC') of Khurda District in the child's country of origin released S.H. for adoption and on the 3rd March 2010, the SANYOG Adoption Coordinating Agency (hereafter 'ACA'), Orissa gave clearance for S.H. to be placed for intercountry adoption. In the accompanying Certificate of ACA Clearance, it certifies that efforts had been made by the placement agency and by the ACA to place the child for adoption with an Indian family in India, but these efforts were not successful.

13. The prospective adoptive parents received a referral in respect of S.H. in April of 2010.

14. On the 21st September 2010, the Central Adoption and Resource Authority (hereafter 'CARA'), the Central Authority of India, certified that it had no objection to the placement of S.H. with the prospective adoptive parents and it issued a "*No Objection Certificate",* which states that it was issued having regard to Article 17(c) of the Convention.

15. On the 9th June 2011, the Secretary of Subhadra Mahtab Seva Sadan, an Indian Placement Agency (the 'RIPA'), recognized by CARA, wrote to the Authority. This correspondence included the CWC release order for adoption, the Certificate of ACA Clearance and CARA's No Objection Certificate. It also included a letter entitled *"Irrevocable Consent for eligibility of adoption for child S.P*." signed by the Secretary of the RIPA, dated the 9th June 2011. This states that the RIPA is the present guardian of the child and that it has approved the Irrevocable Consent to *Adoption "which cannot be revoked after it is signed because the child S.P. is eligible for adoption and has adoptability status*". This correspondence also included a birth affidavit in respect of the

child, sworn by the Secretary of the RIPA. This attests to the fact that the child is an orphan, living at the RIPA and that she has been made legally free for adoption by the Child Welfare Committee, Khurda on the 4th December 2009. It indicates that the child's birth had not been previously registered, but to the best of his knowledge her date of birth is _9999999__ 2009, and that there is no other document or record recording the birth. Essentially this correspondence amounted to an Article 16 report pursuant to the Convention and a request was made to the Authority for Article 17 approval for the placement of S.H.

16. Prior to a determination being made by the Authority in relation to the request for Article 17 approval, the Authority sought clarification with the RIPA as to the intention of the prospective adoptive parents regarding the court proceedings to follow. It sought clarity as to whether they intended to complete an adoption in India under the Juvenile Justice Act, 2000 or whether they were seeking guardianship in India, with the intention of effecting an adoption in Ireland. The Authority indicated that it would defer a decision on the issuing of an Article 17 Child Placement Approval Notice pending a response and that in accordance with Article 17, no child should be entrusted to Irish prospective adoptive parents until such time as the Authority has given its approval. The Authority received no response from the RIPA.

17. The Authority was informed by the prospective adoptive parents' solicitor that they were intending to apply for guardianship of the child in India and that on their return to Ireland, they would apply for an adoption order in this jurisdiction. The prospective adoptive parents were notified by the Authority that whether they obtained an adoption order in India or whether they made a subsequent application for an adoption order in Ireland, Article 17 approval needed to be granted by the Authority prior to any placement of the child with the prospective adoptive parents. Approval by way of Article 17 would be required before the placement could proceed so as to allow the Indian authorities to issue an Article 23 certificate. As a result, the prospective adoptive parents were urged not to proceed with their guardianship application prior to a decision being made by the Authority on the Article 17 approval application.

18. On the 14th September 2011, the prospective adoptive parents obtained judgment appointing them as guardians in respect of the child by Order of the Family Court, Bhubaneswar. It appears they brought the child to Ireland with them at some time towards the end of October 2011. She has been residing in Ireland with them ever since. They obtained an Irish guardianship order in relation to the child on the 24th October 2012, by Order of the District Court sitting in the south of the country.

19. No Article 17 approval was granted by the Authority prior to the Indian guardianship order or prior to the placement of the child with the prospective adoptive parents. The Authority apparently felt unable to decide on the request at that time as it was awaiting responses to queries raised with both the RIPA and CARA. The transfer of the child to Ireland was made in the absence of approval by the Authority under Article 17(c) and complex legal issues have arisen as a result. Recognition cannot proceed under section 57

of the Adoption Act 2010 as no adoption order was granted in India. Furthermore, section 68 of the Act is not available to the prospective adoptive parents as the transfer of the child occurred without Authority approval given that the Authority's consent under Article 17(c) was not obtained prior to placement.

20. The prospective adoptive parents have applied to adopt S.H. domestically.

T.S., born in 2008

21. The second application concerns the child, T.S., believed to be born on the ____ 2008. There is no original birth certificate available in relation to T.S.

22. The prospective adoptive parents in this case, W.M. and R.M., were granted a declaration by the Authority on the 8th September 2009, stating that they were eligible to adopt by virtue of s. 10 of the Adoption Act, 1991 and were suitable to effect an adoption outside the State by virtue of section 13 of the Adoption Act, 1952. This Declaration was subsequently renewed and was therefore valid until the 8th September 2011.

23. On the 3rd November 2009, the CWC of Khurda District released T.S. for adoption and on the 8th March 2010, the SANYOG ACA, Orissa gave clearance for T.S. to be placed for intercountry adoption. The accompanying Certificate of ACA Clearance certifies that efforts had been made by the placement agency and by the ACA to place the child for adoption with an Indian family in India, but these efforts were not successful.

24. The prospective adoptive parents received a referral in respect of T.S. on the 1 April 2010.

25. On the 17th August 2010, CARA, the Central Authority of India, certified that it had no objection to the placement of T.S. with the prospective adoptive parents and it issued a "*No Objection Certificate*", which states same was issued having regard to Article 17(c) of the Convention.

26. On the 9th June 2011, the Secretary of the RIPA wrote to the Authority. This correspondence included the CWC release order for adoption, the Certificate of ACA Clearance and CARA's No Objection Certificate. It also included a letter entitled *"Irrevocable Consent for eligibility of adoption for child S."* signed by the Secretary of the RIPA, dated the 9th June 2011. This states that the RIPA is the present guardian of the child and that it has approved the Irrevocable Consent to Adoption "*which cannot be revoked after it is signed because the child S. is eligible for adoption and has adoptability status"*. This correspondence also included a birth affidavit in respect of the child, sworn by the Secretary of the RIPA. This attests to the fact that the child is an orphan, living at the RIPA and that she has been made legally free for adoption by the Child Welfare Committee, Khurda on the 3rd November 2009. It indicates that the child's birth had not been previously registered, but to the best of his knowledge her date of birth is __ __ 2008, and that there is no other document or record recording her birth. Essentially, therefore, this correspondence amounted to an Article 16 report pursuant to the

Convention and a request was made to the Authority for Article 17 approval for the placement of T.S.

27. Prior to a determination being made by the Authority in relation to the request for Article 17 approval, the Authority sought clarification with the RIPA as to the intention of the prospective adoptive parents regarding the court proceedings to follow. It enquired as to whether they intended to complete an adoption in India under the Juvenile Justice Act, 2000 or whether they were seeking guardianship in India, with the intention of effecting an adoption in Ireland. The Authority indicated that it would defer a decision on the issuing of an Article 17 Child Placement Approval Notice pending a response and that in accordance with Article 17, no child should be entrusted to Irish prospective adoptive parents until the Authority has given its approval. The Authority received no response from the RIPA.

28. The Authority was informed by the prospective adoptive parents' solicitor that they were intending to apply for guardianship of the child in India and that on their return to Ireland, they would apply for an adoption order in this jurisdiction. The prospective adoptive parents were notified by the Authority that whether they obtained an adoption order in India or whether they made a subsequent application for an adoption order in Ireland, either way, Article 17 approval needed to be granted by the Authority prior to any placement of the child with the prospective adoptive parents. Approval by way of Article 17 would be required before the placement could proceed in order to allow the Indian authorities to issue an Article 23 certificate. Furthermore, the prospective adoptive parents were urged not to proceed with their guardianship application prior to a decision being made by the Authority on the Article 17 approval application.

29. On the 14th September 2011, the prospective adoptive parents obtained judgment appointing them as guardians in respect of the child by Order of the Family Court, Bhubaneswar. It appears they brought the child to Ireland with them shortly afterwards. She has been residing in Ireland with them ever since. They obtained an Irish guardianship order in relation to the child on the 24th October 2012, by Order of the District Court.

30. No Article 17 approval was granted by the Authority prior to the Indian guardianship order or prior to the placement of the child with the prospective adoptive parents. The Authority apparently felt unable to make a decision on the request at that time as it was awaiting responses to queries raised with both the RIPA and CARA. The transfer of the child to Ireland was thus made in the absence of approval by the Authority under Article 17(c) and the same complex legal issues have arisen as a result. Recognition cannot proceed under section 57 of the 2010 Act as no adoption order was granted in India. Furthermore, section 68 of the Act is not available to the prospective adoptive parents as the transfer of the child occurred without Authority approval.

31. The prospective adoptive parents have therefore applied to adopt T.S. domestically.

S.S., born in 2005 and S.S., born in 2006

32. The third and fourth applications concern the siblings, S.S., believed to have beeen born in 2005 and S.S., believed to have been born in 2006. There are no original birth certificates available in relation to the children.

33. The prospective adoptive parents in these two applications, P.S. and U.S., were granted a declaration by the Authority on the 15th June 2010, stating that they were eligible to adopt by virtue of s. 10 of the Adoption Act, 1991 and were suitable to effect an adoption by virtue of s. 13 of the Adoption Act, 1952 outside the state. A further declaration pursuant to s. 63 of the Adoption Act 2010 that they were eligible to adopt by virtue of s. 33 and suitable to adopt by virtue of s.34 of the 2010 Act issued to them on the 31st May 2011 valid for the 24 month period from the 1st November 2010 to the 31st October 2012.

34. On the 3rd November 2009, the CWC of Khurda District released both children for adoption and on the 8th March 2010, the SANYOG ACA Orissa gave clearance for the children to be placed for intercountry adoption. In the accompanying Certificate of ACA Clearance it is certified that efforts had been made by the placement agency and by the ACA to place the children for adoption with an Indian family in India, but these efforts were not successful.

35. The prospective adoptive parents received a referral in respect of the siblings on the 28th July 2010.

36. On 26 October 2010, CARA certified that it had no objection to the placement of the children with the prospective adoptive parents and it issued a "No Objection Certificate", which states same was issued having regard to Article 17(c) of the Convention.

37. On the 9th June 2011, the Secretary of the RIPA wrote to the Authority. This correspondence included the CWC release order for adoption, the Certificate of ACA Clearance and CARA's No Objection Certificate. It also included letters entitled *"Irrevocable Consent for eligibility of adoption for child S."* and Irrevocable Consent for eligibility of adoption for child S." signed by the Secretary of the RIPA, dated the 9th June 2011. These state that the RIPA is the present guardian of the children and that it has approved the Irrevocable Consent to Adoption "*which cannot be revoked after it is signed*" because the children are "*eligible for adoption and have adoptability status*". This correspondence also included birth affidavits in respect of the children, sworn by the Secretary of the RIPA. They attest to the fact that the children are orphans, living at the RIPA and that they have been made legally free for adoption by the Child Welfare Committee, Khurda on the 3rd November 2009. They indicate that the children's birth had not been previously registered, but to the best of his knowledge their dates of birth are __ __ 2005 and __ __ 2006 respectively, and that there are no other documents or records recording their birth. Essentially, this correspondence again amounted to an Article 16 report pursuant to the Convention and a request was made to the Authority for Article 17 approval for the placement of the children.

38. Prior to a determination being made by the Authority in relation to the request for Article 17 approval, the Authority sought clarification with the RIPA as to the intention of the prospective adoptive parents regarding the court proceedings to follow. It wished to know whether they intended to complete an adoption in India under the Juvenile Justice Act, 2000 or whether they were seeking guardianship in India, with the intention of effecting an adoption in Ireland. The Authority indicated that it would defer a decision on the issuing of an Article 17 Child Placement Approval Notice pending a response and that in accordance with Article 17, no child should be entrusted to Irish prospective adoptive parents until such time as the Authority has given its approval. The Authority received no response from the RIPA.

39. On the 5th September 2011, the prospective adoptive parents obtained judgment appointing them as guardians of the children by Order of the Family Court, Bhubaneswar. They brought the children to Ireland on the 4th November 2011 and they have been in their care ever since. They obtained an Irish guardianship order in relation to the children on the 13th May 2013, by Order of the District Court in Wexfo rd.

40. No Article 17 approval was granted by the Authority prior to the Indian guardianship order or prior to the placement of the child with the prospective adoptive parents. The Authority made a decision in relation to the Article 17 request on the 6th March 2012. In circumstances where the placement of the children with the prospective adoptive parents had already occurred, it determined that granting Article 17 approval would not be appropriate. It noted that the placement was in contravention of the terms of the Convention which decrees that the sending and receiving countries must agree the placement of a child before the placement is made. The transfer of the child to Ireland was thus made in the absence of approval by the Authority under Article 17(c) and once more complex legal issues have arisen. Recognition cannot proceed under s. 57 of the 2010 Act as no adoption order was granted in India. Furthermore, s. 68 of the Act is not available to the prospective adoptive parents as the transfer of the children occurred without Authority approval given that the Authority's consent under Article 17(c) was not obtained.

41. The prospective adoptive parents have therefore applied to adopt siblings S.S. and S.S. domestically.

The Law

42. In the circumstances of these four cases, all broadly similar on a factual level, several legal issues have arisen. The question posed is whether Part 7 of the Acts is the only option and a proper route pursuant to which adoption orders can be made in respect of the four children. This involves a discussion as to why alternative sections of the Acts are not applicable.

Are Indian Guardianship Orders capable of being recognised under s. 57 of the Acts?

43. Pursuant to Article 23 of the Convention, if an adoption is affected in the state of origin of the children, namely India, once same is certified by the Indian competent authority as having been made in accordance with the Convention, it must be recognized by operation

of law in the receiving State, unless the recognition of same is manifestly contrary to the public policy of the receiving State.

44. The initial question, therefore, that arises is whether an adoption was effected in India in relation to the four children, and whether that adoption was certified by the Indian Central Authority, CARA.

45. The prospective adoptive parents in each application are guardians of the children as a matter of Indian law pursuant to the Guardians & Wards Act, 1890. These orders do not amount to adoption orders within the meaning of the Convention. The respective orders each specifically state that guardianship is granted to the petitioners "*for the purpose of [the child's] adoption"* with the orders granting the prospective adoptive parents leave to remove the children outside the jurisdiction of India to Ireland. On the very face of the orders the petitioners are designated as guardians only and the future and intended step of adoption is contemplated specifically. In the Indian Court's judgment, it notes that guardianship is sought by the practitioners, along with permission to take the child out of India "to have her adopted according to their country law".

46. The guardianship orders cannot qualify for recognition under s. 57 of the Acts. S. 57 concerns the recognition of intercountry adoptions effected outside the State and there are no adoptions here to be recognized.

47. Even if the Indian guardianship orders had the potential to be viewed as an "adoption" within the meaning of the Convention, no Article 23 certificate was issued by India in any of the four cases. Article 23 provides as follows:

> '*(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph (c), were given.*
>
> *(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.'*

48. An Article 23 certificate is a precondition for recognition and none has been issued by CARA in any of the applications. Given that Article 17(c) approval for placement was not given by the Authority in these cases such a certificate could not have been properly issued in any event by the Indian authorities. Thus, if this Court did find that the orders made in India did amount to "adoptions" in substance the absence of Convention compliance would be an impediment to recognition. It should be said that the Court is not so finding although the terminology used may not always be determinative.

49. It is also worth noting that the prospective adoptive parents have indicated to the Authority that they have been informed that it is not possible to subsequently apply for an adoption order in India under the Juvenile Justice Act, 2000 as they have already been granted a guardianship order. They say that they were informed that under Indian law it is not possible to retrospectively apply for an adoption order once guardianship has been granted. If they are correct then it appears that their process in India has gone as far as it can. However, in the absence of an expert opinion on Indian law, this Court is making no finding in this regard.

50. Since no Indian adoption orders were made in these cases, and no orders are therefore capable of recognition, it follows the question for resolution is whether an adoption order may be affected in the receiving state, Ireland, in relation to the four children.

The applicability of section 68 of the Acts

51. The first relevant section of the Acts to consider is section 68, which specifically envisages situations where adoption is sought to be affected in the receiving State.

52. Section 68 of the Acts provides as follows:

"68 – (1) Subject to subsection (2), the Authority may make an adoption order in relation to a child who –

(a) was transferred to the State from the child's state of origin, in accordance with Article 17 (which relates to when the state of origin may entrust a child to prospective adoptive parents), and

(b) was placed, in accordance with the Convention and this Act, with prospective adopters habitually resident in the State.

(2) The Authority may make an adoption order under subsection (1) only on the application of the prospective adopters with whom the child was placed and only –

(a) if satisfied that Article 4 (which relates to when an adoption may take place) and the relevant provisions of this Act have been met, and

(b) where the consent of a person is necessary and has not been given, if the High Court has made an order –

(i) under section 31(3)(b) authorising the Authority to dispense with consent as described in that provision, or

(ii) under section 54 authorising the Authority to make an adoption order in relation to the child."

53. Thus, the child must be placed in accordance with the Convention and the 2010 Act. Article 17 of the Convention provides as follows -

'Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

a) *the Central Authority of that State has ensured that the prospective adoptive parents agree;*

b) *the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;*

c) *the Central Authorities of both States have agreed that the adoption may proceed; and*

d) *it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.'*

54. In these four applications the children were not placed in accordance with the Convention given that Article 17(c) approval was not given by the Authority prior to the children's placement with the prospective adoptive parents.

55. Section 68 of the Acts is thus not available to enable the Authority to make an adoption order in respect of the children – as the placement and transfer of the children did not comply with the provisions of the Convention and Article 17 in particular.

Domestic adoption – section 20 of the Acts

56. A domestic adoption is defined by the Acts in s. 3 as "*the adoption of a child who was habitually resident in the State before his or her adoption by a person or persons habitually resident in the State"*.

57. On the other hand, an intercountry adoption is defined as follows:

'…….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 or persons habitually resident in the receiving state.'

58. The boundaries between the definition of a domestic adoption and an intercountry adoption are not clearly drawn in the Acts. It is not explicitly stated that a matter which is an intercountry adoption cannot also be a domestic adoption. Furthermore, while a domestic adoption refers to *"the adoption of a child habitually resident in the State before his or her adoption by a person or persons habitually resident in the State*", it does not exclude a situation where the child is habitually resident in Ireland before his or her adoption but he or she has previously been brought from another country to this jurisdiction for the purpose of an adoption. The Authority has therefore submitted that the concepts of domestic adoption and intercountry adoption are not mutually exclusive under

the Acts. This assertion is grounded in the wording of the sections, but its sweeping ambit is subject to the provisions of the Convention itself – in the sense that the convention ought not to be circumvented. Each case must be decided on its own facts – or as here these very similar cases must be decided on their own facts – and against the backdrop of the provisions of the Convention and the potential evils it seeks to guard against.

59. The children in these applications have each been resident in Ireland since late 2011. The prospective adoptive parents have been the primary care givers of the children since that time. It is accepted that in the case of small children, their habitual residence is generally determined by that of their primary care giver, as in the case of C-497/10 PPU, *Mercredi v Chaffe*. Duration of residence is also important when considering habitual residence. All the children concerned have now been residing in Ireland for approximately 9 years. The children undoubtedly have acquired an ordinary residence in Ireland and an Irish habitual residence.

60. S. 20 of the Acts confers on the Authority the power to make adoption orders and recognise intercountry adoptions effected outside of the State. S.20 is contained within Part 4 of the Acts, entitled "*Domestic Adoptions and Intercountry Adoptions*" and no distinction is made between adoption orders in intercountry adoptions and domestic adoptions. On the face of it, the power under s 20 therefore applies to both types of adoptions. Furthermore, s. 23 of the Acts sets out the conditions for adoption. It states that the Authority shall not make an adoption order in respect of a child unless the child resides in the State and is, at the date of the making of the adoption order, less than 18, as well as requirements relating to the length of time the child has been in the care of the prospective adoptive parents. In relation to residency, therefore, the requirement is only that the child resides in the State. It does not give any further direction as to how long the child must have resided in the State prior to the making of the adoption order and does not explicitly preclude children who were brought to Ireland for adoption. It thus appears that the power to proceed under s. 20 of the Acts applies to both domestic and intercountry adoptions.

61. The difficulty with the Authority proceeding and utilizing its power under s. 20 is due to the required consents to adoption orders, as set out in s. 26 of the Acts. S. 26 of the Acts provides that "*the Authority shall not make an adoption order without the consent of every person, being the child's mother or guardian or other person having charge of or control over the child*", unless such consent is dispensed with by the High Court in certain circumstances. Consents are required to be given in writing in the prescribed form. In the circumstances of these cases, it is not possible for the Authority to obtain the necessary consents from the abovementioned persons, thus proceeding under s. 20 of the Acts is not available in this instance.

62. In each of four cases the very limited information surrounding birth parent consents is a matter of concern. Consent has, however, been provided by the children's orphanage, a Recognised Indian Placement Agency (the RIPA), in the '*Irrevocable Consent'* submitted. The RIPA represents the "*other person having charge of or control over the child"*

referenced in section 26 of the Acts. The issue arises with respect to the consents of the birth parents.

63. In relation to the child, S.H., in the Birth Affidavit submitted by the RIPA to the Authority, there is reference to the child as an orphan, suggesting that both of her natural parents are deceased. The contrary, however, is indicated in the document entitled*, Irrevocable Consent for eligibility of adoption for child S. H.*, where it states that the child was abandoned by her father following the death of her mother. There is no death certificate provided for the birth mother, however, and no consent to adoption obtained. It must be also assumed that the birth father is alive - given the assertion that he abandoned the child and in the absence of any death certificate for him. There is no reference in the documentation as to whether the natural parents were married or unmarried, but in the absence of any assertion in the documentation provided that they were unwed, it is best to operate on the premise that they were married. As a result, it should be assumed that the birth father was a guardian of the child. There is, however, no consent provided from either birth parent to the adoption of the child.

64. With regard to the child, T.S., again in the Birth Affidavit, it is asserted that the child is an orphan. This suggests that her natural parents are both deceased. On the other hand, in the document entitled *Irrevocable Consent for eligibility of adoption for child T.S.*, it is stated that the child was abandoned by her unwed mother. This gives reason to believe that the child is not an orphan as is claimed in the Birth Affidavit and that her mother is alive, having abandoned the child. No death certificate is provided for the mother to evidence the assertion that the child is an orphan. It thus must be assumed that the birth mother is alive. No consent, however, has been provided by her to the adoption of the child in any of the documentation provided to the Authority by the RIPA. In relation to the birth father, there seems to be a claim that the natural parents were unwed. If this be the case, there may be no requirement for the consent of the natural father to the child's adoption – but this is dependent upon whether or not he is a guardian of the child and there is no information provided indicating the birth father's position with regard to guardianship. Similarly, there is no death certificate in relation to him, so it must also be assumed that he is alive. Again, no consent of the birth father is contained in the documentation submitted to the Authority by the RIPA.

65. In relation to siblings, S.S. and S.S., the consent of the birth parents has also not been obtained. In a similar manner, the Birth Affidavits for the children refer to them as orphans. This suggests both of their parents are dead. There is, however, an assertion to the contrary in the *Irrevocable Consent* provided by the RIPA, where it states that the children were abandoned at a railway track. This gives reason to believe that the children were abandoned and that their parents are in fact alive. No death certificate for either parent has been provided and in the absence of any evidence to indicate that the birth parents were not married, it is prudent to operate on the basis that they were and that the birth father is a guardian. There is, however, no consent provided from either birth parent to the adoption of the child.

66. In all cases therefore there are no consents provided in the documentation submitted from the children's natural parents. Section 26 of the Acts makes it clear that the consent of every person is required prior to an adoption order being made by the Authority, being the child's mother or guardian or other person having charge or control over the child. So, while the consent of the orphanage, the RIPA, who had control of the children at that time was satisfactorily provided, this alone is not sufficient if the birth mother or other guardians are alive and did not similarly provide their consent. Furthermore, given that the Birth Affidavits are almost identical in each case and appear to be a *pro forma* type document, it is difficult to rely on the somewhat bare assertions that the children are orphans - particularly given the contradictions in other documentation provided by the RIPA.

67. Therefore, s. 20 cannot be used by the Authority to make a domestic adoption order in respect of the four children. Birth parent consents were not provided and it cannot be safely assumed that the children are orphans. While the Authority did try to clarify further the issue of birth parent consents in these cases with CARA, those attempts to liaise with the Indian Central Authority have not been fruitful.

68. It is also the situation that there is no evidence or suggestion that these consents have not been properly obtained as a matter of Indian law or that the children were improperly freed for adoption. Nevertheless, the Authority's power under s. 20 to make an adoption order cannot be invoked absent proof of the required s. 26 consents.

69. This then leads to a consideration as to how the requirements for such consents can be dispensed with by this Court. In this regard, it is submitted that the only way forward is to be found in Part 7 of the Acts. S. 92 of the Acts is not an available option in circumstances where no adoption orders have been granted in respect of the children.

Adoption under Part 7

70. Part 7 of the Acts refers to sections 52 – 56. S. 54 specifically empowers the High Court to authorise the making of adoption orders for children whose parents fail in their duty towards them. If an application is made to it under this section, s. 54(2) provides that the High Court may authorise the Authority to make an adoption order in relation to the child in favour of the applicants and dispense with the consent of any person whose consent is necessary to the making of the adoption order. It sets out a specific six- prong test which must be met under subsection 2A prior to making such an order.

71. The Court accepts the submission that there is nothing to prevent Part 7 of the Acts being applicable to children who are not Irish citizens and who were born outside the jurisdiction of the State. In this regard, it was specifically confirmed by the Supreme Court in *Eastern Health Board v An Bord Uchtála* [1994] 3 IR 207 that the Adoption Act 1988 could be used in respect of a foundling born outside the jurisdiction to foreign parents. Finlay CJ stated:

> 'The Act of 1988, is a very significant step forward in the capacity of our society to care and provide for children in need of care and protection. Unless compelled by

its terms to do so the courts should not, in my view, construe it as unavailable to any child within their jurisdiction who would otherwise qualify for adoption and in particular, such exclusion based on nationality, citizenship or place of birth would not appear to be supportable'.

72. O'Flaherty J., also in *Eastern Health Board v An Bord Uchtála* [1994] 3 IR 207 at p.277, agreed and commented that the reference to "*parents*" and "*children*" in Article 42.5, is not confined to citizens of this State. He stated: "*Indeed, it would be remarkable if this section could not be invoked to protect a child in the State who is left, in effect, parentless".*

73. While these comments were made in relation to the Adoption Act 1988, the situation did not change with the introduction of the Acts. A child is defined as *any person* who is under the age of 18 and no restrictions are imposed in terms of nationality or citizenship. The above comments indicate that a strong purposive approach is to be applied to the interpretation of what is now Part 7. Part 7 is not confined to Irish citizens. It can equally be applicable to children of foreign parents. The fact that the four children here are children of foreign parents and were not born in the State does not preclude the applicability of Part 7 to the applications.

74. This Court agrees that Part 7 applies equally to intercountry adoptions and domestic adoptions. Part 7 is not located in the section of the Acts that exclusively focuses on domestic adoption. It is headed "*Adoption Orders in Exceptional Cases and Role of High Court".* It has a social remedial purpose and it can apply in cases where an intercountry adoption had been envisaged but did not proceed as an adoption abroad. It can apply to children who are born outside the jurisdiction where there is an attempt to regularise their position.

Applicability of Part 7

75. The question as to the applicability of Part 7 arose *In the matter of K and F (minors)* [2019] IEHC 935. This case stated asked the question as to whether pre-existing rights to adoption which survived the Acts can arise where the minor to be adopted was born after the commencement of the Act. The pre-existing rights question stemmed from Abbott J.'s decision in *MO'C and B'OC v Údarás Uchtála na hÉireann* [2015] 2 IR 94. In that case, the applicants sought to have the adoption of their child which took place in Mexico registered in the Register of Intercountry Adoptions maintained by the Authority. The Mexican adoption did not comply with the Convention. Article 23 of the Convention requires that an Article 23 certificate be provided by the country of origin, which shall specify when and by whom the agreements under Article 17(c) were given. However, in that case, the Authority was not requested to approve the placement of the child pursuant to Article 17, nor did it. It thus viewed the Article 23 certificate as invalid. Furthermore, the certificate was provided by the Judiciary of the State of Mexico, as opposed to the Central Authority of Mexico which the Convention requires.

76. Abbott J. in the High Court placed weight on the Declarations of Eligibility and Suitability held by the applicants under the 1991 Act. The Court noted, at para. 14, that the:

'……order, (as appears from the translation of the original Spanish version), is comprehensive, and also shows the detail of consideration of the documents, evidence and reports from third parties, and an assessment of the actions taken by the parties, such that it appears to match the highest standards of care and propriety for an adoption process.'

77. Taking into account the best interests of the child and having interpreted the law, the Court held it was obliged to construe the legislation in accordance with the principles of the Constitution and to allow for an interpretation of the provisions which would permit the continuing use of declarations of eligibility and suitability, avoiding outcomes such as invidious discrimination against persons in the applicant's position. This discrimination related to a new change in law in Mexico whereby no children under 5 could be adopted. The Court went on to determine that s. 63 of the 2010 Act, dealing with the transitional provisions, was not sufficient to repeal or revoke the vested rights of the applicants in relation to the adoption. In dealing with the provisions of s. 63, the Court accepted that there should be a two legged test to examine whether, under s. 27 of the Interpretation Act 2005, pre-existing rights to adoption of the applicants survived the commencement of the Acts. The first such leg is to determine whether such a right arose, and the applicants took real steps to avail of it, and bring it to further states of advancement through the process in which they were involved, by seeking to adopt under the Act of 1991. The Court found that a number of rights (8) arose on this leg and that when the enumeration of such rights were taken together it presented an almost irreversible situation in fact. The second leg is that the survival of acquired rights would not occur if the Act, in clear terms, repealed and revoked these rights.

78. Abbott J. found no repeal or revocation by the Act. He directed the registration of the adoption under section 92 of the Acts on the basis of vested rights under the law as it was before the adoption of the Convention and in circumstances where the applicants had complied 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. However, section 92 of the Acts is not available to the applicants in this instance given that no prior adoptions exist.

79. The matter of *Údarás Uchtála na hÉireann v. M (A Minor)* [2019] IEHC 935 concerned the applicability of the principles of Abbott J.'s decision in *MO'C and B'OC*. It related to two couples who had adopted Mexican children. In each of the cases the couple had commenced the adoption process in Ireland under the 1991 Act, but the child whom they adopted in Mexico was not born until after the 1st November 2010 (the date of commencement of the 2010 Act). They had obtained declarations of eligibility and suitability in Ireland in advance of the adoptions. They then travelled to Mexico, had proceedings in Mexico and ultimately got Court Orders for adoption in May 2011. The couples were however unable to prove compliance with the Convention to the satisfaction of the Authority to enable the Mexican adoptions to be recognized in Ireland. They did not have the requisite Article 23 certificate which allows recognition. The Authority was of the view that the Mexican Court Orders which had been obtained were not sufficient as the

Mexican Court in each instance was not a Central Authority and could not issue an Article 23 certificate. It ultimately determined that the principles and judgment of Abbott J. in *MO'C and BO'C* did not extend to permit it to register the adoptions of the two minors on the Register of Intercountry Adoptions. This was because the minors were born after the date of commencement of the 2010 Act, in distinction to the situation which had applied in that case – i.e. vested rights could not have accrued under the 1991 Act by reason of they being born after its commencement.

80. A case was stated to the the High Court by the Authority pursuant to s. 49 of the Acts and the following questions were stated to the Court in that case:-

    1. Are pre-existing rights to adoption which survived the Act capable of arising where the minor to be adopted was born after the commencement of the Act?

    2. In the event the answer is "no", is the Authority entitled to proceed under Part 7?

    3. Is the CFA entitled to insist on confirmation that a child is eligible for adoption before carrying out an assessment under section 37?

81. In relation to the first question, this Court held that the bearer or bearers of the Declaration of Eligibility and Suitability had acquired, on its issue, important rights. The Court held that it would be unfair to remove those rights even though the child to whom the Declaration of Eligibility and Suitability was subsequently related to was not born at the time the declaration issued or at the time the applicable law concerning inter-country adoption was changed. The Court held that the removal of these vested rights could only have been achieved by clear and express wording in the Acts, but such wording is absent. The Court stated, at para 88:-

    'I am entirely satisfied that the declaration of eligibility and suitability vested rights in both couples once they came into possession of the declarations. The declarations of eligibility and suitability in question were in effect licences to allow the bearers at the time of issue to travel abroad to adopt a child abroad and return to Ireland with the child and apply to have the foreign adoption entered in the register of intercountry adoptions. The date of birth of the child adopted in Mexico cannot impact on these vested rights. The declarations are self-contained, clear and legal documents which must be afforded the recognition and effect which they were intended to have when issued in the absence of anything in the 2010 Act to say otherwise'.

82. The Court did not make a decision on the second question as it determined that it did not arise in the case, given the answer provided to the first question. Thus, the applicability of Part 7 in the circumstances of that case was not adjudicated upon. The third question was no longer an issue at the hearing.

83. This decision was appealed to the Supreme Court; *Udarás Úchtála -v- M. & Ors* [2020] IESCDET 33. In the appeal proceedings only the answer to the first question was at issue.

Accordingly, no decision was made by the Court in relation to the second question. O'Donnell J. delivered judgment on the 19th October 2020 and he did briefly make reference to Part 7. At p. 60 of the judgment, he stated;

> 'I am not convinced that Part 7 of the Act provides a ready path to absolution and that, if embarked upon, some further difficulties would not be encountered. Furthermore, if Part 7 was available in this case, it appears that it may open up the very possibility with which the Authority is correctly concerned: that is, that non-compliant inter country adoptions would nevertheless be capable of giving rise to domestic adoptions and thus circumventing the requirements of the Convention itself.'

84. While these comments are *obiter*, they do sound a warning concerning the obligation to adhere to the Convention. However, the context in which the question of the applicability of Part 7 was raised in that case can be distinguished from the facts with which this Court is concerned. In the abovementioned case, two Mexican *adoption orders* were at issue. The children had been the subject of adoption orders in Mexico which were not Hague Convention compliant. In these four cases adoption orders have never been made in any jurisdiction in relation to the children. While ultimately seeking to adopt the children the prospective adoptive parents only obtained *guardianship orders* in India. As the children were not adopted in India these applications do not involve "*non-compliant inter country adoptions"* as referred to by the Supreme Court. These cases cannot be resolved by way of an application under section 92 of the Acts, which provision entitles the High Court, *inter alia*, to direct the Authority to procure the making of an entry in the Register of Intercountry Adoptions with respect to an adoption. Instead, these cases involve an attempt to adopt children domestically now, in circumstances where guardianship orders have been obtained in both jurisdictions. The Indian guardianship orders specifically envisaged the children being subsequently adopted in Ireland. The children are habitually resident in this jurisdiction and there is nothing in Part 7 to preclude it from being utilized in relation to them if their parents have failed in their duty toward them. The evidence proves abandonment – in relation to each of the four children who ended up parentless over a decade ago in an Indian orphanage.

85. While there existed an intention to adopt from the outset by the prospective adoptive parents in each case the Indian Authority did place the children with the prospective adoptive families without Article 17 pre-placement approval. The prospective adoptive parents did not set out to circumvent the requirements of the Convention. Proceeding to deal with the four applications by way of Part 7 would not be at odds with the general principles of the Convention, having regard to the length of time that these children have resided with their prospective adoptive parents without having their situation legally regulated. The principle of ensuring the prevention of abduction, sale and trafficking of children has not been ignored in the circumstances of these cases, particularly given the level of involvement of the prospective adopters with both the Authority and the Indian RIPA prior to the children's placement with them. Ultimately, a primary objective of the Convention is to ensure that adoptions take place in the best interests of the child, with

respect for his or her fundamental rights. Bringing certainty to the legal situation for each child at this time is not contrary to that objective.

86. In the decision of Abbott J. in *MO'C and B'OC v Údarás Uchtála na hÉireann*, the approach adopted by the Court recognized that some flexibility could be allowed by the court in situations where technical problems arise within the ambit of the Convention, but only if the adoption sought to be recognised fulfilled the broad objectives and fundamental principles of the Convention. In that case, neither a valid Article 23 certificate existed nor did the Authority give pre-placement Article 17 approval – yet the Court directed the registration of the Mexican adoptions relying on the Declarations and broad compliance with the Convention.

87. On the other hand, such flexibility did not arise in the case of *J.M. v. Adoption Authority of Ireland* [2017] IEHC 320, where the Court declined to register an intercountry adoption. Reynolds J. contrasted the facts of the case before her with those existing in the *M.O'C* case as the applicants had no prior engagement with the Authority and no declaration of eligibility and suitability had been obtained by them.

88. Looking at these four applications, while no adoption order was obtained in India and this is not a case where the registration of an intercountry adoption is sought, the prospective adoptive parents did all hold declarations of eligibility and suitability under the 1991 Act prior to placement. While neither an Article 23 certificate or Article 17 pre-placement approval was obtained the broad requirements of the Convention were complied with – having regard to the documentation provided in the Article 16 report by the Indian RIPA, the prospective adoptive parents' engagement with the Authority and their declarations of eligibility and suitability. The circumstances of these four cases do merit a degree of flexibility being applied to them, similar to that which was applied by the Court in *M.O'C.* The problematic issues that arose in *J.M*. cannot be said to have occurred here.

In the matter of JB & KB (a minor) [2018] IESC 30

89. In relation to taking a flexible approach, it is necessary to consider the Supreme Court judgment in *In the matter of JB & KB (a minor)* [2018] IESC 30.

90. The concerned the registration of an intercountry adoption and concerned a married couple who attempted to adopt two children, a niece and nephew of the wife, from their birth country, Country A. The wife was from Country A and Country A was a contracting party to the Convention. At time of the Supreme Court case, the children had been living with the applicants in Ireland for over 6 years.

91. The husband had initially contacted the Authority – who informed him that they would need to be assessed by a local HSE adoption assessment body for eligibility and suitability as a first step. The HSE "*advised the applicants that they should either adopt the children in Country A and then bring them to Ireland, or alternatively, bring the children to Ireland and then apply to have them adopted here*". This advice ran contrary to the Adoption Act and Convention which actually required them to apply to the Authority in Ireland as the first step. Acting on this advice, however, the applicants went to Country A, but did not

establish contact with its Central Authority. Instead they went to the Social Protection Authority in the wife's native province, who asked the husband to get an assessment of eligibility and suitability from Ireland. As the CFA had previously refused to do this assessment, the wife instead adopted the children on her own in Country A.

92. Many procedures were therefore not followed. The couple should have been assessed in Ireland and the children should have been assessed in Country A. An Article 17 placement approval notice should have been sought and issued by the Authority and then once satisfied all the procedures, assessments and consents had been completed, the Country A Central Authority could and should have issued an Article 23 certificate. None of these steps were complied with and when the applicants came to Ireland with the children they applied jointly for a domestic adoption in Ireland. The Authority stated a case to the High Court in relation to the circumstances of this case and the High Court's decision was subsequently appealed to the Supreme Court.

93. In the Supreme Court, MacMenamin J. delivered the majority judgment. He noted that the fundamental Convention requirements were not satisfied in this case, none of the preliminary steps were complied with and the Central Authorities in the two countries played no role in the proceedings prior to the adoption. On the other hand, the Court had regard to the fact that the children had been with the applicants for many years, this was an intra-family adoption and there was no reason to believe that the adoption would not have been registered if it had been processed in accordance with the Acts. The applicants and the Attorney General submitted that, due to the children's present habitual residence, they were now eligible for a domestic adoption. The Supreme Court did not accept this. It held that the Authority was duty bound to deal with this situation as being a non-compliant inter-country adoption and to ask the Authority to apply some flexibility would be to ask it to ignore the basis of the Convention and proceed *ultra vires*, at p. 84:

> 'While a court may legitimately adopt a flexible approach in a remedial statute, such as this, even a court may only do so within the scope of the Act, as set out in the long title. As a creature of statute, the Authority must operate within the terms of the Act of 2010. To allow an 'inter-country adoption' to be re-characterised as a 'domestic adoption' simply by dint of establishing habitual residence in this country, would be to defeat the intent of the Oireachtas, and the clear terms of the Convention. It was precisely that type of 'mischief' or wrongdoing, which the Act and the Convention were designed to prevent.'

94. The Court proposed that as a preliminary step, the Authority should correspond with the Central Authority of Country A with a view to identifying whether, within a reasonable set period of time, the necessary procedures by way of healing the defect in the procedure in the case could be complied with.

95. If not, the Court found that the alternative approach was within s. 90 and s. 92 of the Acts. Section 90 of the Acts sets out that once the Authority is satisfied of compliance with the Convention, it shall enter particulars of the adoption in the Register. S. 90(8) of the Acts says that if the High Court so directs, an entry shall be made in the Register

concerning a specified intercountry adoption effected outside the State. S. 92 of the Acts allows an application to be made to the High Court and if the High Court is satisfied that an entry with respect to an adoption in the Register should be made, it may direct the Authority to procure the making of a specified entry (s. 92(1)(a) of the Acts). The Court majority decision thus interpreted s. 92(1) of the Acts as vesting in the High Court a slightly different and broader power from that to be found in section 90. It said, however, that this power should be operated in accordance with the objects of the Acts, as informed by the Explanatory Report referred to in s. 10 of the Acts.

96. The Court then considered whether this allows for an area of residual discretion in an exceptional case. It noted that in Abbott J.'s decision in *MO'C & BO'C*, the High Court appeared to accept the proposition that in very exceptional cases s. 92 may give a somewhat broader jurisdiction than that held by the Authority. The Court noted that Abbott J. concluded that any broader power, exercised by the High Court, might be employed with regard to the Constitution, and without *'invidious discrimination'*. It found, however, that such a broad statement would cast the net far too widely. It held that this section must be interpreted narrowly, and with great care.

97. On the facts of this exceptional case, informed by the provisions of Article 42A of the Constitution, the Supreme Court took 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. The Court held that this would not do violence to the best interests test. It would be consistent with the spirit of the Convention in dealing with exceptional cases such as this one and in accordance with the internal law of the State. While the Court commented that the recognition would be outside the Convention, it said it would accord with the type of situation envisaged in the Explanatory Report, to which this Court should have regard; (see para. 114).

98. The case subsequently returned to the High Court with an application pursuant to section 92 of the Acts. In a judgment delivered on the 10th September 2019, *C.B. & anor -v- The Adoption Authority of Ireland* [2019] IEHC 779, Faherty J. made an Order pursuant to section 92(1)(a) of the Acts directing the Authority to enter the adoptions of JB and KB on the Register. Following a rigorous scrutiny of the facts and a careful examination of the legal position and legislation, Faherty J. was satisfied that she was dealing with, as per the words of the majority view in the Supreme Court, *"a truly exceptional case".*

99. Drawing on the Supreme Court guidance, Faherty J. said she was satisfied that the applicants (who *"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 unintentionally. 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 had 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) The general excusability of the deviation from what was contemplated by the 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.

100. Having considered factors (i) to (xi), the Court stated it was satisfied that the tests had been met. It thus made an order pursuant to s. 92(1)(a) directing the Authority to enter the adoptions of the children on the Register. Faherty J. said that she was satisfied that such an order would not give rise to any public policy concern. As the Convention was not applied, the Court noted that there was a public interest in maintaining the State's commitment to the Convention. However, Faherty J. was satisfied that the order could exist in harmony with both the spirit and letter of the Convention.

101. The Supreme Court and subsequent High Court decisions in In the matter of *JB & KB (a minor),* are worth considering for the purposes of these four applications. In the *JB & KB* case, a 'non-Hague Convention compliant' adoption was directed to be entered into the Register of Intercountry Adoptions as falling within the "*truly exceptional*" test, despite the lack of Article 17 approval and Article 23 certificate. These four applications do not involve an application for such registration as no adoption orders were made in India and s. 92 of the Acts is not available. Yet this court is satisfied that these applications are similarly exceptional and applying Part 7 to them will not fall foul of the spirit and letter of the Convention.

102. There was no Article 17 approval pre-placement but there was engagement between the Central Authorities in advance of placement and the prospective adoptive parents had obtained declarations of eligibility and suitability from the Authority. Attempts to resolve these matters directly between the Central Authorities have taken place, but have not

proved fruitful. The Court accepts that, from a public policy perspective, there is a public interest in regulating the status of the four children which overrides the failure to strictly adhere to the provisions of the Convention.

Statutory preconditions to Part 7

103. There are two statutory preconditions to the operation of Part 7, contained in s. 53. First, s. 53(1)(b) provides that Part 7 only applies where, but for it, the Authority would not have power to make the adoption order. This means that the Authority must not be able to use its statutory powers under any other provisions of the Acts to make an adoption order in the case. The Court is satisfied that there is no other route in the acts which enables the Authority to make an adoption order in these four cases. Recourse to Part 7 is the last and only option. Second, s. 53(1)(c) requires that the Authority must be satisfied that if an order of the High Court were made in favour of the applicants under s. 54(2), it would be proper to make the adoption order. This Court is satisfied that this precondition has been met in respect of these four applications. The Authority considered all the documentation provided to it and convened hearings in relation to each of the four cases. It has made its determination that if the High Court were to grant an order under s. 54(2) it would be proper to make an adoption order in these cases. This is evidenced in the four s. 53 declarations.

104. The Court is satisfied that the Authority was careful and comprehensive in considering whether it would be proper in each case. It considered the best interests of the children. It considered the fact that the present difficulties that have arisen occurred during a period when there was a transition to Convention procedures by Ireland. Notwithstanding that the prospective adoptive parents pursued guardianship orders in respect of the children, they did comply with the procedures of the Indian authorities. Their decisions to obtain guardianship orders seems to have been motivated primarily by the Indian law and practice and their desire not to leave the children in orphanages rather than any other suspect motive. It also worth noting that the actual breach of Convention procedures was the Indian authorities placing of the children with the prospective adoptive parents before the Authority’s Article 17 approval had been obtained. The Court acknowledges that the Authority considered and weighed in the balance the need to ensure respect for Convention procedures, and whether proceeding with a domestic adoption in these four applications would undermine the fundamental and crucial goals of the Convention, namely to combat the sale, trafficking or abduction of children – particularly bearing in mind the absence of the birth parents’ consents in the Indian Authority’s Article 16 report. Ultimately, by granting the s. 53 declarations, the Authority concluded that it was of the view that the granting of an adoption order in respect of each of the four children would be proper, if the Court is satisfied to grant an Order under s. 54(2).

105. The Authority took the view that, on balance, there has been substantial compliance with the Convention in the circumstances of the four cases and there did not appear to be anything to suggest that the applications do not meet Convention standards, notwithstanding the absence of the pre-placement approval of the Authority pursuant to

Article 17. This court is satisfied that the Authority was correct in the conclusions it reached on the evidence.

106. While s. 53(1)(c) requires that the Authority must satisfy itself as to propriety s. 54(3) of the Acts provides that in considering an application under s. 54(2) the High Court shall have regard to the rights of the persons concerned, including the natural and imprescriptible rights of the child, and any other matter which the High Court considers relevant to the application. The Court is obliged to consider the facts of each case and must have regard to the convention in dealing with an application under s. 54(2) and must form its own view on whether it is proper to make the order sought. The considerations are not limited to the "statutory proofs".

Section 54(2A) proofs

107. Pursuant to s. 54(2) of the Acts, this Court may authorize the Authority to make an adoption order of a child in favour of prospective adoptive parents and may dispense with the consent of any person whose consent is necessary to the making of the adoption order, once it is satisfied that the proofs set out in s. 54(2A) are met.

108. MacGrath J. in *CFA and H.R. and F.R. v. The Adoption Authority of Ireland and P.W. and S.W.* [2018] IEHC 515 (hereafter '*H.R.*'), provides a thorough analysis of the contemporary test set by section 54(2A), in light of the commencement of the Adoption (Amendment) Act 2017, which gave effect to Article 42A of the Constitution.

109. The facts in *H.R*. concerned a child who had been in the care of foster parents since 13 days old. The birth parents in this case were married and their other child had died in their care. The circumstances surrounding his death (likely non-accidental injury) led to emergency, interim and full Care Orders being granted regarding their other child, C.W. A full Care Order was made in respect of C.W. in July 2001. Considering the implications of the full Care Order, MacGrath J accepted that the existence of the order was by no means decisive of the matter at hand and that the s. 54(2A) factors had to be satisfied on the basis of all the circumstances. The Care Order, nonetheless, was held to constitute an important part of those overall circumstances.

110. The first three prongs of s.54(2A) can be analysed together, although as a matter of law they are distinct legal requirements or stringent proofs, all of which must be satisfied (See *Northern Area Health Board, W.H. and P.H. v. An Bord Uchtála* [2002] 4 I.R. 252, *Re the Adoption (No. 2)* Bill 1987 [1989] I.R. 656):-

'(a) for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53(1) relates, have failed in their duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected,

(b) there is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare,

(c) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child…'

111. MacGrath J. favoured an objective approach which looked to the reality of the child's living circumstances rather than to the nature of and/or reasons for failure on the part of the parents. He commented at para. 111

> 'In reality, however, and objectively, the birth parents have had no involvement in C.W.'s upbringing for the last three years.'

112. In finding that requirement (b) was satisfied, he commented at para. 114:

> 'While it may very well be that the birth parents could or would be able to care for C.W., given the expressed wishes of the child and his stated opposition to contact with them, in my view it would be inimical to his welfare and would cause him great distress to have such care arrangements effectively foisted upon him.'

113. In considering the abandonment criterion in (c), MacGrath J. considered all the circumstances including the fact that a Care Order had been in place for 16 years and that there had been an application to vary that order some 5 years before, but that the application had been withdrawn. He ultimately concluded, at para. 116:

> 'The fact and reality of the situation is that, at a minimum and objectively there has been acquiescence by the birth parents in relation to crucial decisions regarding C.W.'s education, health and upbringing and in the carrying into effect of those decisions for in excess of 36 months. I am satisfied that this amounts in a real and objective sense to abandonment of their rights as parents.'

114. The Court reiterated that the concept of abandonment within the meaning of the Adoption Acts centers not on the intention of the birth parents but must be objectively assessed in the strict legal sense, as determined by Denham C.J. in *Southern Health Board v An Bord Uchtála* [2002] 1 I.R. 165.

115. Section 54(2D)(d) requires that *"by reason of the failure, the State, as guardian of the common good, should supply the place of the parents*."

116. Requirement (e) is straightforward:

(e) the child—

> *(i) at the time of the making of the application, is in the custody of and has a home with the applicants, and*
>
> *(ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants…*

117. Finally, requirement (f) provides that "*the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents*." In *H.R.*, MacGrath J. emphasized that the proportionality analysis effectively requires the court to consider what less serious, alternative measures might be available to protect the interests of the child. He commented, at para. 123, that:-

> 'I accept the submission of the Adoption Authority that proportionality, and a consideration of what may be proportionate must relate to the facts and circumstances of each individual case. What may be proportionate in the case of an eight year old may not be proportionate in the case of a seventeen year old. The concept of proportionality in most cases is likely to require the ascertainment and assessment of the available options.'

118. In these four applications the children have each been in the care of the prospective adoptive parents for nine years or so. Their natural parents have thus failed to care for them for well over the thirty month period as set out in subsection 2A(a) and the prospective adoptive parents have had care and custody of the children for a continuous period of not less than 18 months prior to the making of the applications as required by subsection 2A(e).

119. It appears from the Article 16 report provided by the RIPA that the children came to reside at the orphanage in India, having been either abandoned to the orphanage directly, or having been abandoned at a railway track and given to the RIPA by the Child Line of Bhubaneswar. In 2009, each of the children were released for adoption by Order of the District Child Welfare Committee, Khurda, which certified that the children were legally free for adoption. Given that the children in question have not been cared for by their natural parents since prior to this time in 2009, it is clear that there is no reasonable prospect that the birth parents, if ever located, would be able to care for the children in a manner which would not prejudicially affect their safety or welfare. This is particularly so having regard to the fact that for the majority of each of the children's lives, their prospective adoptive parents have been their primary carers. The children are settled in Ireland. They are well-adjusted and happy in their lives with their prospective adoptive parents - who are the only caregivers that they have known for most of their lives. The natural parents have not been involved in any crucial decisions concerning the welfare of the children and it does not appear that any steps were taken by them to have the children returned to their care between the abandonment of the children in or around 2009 and when the prospective adoptive parents were granted guardianship in India in 2011.

120. The natural parents' failure in their duty towards the respective children constitutes abandonment, within the legal meaning of the term "*abandonment*". By reason of this failure, the State should supply the place of the parents and it is the view of this Court that adoption is the proportionate means by which to supply the place of the parents in these cases. All the prospective parents have already obtained guardianship orders, both in India and Ireland, in respect of the children. Guardianship, however ceases at age

eighteen and does not create the type of parental-child relationship that lasts beyond eighteen.

121. Applying the above principles set out in *H.R*. to the facts of these cases, the test in s. 54(2A) is met.

122. In reality, the natural parents have had no involvement in the children's upbringing since they were received into the care of the RIPA and there is no realistic prospect that the natural parents would be able to care for the children until they reach 18, bearing in mind the role of the prospective adoptive parents in the children's lives.

Section 54(3) and Article 42A: Best Interests and the Views of the Child

123. Section 54(3) of the Acts provides:

> *(3) In considering an application for an order under subsection (2), the High Court shall—*
>
> *(a) have regard to the following:*
>
> *(i) the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child);*
>
> *(ii) any other matter which the High Court considers relevant to the application,*
>
> *and*
>
> *(b) in so far as is practicable, in a case where the child concerned is capable of forming his or her own views, give due weight to the views of that child, having regard to the age and maturity of the child,*
>
> *and, in the resolution of any such application, the best interests of the child shall be the paramount consideration.*

124. In *H.R*., MacGrath J. noted, at para. 101 of the Court's judgment, that all the proofs in section 54(2A) must be met, but the best interests of the child remain the paramount consideration:

> 'I am satisfied, nevertheless, that in the Court's approach to the determination of an application under s. 54(2) the legislative amendments as constitutionally mandated now place at the heart of the resolution of the application, the best interests of the child as being the paramount consideration. Paramount, in this regard, means the overriding and not the sole consideration. This does not mean, however, that there is any easing in the requirements for satisfactory proof of each and all of the matters set out in s. 54(2). Rather in approaching the consideration of the application under subsection 2, and in the assessment of whether the criteria have been fulfilled, there is an obligation on the court to place at centre stage the

best interests of the child, not as an additional matter of proof but as an overriding or overarching requirement.'

125. In the application of s. 54 therefore the best interests of the child are the paramount consideration. But they are not the only consideration and the best interests principle does not mean any easing in the stringency of the proofs. While it is relevant to the interpretation of some of those proofs, for example, proportionality, it does not per se make them any easier to satisfy.

126. Recent judgments of the Superior Courts have also provided clarity in respect of the effect of Article 42A and the legal status of the best interests principle. In *In the matter of JB (A minor)* [2018] IESC 30, O'Donnell J. explained, at para. 6, that status as follows:

> 'First, as McKechnie J. observes, the constitutional obligation contained in Art.42A.4.1° has been complied with. It is, explicitly, a requirement to introduce into legislation dealing with proceedings in the specified areas a provision requiring that the interests of the child be considered paramount: that is, superior to other interests that might be engaged. Such a provision is, however, set out in unambiguous terms by s. 19 of the Act of 2010.'

127. Article 42A thus does not add additional force to the best interests principle in the context of the Acts. The Acts already legislate for the best interests principle, generally in s. 19 and specifically in relation to s. 54 applications, within s. 54(3).

128. Assessing the best interests of the child in these proceedings, it is in each of the four children's best interests for an adoption order to be made. First and foremost, the children at this point require and deserve certainty with respect to their legal relationship with their primary carers - all the more so given the prospective adopters' intention to adopt at the outset which has yet not been brought to fruition. Bearing in mind the children's stable lives with the prospective adoptive parents, their expressed wishes, the exceptional care they have received from their prospective adopters and the lack of any meaningful relationship with their respective natural parents, the best interests of the children will clearly be served if the Orders sought are granted.

129. Concerning the views of the child, MacGrath J commented in *H.R*. at para. 97 as follows:

> 'The expressed wishes of the child must be afforded due weight bearing in mind his age and maturity – he is now almost an adult. However, his wishes cannot be determinative of this application as the Court is required both constitutionally and statutorily to take into consideration the rights of others, in particular his birth parents and family, and to attempt to balance those rights, in accordance with the requirements of the Act of 2010.'

130. The children here are all at ages where their views should be considered and afforded due weight. While not at the cusp of adulthood, S.H. and T.S. are both aged eleven and clearly have the maturity to understand the meaning of adoption. Siblings S.S. and S.S.,

at fourteen and fifteen respectively, are well into their teenage years and are capable of knowing and expressing their views. All of the children are expressing a strong desire to be adopted by the applicants for their adoption and due weight must be given to their views and wishes.

The absence of birth certificates

131. It is a concern in each case that there is no original birth certificate available. Instead, a Birth Affidavit has been prepared in respect of each child, sworn by the Secretary of the RIPA. In all the Birth Affidavits it is stated that the child concerned is an orphan, living at the RIPA and that she was made legally free for adoption by the Child Welfare Committee, Khurda. It indicates that the child's birth had not been previously registered, and that there is no other document or record recording the birth. It provides the purported date of birth of the child to the best of the Secretary's knowledge. No original birth certificate is available in relation to any of the children. While the absence of birth certificates is far from ideal, it is not the first time that this issue has arisen in applications before this Court.

132. In the case of *CFA and T.J. and D.J. v Adoption Authority of Ireland* [2018] IEHC 310 (*hereafter 'T.J. and D.J.*'), there was a similar problem in relation to the child's birth certificate. This case also concerned a s. 54(2) application by the CFA, where an Order was sought authorising the Authority to make an adoption order in favour of the child's foster parents and dispensing with the birth mother's consent in relation to the proposed adoption. The child in the case was born in Romania and he came to Ireland with his mother in 2002. They sought asylum in Ireland and were granted refugee status. In the asylum application the birth mother stated that the child's date of birth was the 31st May 2000. In 2003, the child was taken into care due to concerns surrounding possible non-accidental injury to him and developmental delay. He resided with his foster parents from the age of four and was believed to be seventeen at the time of the s. 54 application. Over the years, the mother had given conflicting accounts of the child's date of birth, citing other dates in 2000 to be his date of birth. No birth certificate was available for him, despite efforts made by the CFA to liaise with the relevant Romanian authorities. The uncertainty surrounding the child's date of birth was a particularly significant issue. The case was heard at the end of April 2018 and the child's purported date of birth was the 31st May 2000.

133. Considering the application, Reynolds J. was of the view that the most difficult issue in the case was the lack of evidence surrounding the child's purported date of birth. Having analysed the evidence that was available, the Court was satisfied that the only written record of the child's date of birth was that in the asylum application. It noted that this was the first record of the date of birth given by the mother and the closest record subsequent to his birth; although the mother indicated she was unsure about the date of birth in subsequent years and gave differing accounts. The Court noted that despite the best efforts of the Child and Family Agency, it had not been possible to identify any independent record of the child's birth. It said that the question of whether the child was less than eighteen was a difficult one which must be resolved based on imperfect or

inconclusive evidence. The Court stated that it must consider the totality of the evidence and determine the issue having regard to the balance of probabilities. It thus concluded that whilst the birth mother may have given varying accounts over the years in relation to this matter and indeed other matters, it had to balance this against what it considered to be the more persuasive evidence in relation to the asylum application. On the balance of probabilities, it held that the likely date of birth was the 31st May, 2000. Ultimately, therefore, having considered the statutory test in section 54(2A), the Court granted the Orders sought.

134. In these four applications there is similarly a problem regarding the absence of birth certificates relating to the children. In contrast however, there is no similar significant concern regarding these children as to whether they have reached the age of majority at this time. Their respective current ages – believed to be between eleven and fifteen – are significantly younger than the child in *CFA and T.J. and D.J*. While the absence of birth certificates is not ideal, the children the subject matter of these applications are not so old that the question as to their exact age raises an issue bearing on their eligibility for adoption.

135. In relation to the evidence available to the Court, a Birth Affidavit has been provided by the RIPA relating to each child. It states on its face that its intention is to be used as a birth date certificate for the children and that there is no other record of the children's birth available. There is no reason to doubt the content of these affidavits, which have been prepared by the Indian RIPA in relation to children who were born in India. There is nothing to indicate that the content of each is not an entirely accurate statement of fact and it is clear that the Indian authorities have specifically provided such affidavits in order to address the difficulties arising from the absence of any birth certificates for the four children.

136. The four Birth Affidavits were sworn on the 9th June 2011. It is accepted that this is some time after the purported birth dates of the children, which range between 2005-2009. There is perhaps other corroborating evidence as to the children's dates of birth. Further documentation was provided to the Authority by the RIPA. Both the 'No Objection Certificate', issued between August – October 2010 in each case, references the children's respective date of births, as does the Certificate of ACA Clearance, which is dated the 8th March 2010 in each case. This documentation refers to the children's dates of birth and have the dates as listed in the Birth Affidavits. Likewise, the Release Orders for the Adoption of each child, which all date back to 2009 similarly list the same date for each child's date of birth as that contained in the Birth Affidavits, with the caveat that same is listed as an approximate date. There is however the obvious infirmity in taking too much from the repetition of the dates of birth - since the various authors are probably relying on the same source and repetition does not make the dates any more reliable in terms of accuracy.

137. The ages of the children must therefore be determined based on imperfect evidence. As a matter of probability this court is satisfied that there is adequate evidence to accept as accurate the dates of birth as given for each of the four children.

Conclusion

138. The complex legal situation which has arisen in relation to each of the four children is the result of a combination of factors, including: -

(a) The Convention on the Protection of Children and Co-Operation in respect of intercountry adoption which was signed at The Hague on the 29th May 1993 was given the force of law in Ireland by the Adoption Act 2010 which came into force on the 1st November 2010. The transitional provisions in the 2010 Act and the transition from the old regime to the new – at home and internationally – caused both confusion and problems. Many prospective adoptive parents and children, including the prospective adoptive parents and the four children here, became innocent victims of the uncertainties that resulted from the transition.

(b) In each of these four cases, Guardianship Orders were issued in India with a view to the four children being adopted in Ireland. It appears that the Hindu Adoptions and Maintenance Act, 1956 which was enacted as part of the Hindu Code Bills provided that Hindu children could only be adopted by Hindu people in India. The prospective adoptive parents had been matched with the four children and were endeavouring to have their adoption applications processed in India and Ireland under the old regime. The prospective adoptive parents understandably considered the need to get each child released from the orphanage and back to Ireland a priority and wished to do so with expedition – given natural and correct child welfare concerns. Although they were operating under the old regime it appears that changes to the law were being introduced and that the changes under the Juvenile Justice (Care and Protection of Children) Acts 2000-2006 in India would permit the prospective adoptive parents to adopt the four children who are from a Hindu background although the prospective adoptive parents are not. As the new law had not come into force at the time the prospective adoptive parents commenced the process and there was a transition in being they proceeded and obtained Orders appointing them as guardians under the Guardians and Wards Act, 1890. Each of the Court Orders provided that the appointments of the prospective adoptive parents as guardians was to allow the child in question to be taken out of India to be adopted in Ireland. Although it appears that it would have been possible for the prospective adoptive parents to withdraw their applications concerning guardianship and to proceed under the new law once it came into force this would have involved a considerable delay which the prospective adoptive parents correctly decided was not in the best interests of the children as they would each remain in the orphanage whilst the court process was ongoing in India. It appears that the delays which a fresh application under the newly commenced law would entail would have been considerable – estimated as being within six months to eighteen months. The picture appears further complicated in that it is stated in

the affidavits and exhibits before the court that under Indian law it is not possible to retrospectively apply for an adoption order once guardianship has been granted. The Court is conscious of the fact that it is without an expert opinion on Indian law and the actual position under Indian law, past and present, has not in fact been established to the satisfaction of the court. Having said that, the Court does accept that the prospective adoptive parents understood the position in Indian law to be as set out above.

(c) Some criticism has been levelled at the Indian authorities and concerning the lack of engagement by it with the Authority in relation to queries raised concerning the four children and the paperwork provided. This Court is not satisfied that such criticism is justified. In each of the four cases this Court is impressed at the quality and comprehensive nature of the paperwork which was provided to the Adoption Authority when the Article 17 Certificate was requested on the 9th June 2011 by letter from the Secretary of the RIPA. In case bearing record number 2020 No. 75 M, the Irish solicitors acting for the prospective adoptive parent faxed a comprehensive letter on the 10th June 2011 to the Authority which set out in clear and comprehensive terms the intention of the prospective adoptive parents to apply to be appointed as guardians under the Guardians and Wards Act 1890 of S.P. with the intention of applying to adopt the child on their return to Ireland with the child. In a handwritten letter to the Adoption Authority dated the 15th July 2011, the prospective adoptive parents again explained their intention to proceed under guardianship and the reason for doing so – in clear terms. In case bearing record number 2020 No. 76 M, the Irish solicitors for the prospective adoptive parents in a letter to the Authority dated the 18th July 2011 spelt out their intention to apply to be appointed legal guardians of baby S at a court hearing in India on the 25th July 2011 and with a view to adoption in Ireland. It is also clear from the documentation exhibited that the prospective adoptive parents of the "*siblings*" – cases bearing record number 2020 No. 77 M and record number 2020 No. 78 M – were in touch with the Adoption Authority in April and June of 2011 and did outline their situation in relation to the guardianship application in respect of the two children which they had pending in the court in Bhubaneswar, Orissa, India at that time. It is clear from the history recited in their letter to the Authority dated 10th January 2012 that there was no ambiguity at the relevant time in relation to their applications for guardianship and their intention to bring the children to Ireland with the benefit of guardianship orders and apply to adopt them in Ireland. In these circumstances it is difficult to understand why the Adoption Authority was corresponding with the RIPA in June of 2011, after being appraised of the situation, seeking to clarify whether the applicants intended to complete an adoption in India under the Juvenile Justice Act, 2000 or whether they were seeking guardianship in India with the intention of effecting an adoption in Ireland. Although this information had already been provided by the prospective adoptive parents or their solicitors (or both) to the Adoption Authority it was asking for it again and indicating that it would defer a decision on the issuing of an Article 17 pending a response. The position of the authority was apparently that "*the Board of the AAI*

will not issue an Article 17 until it is clear what it will be used for" (email of Mr. Treacy of the Adoption Authority dated the 31st July 2011 to one of the prospective adoptive parents - Record number 2020 No. 77 M). But it had been told of the actual state of play concerning the Guardianship applications.

139. In truth, there was a new authority in Ireland dealing with new legislation and transitional provisions - and transition was also taking place in India. The prospective adoptive parents who had pre-Hague declarations of eligibility and suitability were attempting to navigate through uncharted seas – as were those in authority.

140. In each of the affidavits filed in respect of each of these applications Mr. Mark Kirwan who is the Manager of the Domestic Adoption Unit of the Adoption Authority avers that : -

> *'… on balance the Authority is of the view that there has been substantial compliance with The Hague Convention in the circumstances of the within case, and the documentation exhibited to the Article 17 request above indicates that many of the cardinal rules of The Convention have been satisfied. The formal Article 17 Certificate, which is a prerequisite to the granting of an Article 23 Certificate by the Indian authorities is absent however, and there are certain proofs that cannot be procured, yet there exists a Guardianship Order from India, along with a Release Order for Adoption, Certificate of ACA clearance, irrevocable consent of eligibility for adoption and a No-objection Certificate. Thus, there does not appear to be anything to suggest that this application does not meet Hague Convention standards and it is broadly compliant with the principles therein.'*

141. One cannot help observing that the position as deposed to above by Mr. Kirwan is the position which existed in June 2011 – over nine years ago. In this regard, the Court feels it necessary to remind the stake holders – and in particular the Adoption Authority of Ireland – of the provision in Article 35 of the Convention which states that: -

> *'The competent authorities of the contracting states shall act expeditiously in the process of adoption.'*

142. This Court has not been persuaded that the RIPA or the Central Adoption and Resource Authority ('CARA' - the Central Authority of India under The Hague Convention) or the applicants are to blame for the delayed decisions on the requests for the Article 17 Certificates. The evidence before the Court indicates that the Adoption Authority did in essence have the information from reliable sources in 2011 which it was requesting that the Indian authorities again provide.

143. In relation to the years intervening between 2011 and 2020 it need hardly be pointed out that causing or allowing a delay of this nature is not acting expeditiously – if that is not an understatement. In applications of this nature time and expedition should be measured in weeks and months – and not in years.

144. In conclusion, the Court is satisfied:-

(1) That each of the applicants are suitable to be adoptive parents.

(2) That there was no intentional circumvention of The Hague Convention and the 2010 Act.

(3) That these applications come before this Court because of confusion and uncertainty surrounding the transitional provisions resulting from the bringing into force of The Hague Convention in Ireland and the commencement of the Adoption Act 2010 – and by reason of the actual transition from the old to the new.

(4) Each of the applicants are and dedicated and loving parents to each of the four children.

(5) The spirit of The Hague Convention was broadly adhered to and would probably have been complied with in full were it not for understandable problems associated with the transition from the old to the new – and the difficulties which this transition caused for prospective adoptive parents and for national authorities dealing with inter country adoption situations.

(6) Each of the four children have an excellent relationship with the prospective adoptive parents and are thriving in loving families – the only families that each of them knows.

(7) Each of the children do wish to be adopted by the prospective adoptive parents and it is in their best interests that the adoptions be allowed to proceed.

145. Nothing is really known of the biological parents of the four children, or their whereabouts, if still living, and this Court is satisfied to proceed having regard to the provisions in s.55 of the 2010 Act.

146. As detailed above, the statutory proofs in s.54(2A) are satisfied by the evidence in the case and this Court has considered the other matters detailed above which it is obliged to consider under s.54(3) of the 2010 Act.

147. Accordingly, the Court does grant the orders as sought in each of the applications.