AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2019:000226

O'Donnell J.

MacMenamin J.

Dunne J.

Charleton J.

Baker J.

IN THE MATTER OF SECTION 49 OF THE ADOPTION ACT 2010

AND IN THE MATTER OF K (A MINOR) AND F (A MINOR)

AND IN THE MATTER OF A CASE STATED BY ÚDARÁS UCHTÁLA NA hÉIREANN

AND

PP, YY, AND K (A MINOR)

XM, ZW, AND F (A MINOR)

THE ATTORNEY GENERAL

AND

THE CHILD AND FAMILY AGENCY

Notice Parties

Judgment of Mr. Justice Donal O'Donnell delivered on the 19th day of October, 2020.

1. This case concerns difficulties which have arisen in respect of two intercountry adoptions. Such adoptions are now regulated by the Adoption Act 2010 ('the 2010 Act"): commenced on the 1st of November, 2010, which gave effect in Irish law to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the Hague Convention"). The commencement date of the 2010 Act, which is also the date of repeal of the Adoption Act 1991 ("the 1991 Act"), is central to these proceedings. Both the children involved in these proceedings, the third named applicant, K., and the sixth named applicant, F., were born in Mexico after that date.

2. The commencement of the 2010 Act in November, 2010, altered the Irish system for the recognition of intercountry adoptions and gives rise, moreover, to the difficult legal issue at the heart of this case. Under the 1991 Act a couple could, after assessment, obtain a declaration of eligibility and suitability ("DES"), travel abroad to pursue a private placement adoption, and, on return to Ireland, seek to have the adoption registered in the Register of Foreign Adoptions. The Hague Convention created a much more structured approach. It required each signatory state to have a central authority; adopting a child from a signatory state requires the co-operation of both the central authority in the child's state of origin and that in the state to which the child is being relocated.

3. Article 17 of the Hague Convention provides for the process to be followed in respect of intercountry adoption. Article 23 of the Hague Convention provides for the issuing of a certificate by the central authority of the state where the adoption is made. These cases concern adoption processes commenced under the regime created by the 1991 Act, but which had not been completed prior to the coming into force of the 2010 Act. In each case, the local adoption effected may have been sufficient under the 1991 Act but did not comply with the requirements of the Hague Convention and, therefore, the 2010 Act. In

particular, in each case the prospective adopting couple did not have an Article 23 certificate from the designated central authority. No one suggests that anyone involved in these proceedings – the adoptive parents, Údarás Uchtála na hÉireann ("the Authority"), or the Mexican authorities – have acted improperly or have failed to perform their functions. It is apparent that each of the parties involved had acted conscientiously, having regard to their differing perspectives, and each is conscious of the best interests of the individual children involved. Nevertheless, the fact is that – almost ten years after both children were born, adopted, and brought back to Ireland – they remain in a form of legal limbo and where, as it was put in the legal submissions made on their behalf, they are unrelated by the law of their habitual residence to their *de facto* parents with whom they live and unrelated by the law of the land of their birth to the people whom Irish law, it is said, maintains are their parents.

Facts

The Third Named Applicant: Baby K.

4. The first and second named applicants, P.P. and Y.Y., applied for an assessment of eligibility and suitability for adoption in 2006. An assessment, dated the 24th of November, 2009, was carried out recommending that the couple be approved to adopt a child of either gender, as young as possible, up to the age of 15 months and, in the first appendix, acknowledged Mexico as the country of choice. Mexico was an approved jurisdiction for the purposes of adoption abroad and the procedures complied with the 1991 Act.

5. A DES was granted to the couple by An Bord Uchtála (the body to which the Authority is the successor) on the 24th of February, 2010, and a further declaration was issued dated the 8th of February, 2011. Six explanatory letters to the couple from the Authority and the

Foreign Adoption Unit of the Irish Naturalisation and Immigration Service ("INIS") followed.

6. The couple travelled to Mexico in November, 2010, met Baby K. and, with the consent of the birth mother, have cared for Baby K. since the 22nd of November, 2010, and ultimately adopted Baby K. on the 10th of May, 2011, with an adoption order made by the Family and Civil Court of First Instance in the United Mexican States. The Mexican court ruled that it would integrate the Article 23 certificate into the Deed of Adoption. The Mexican authorities subsequently advised the Authority in Ireland that the court was not a central authority for the purposes of the Hague Convention and could not issue the Article 23 certificate.

7. The High Court judge, Jordan J., accepted the couple's assertions that they believed in good faith that they had complied with all necessary requirements of the Hague Convention. Towards the end of May, 2011, the couple received the adoption decree and Baby K.'s birth certificate was issued. A passport was issued to Baby K. by the Mexican authorities on the 29th of May, 2011. On the 1st of January, 2011, and the 17th of February, 2011, the Foreign Adoption Unit of the INIS, by letter and on the Authority's instruction, gave immigration clearance for Baby K. to travel to and enter Ireland. The couple and Baby K. arrived in Ireland on the 2nd of June, 2011, and sought thereafter to have the adoption entered in the Register.

8. The couple acknowledged that, prior to travelling to Mexico, they were aware that the law was changing and they sought clarification from the Authority in this regard. In a letter issued by the Authority on the 9th of February, 2011, it stated that "the bearer(s) (of the declaration) are entitled to seek an entry in the [*Register of Foreign Adoption*] … upon their return to Ireland" and that "a foreign adoption … is deemed to be effected by a valid Adoption Order if … (1) as having been effected in accordance with The Hague

Convention on Inter-Country Adoption (1993) or (2) the adoption must be a recognised 'foreign adoption' as defined in Section 1 of the [*1991 Act*] … and (3) is not contrary to public policy".

9. There were 19 so-called "Mexican adoptions" which encountered difficulty due to the commencement of the 2010 Act. 15 such cases were resolved as a result of *O'C. & Anor. v. Údarás Uchtála na hÉireann* [2014] IEHC 580 ("*O'C.*"). That decision was not appealed by the Authority and the adoption in that case and 14 other adoptions were duly registered. However, the Authority considered that, since Baby K. was not born by the time of the 2010 Act's commencement, vested rights could not have accrued under the 1991 Act.

10. While the Authority has maintained the position that it cannot register the adoptions in the Register of Intercountry Adoptions, it has recognised the reality that the interests of the children concerned lie in remaining in Ireland and in a stable legal structure which is consistent with the reality of their lives. The Authority suggested that the children could be adopted in Ireland by a domestic adoption order pursuant to the provisions of Part 7 of the 2010 Act. However, difficulties in regularising the childrens' position arose where the Child and Family Agency insisted on confirmation that the child was eligible for adoption before carrying out an assessment under s. 37 of the 2010 Act. At the commencement of the High Court hearing, the Child and Family Agency indicated that it was no longer maintaining such a position.

11. One feature of the case which vividly illustrates both the legal issue involved and its dramatic effect on individual cases is that Baby K. has a birth sibling in Ireland with whom they have contact. That sibling was born before the 1st of November, 2010, but was not adopted in Mexico until some months after Baby K.'s adoption. Consistent with its approach to the law, the Authority entered Baby K.'s sibling's Mexican adoption on

the Register, while refusing to register Baby K's. The line drawn by the law – as interpreted by the Authority – runs to divide birth siblings, both of whom were adopted after the coming into force of the 2010 Act pursuant to adoption procedures commenced prior to that date.

The Sixth named Applicant: Baby F.

12. By a letter dated the 20th of February, 2007, the couple applied for an assessment of eligibility and suitability for adoption. The assessment was carried out by the regional Child and Family Centre, and recommended that they be approved to adopt one child of either sex, with the first appendix noting Mexico as the country of choice. The first DES, dated the 26th of May, 2009, was issued to the couple under cover of an undated letter.

13. The couple used the services of Adoption Alliance in Colorado, United States of America, and were ultimately matched around January, 2011, and applied to renew their DES. The renewed declaration is dated the 25th of January, 2011: when the couple arrived in Mexico they gave their original documentation to their Mexican lawyer.

14. Ultimately, the couple adopted Baby F., who was also not born by the time of the commencement of the 2010 Act, on the 17th of May, 2011, with the adoption order made by the relevant Family and Civil Court of First Instance in the United Mexican States. The court order recited that the couple "complied with the requirements ratified by the government of the United States of Mexico in [*the Hague Convention*]". In May, 2011, upon learning from another Irish adoptive couple that a certificate would be required upon their return to Ireland, the couple requested one from their Mexican lawyer and received what they believed was the certificate dated the 2nd of June, 2011. Jordan J. accepted, at para. 29 of his judgment, that the intention of the document was to provide

the Article 23 certificate and the couple believed they had complied with all requirements of The Hague Convention.

15. The couple returned to Ireland on the 6th of July, 2011, and applied to have Baby F.'s adoption entered in the Register of Foreign Adoptions on the 27th of August, 2011, enclosing the purported Article 23 certificate. The Authority considered it could not enter the adoption on the register and, after an exchange of correspondence, the case stated was issued by the Authority.

The High Court Judgment

16. The present case came before the High Court by way of case stated issued by the Authority. Each couple is unable to prove compliance with the Hague Convention to the satisfaction of the Authority, and is thus unable to have the Mexican adoptions recognised in Ireland. They do not have the Article 23 certificate required by The Hague Convention to allow inter-country adoption to be recognised by operation of law in Ireland and other contracting states.

17. The children in question are now approximately 9 years old. Jordan J. accepted that they are and have been happy, thriving, and settled in their family units.

18. Both cases present the difficulty of the absence of a valid Article 23 certificate and confusion as to the identity of the competent central authority in Mexico. It appeared to Jordan J. that the actual identity of the Mexican Central Authority for Adoptions is the Secretary for Exterior Relations ("*S.R.E.*"). The *S.R.E.* implements the Hague Convention through the National System for the Full Development of the Family ("*D.I.F.*").

19. On the 12th of June, 2012, the Mexican Embassy in Dublin issued a third party note to the Authority confirming that the National Central Authority does not now have the power to

issue an Article 23 certificate in respect of the 19 adoptions given the "irregularities". The issuance of such a notice is an unusual step and was the subject of some comment by counsel for the applicants. It should be noted that the note is in general terms and was not directed to any individual case. It was considered in the judgments in both *O'C.* and the present case. It is desirable to set it out in full:-

> "[*T*]he Embassy of Mexico presents its compliments to the Adoption Authority of Ireland and has the honour to refer to the 19 cases of Mexican children adopted by Irish couples who have not been issued the certificate referred to in Article 23 of The Hague Convention for the Protection of Children and Co-Operation in respect of inter-country adoptions. The Mexican authorities have sent this Embassy the following:
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> (1) The procedures established by The Hague Convention for the Protection of Children and Co-Operation in respect of inter-country adoptions, valid for both countries is the instrument which determines that an adoption has been arranged in a regular or irregular manner, and not what either the Mexican or Irish authorities decide.
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> (2) The Mexican authorities and in particular the Central Authority in Mexico does not have the powers under the Convention, to regularise migration matters in the adoptive country of minors, to redress the existing inconsistencies in the adoption proceedings made in infringement of the provisions set in the Convention, but is impeded to issue the certificate referred to in Article 23 of the International Instrument.
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> The above is regardless of the results of investigations carried out by the Attorney General's office and the responsibilities which may result from such irregularities.

(3) If the Irish authorities wish to assist to regularise the situation it is their prerogative and it should be in accordance with their legislation. However, it would be deemed as strange if they were to seek to proceed with the regularisation of migration of cases that are clearly in violation of the rules and procedures contracted bilaterally. It would also be a concern, as it could be construed as encouragement to violate Mexican procedures and then to have the validated by Irish authorities. The Hague Convention contains no provision to make up or improve the processes of adoption made outside its jurisdiction in fact it presupposes that those procedures are only valid in the Convention's. However, the adopters could, under their own volition, attempt to get judgments to remedy the mistakes which occurred in the previous procedure and argue the case in the best interests of the child. This might perhaps mean that the adoptions referred to the Mexican authorities would be nullified and that they would have to restart the process through the mechanism of The Hague. In this vein, the Mexican authorities should not be obliged to provide the elements that enable the adopters to nullify such decisions, but only to maintain official contact with the Irish authorities for purposes of The Hague Convention, as set out in Article no. 4.

(4) The above comments are made independently of the conclusions that the Attorney General's Office or any other authority could reach, on cases in analysis and adinistrative responsibilities that may distance themselves as a result thereof.

(5) The wellbeing of the child must prevail over the multiple considerations. Under the circumstances and given the social acclimitisation and familiarity of the children, it is not advisable to remove the children and return them to Mexico but to keep them in Ireland. The children are the victims here of procedural errors

which occurred, therefore if the granting of Irish citizenship is to occur this will be determined by the Irish authorities, experts in Irish legislation.

The Embassy of Mexico avails itself of this opportunity to renew the Adoption Authority of Ireland the assurances of its highest considerations.

Dublin, 12th of June 2012"

20. It is, perhaps, noteworthy that the note does not purport to distinguish between any of the cases on the basis of the date of birth of the children in question.

The Vested Rights Argument

21. Jordan J. considered ss. 27(1)(c) and 27(2) of the Interpretation Act 2005 ("the Interpretation Act" *or* "the 2005 Act"), which together provide that the repeal of an Act does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment and that legal proceedings in respect of such can be continued, and reviewed the applicable case law.

22. Having considered the case law and relevant statutory provisions, Jordan J. concluded, at para. 86 of his judgment, that a DES vests clear rights in the bearers of that declaration as a formal official document issued pursuant to statute that has clear, important, and valuable consequences for the bearers. At para. 87, he held that such vested rights cannot be taken away by the 2010 Act without clear words, which are noticeably absent. Jordan J. also held that there is nothing in the 2010 Act to rebut the presumption against an intention to remove these vested rights.

23. Jordan J. held, at para. 88, that the declarations in question were, in effect, licences to allow the bearers at the time of issue to travel abroad to adopt a child abroad and then return to Ireland with the child and apply to have the foreign adoption entered into the

Register of Intercountry Adoptions. Accordingly, the date of birth of the child adopted in Mexico could not have an impact upon these vested rights.

24. While Jordan J. acknowledged that the transition from the old to the new system created confusion and uncertainty, that could not deprive the two couples of the rights vested in them when they received the declarations. He did not doubt that both couples relied fully on the declarations and took real steps to avail of the right, privilege, or licence which the declarations vested in them by proceeding with their plans to adopt in Mexico, as he noted at para. 90.

25. In *O'C.*, Abbott J. had referred to eight separate rights which he said had arisen as a result of the applicants seeking to adopt under the 1991 Act. Jordan J., in this present case, considered at para. 91 that what Abbott J. identified as "rights" were actually illustrations of the existence of the right conferred by the declarations.

26. At para. 92 of the High Court judgment, Jordan J. held that it would be unfair to remove the vested rights from the couples even though the child to whom the declaration related was not born at the time the declaration was issued or at the time the applicable law concerning intercountry adoption was changed. While the Authority submitted that "the Oireachtas cannot have intended that vested rights of the (limited) nature proffered here, would prevail over the requirements of the [*Hague*] Convention", Jordan J. disagreed.

Alternative routes suggested by the Authority and interactions with the Child and Family Agency

27. Solicitors for the Authority had stated, in correspondence to solicitors for the parents, that the Authority was willing to consider applications under Part 7 of the 2010 Act and suggested that they contact the Child and Family Agency to start the relevant process. Jordan J. noted at para. 111(14) that it appeared that the applicants had engaged with the

Child and Family Agency, but that the latter would not be able to commence its assessment until the child's eligibility to be adopted had been confirmed.

The Case Stated

28. After considering the law and the facts, Jordan J. turned to the questions of the case stated:

(i) For the purposes of s. 27(1)(c) of the 2005 Act are "…pre-existing rights to adoption [*which*] survived the Act of 2010" (as *per* para. 34 of the *O'C.* judgment), capable of arising where the minor to be adopted was born after the commencement of the 2010 Act on the 1st of November, 2010?

(ii) In the event that the answer to (i) is "No", is the Authority entitled to proceed under Part 7 of the 2010 Act in respect of the applicants who are notice parties to this case stated, subject to hearing the persons in s. 53(1)(a) of the Act and the other requirements in Part 7 being fulfilled?

(iii) Is the Child and Family Agency entitled to insist on confirmation that a child is eligible for adoption before carrying out an assessment under s. 37 of the Act?

Answers to the Questions of the Case Stated

29. Jordan J. answered the questions as followed:

(i) Yes.

(ii) Does not arise in light of the answer to the preceding question.

(iii) No.

30. The Authority sought leave to appeal to this court, supported by the Attorney General, which was granted.

Discussion

31. The complex legal position in this case must be understood by considering the development of the law and, in particular, two cases, first, the High Court decision in *M.O'C. & B.O'C. v. Údáras Uchtála na hÉireann* [2014] IEHC 580, [2015] 2 I.R. 94 ("*M.O'C.*"), and the decision of this court in *In Re.: Section 49(2) of The Adoption Act 2010 and J.B. (a minor) & K.B. (a minor)* [2018] IESC 30, [2019] 1 I.R. 270 ("*J.B.*").

32. *M.O'C.* is a case which is similar to these cases, other than in one respect: in that case, the child to be adopted in Mexico was born prior to the coming into force in Ireland of the 2010 Act, on the 1st November, 2010.

33. In October, 2009, the applicants who were prospective adoptive parents obtained a DES under the 1991 Act. The child in question was born in October, 2010, in Mexico and placed in the care of the applicants on the 26th October, 2010. A Mexican adoption order was made by a Mexican court in March, 2011. The order of the court referred expressly to the Hague Convention of 1993 and stated (as translated) that "these procedures aim to comply with Article 23 of the before mentioned Convention". As Abbott J. noted, there was more general confusion as to the authorities in Mexico entitled to issue a certification under Article 23 of the Convention. At one point, the Mexican authorities had reported to the Working Committee on The Hague Convention that certain Mexican judges were competent authorities for those purposes. On their return to Ireland, the adoptive parents sought to have the adoption registered as an intercountry adoption. The Authority considered that it could not do so and the matter was referred to the High Court.

34. In the proceedings, the applicants raised a number of arguments. They contended that there existed a common law power to recognise foreign adoptions which remained in existence and was independent of the provisions of either the 1991 or the 2010 Acts, relying on the decision of McKenzie J. in *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399, which had predated the coming into force of the 1991 Act. The applicants also argued that the order of the Mexican court should be accepted as an appropriate certification under Article 23. In addition, it was argued that, at the time of passage of the 2010 Act, the applicant adoptive parents had acquired a vested right to adopt under the 1991 Act and the 2010 Act did not contain any clearly expressed intention that such rights should not be given effect. Accordingly, under s. 27(1)(c) of the Interpretation Act, it was said that the vested right had accrued and was not affected by the repeal of the 1991 Act which did not therefore "affect any right, privilege, obligation or liability acquired, accrued or incurred under" that enactment. Finally, it was argued that s. 92 of the 2010 Act gave the High Court power to direct the Authority to register a foreign adoption if it was satisfied that it should do so. This, it was said, gave a wide-ranging discretion to the High Court to direct the registration of the foreign adoption where it considered it appropriate to do so, which was wider than the power of the Authority to register a foreign adoption under s. 90 of the 2010 Act.

35. The Authority disagreed with these submissions made on behalf of the applicant adoptive parents. It contended that the common law power to recognise to foreign adoptions no longer existed, having regard to the combined effect of the 1991 Act and the 2010 Act. Furthermore, it was argued that no vested rights had accrued prior to the coming into force of the 2010 Act which, in any event, contained transitional arrangements directed towards cases which were pending as of the 1st of November, 2010. The Authority initially argued that s. 92 did not extend beyond the Authority's own jurisdiction under s.

90 to register foreign adoptions, and was thus subject to the same limitations. However, in the course of the proceedings, the Authority appeared to agree that s. 92 was somewhat more extensive than s. 90 and did give to the court some degree of discretion.

36. The Attorney General argued that no common law power now existed to recognise foreign adoptions, but also argued forcefully, and contrary to the position of the Authority, that vested rights had accrued under the 1991 Act by reason of the applicants having commenced the process prior to the date of coming into force of the Act and obtained a DES: rights which were not affected by the repeal of the 1991 Act.

37. Abbott J. concluded that the common law power for recognising foreign adoptions still existed but, as regards recognition of an adoption effected in a Hague Convention country, the common law power did not survive the coming into force of the 2010 Act which governed such adoptions. However, Abbott J. considered that s. 92 provided more open wording than s. 90, and allowed the High Court to act as a second guarantor of the interests of the child and the proper administration of the Act. He also considered that the transitional provisions of the 2010 Act could not assist since there was no evidence that the Mexican authorities would not issue a certificate under Article 23 for a child less than five years old other than in defined exceptional circumstances which did not appear to apply in this case.

38. However, in relation to s. 27 of the Interpretation Act, Abbott J. concluded that a number of specific rights could be said to be vested, namely: the declaration of eligibility of the applicants, in particular in relation to seeking the adoption of a child not older than six months; the furnishing of a letter giving a right to travel abroad for that purpose; the consent of the birth mother; the placing of the child in the custody and guardianship of the adoptive parents by the Mexican court; the right of the child in guardianship pending adoption to develop physically and emotionally and to be cared for; the right and duty of

the applicants to apply for adoption to the Mexican courts; the right of the applicants and the child to apply to the Board/Authority for entry on the Register of Foreign Adoptions. Finally, Abbott J. considered the paramountcy of the best interests of the child as a separate factor.

39. It is perhaps useful to note at this point that, in the judgment under appeal, Jordan J. considered that the matters described in the judgment in *O.C.* as "rights" were better conceived not as separate rights, but rather as steps taken from which it was proper to find that a vested right had accrued by the 1st of November, 2010. It is also useful to note at this point that nowhere among the factors identified by Abbott J. was any significance attached to the date of birth of the children involved.

40. Although the Authority had argued against the conclusion to which the High Court judge came, it did not appeal the decision in *O.C.* Instead, it proceeded to enter the *O.C.* adoption in the Register of Intercountry Adoptions and to take the same course in relation to the bulk of the remaining Mexican adoptions where the process had been commenced under the 1991 Act but had not been concluded by the date of the coming into force of the 2010 Act. As I understand it, there were 15 in number, although there is some doubt about the precise figure. However, the important fact which is not in dispute is that a significant number of Mexican adoptions were registered on the basis of the *O.C.* decision. This must be taken as not only acceptance of the decision as determining the outcome in the *O.C.* case, but also establishing the law for any similar case that was not legally distinguishable. However, the Authority did not register the adoption of four children, two of whom are the subject matter of these proceedings. The Authority has made it clear that it considered it could not do so because the children in question had not been born as of the 1st of November, 2010. In this case, this distinction gives rise to the striking difference of treatment between a baby and a sibling child who, while born prior

to the 1st of November, 2010, was adopted in Mexico some months after the adoption of Baby K., but whose adoption has been entered on the register by the Authority consistent, it should be said, with the view it has taken of the law.

41. A further matter which must be noted is the subsequent decision of this court in *J.B.* The facts of that case were quite different. There was no question of a couple obtaining a DES and then seeking a foreign adoption. Instead, one of the spouses adopted children of a sibling in her country of origin, described as Country A. The couple then sought a *domestic* adoption under s. 23 of the 2010 Act. They never sought the registration of the foreign adoption (which, it should be noted, was effected by only one of them). The Authority stated the case to the High Court under s. 49 of the 2010 Act and the High Court found that there was a power to make a domestic adoption order in respect of the two children. The Authority appealed to this court, which reversed the High Court's decision on that question. However, the court was divided on a subsequent question as to whether or not the High Court nevertheless had discretion under s. 92 to direct the entry of the foreign adoption in the Register of Intercountry Adoptions. A majority (MacMenamin J.; Dunne and O'Malley JJ. concurring; O'Donnell and McKechnie JJ. not concurring) held that the High Court had a limited discretion under s. 92 less broad than that which had been held to apply in the *O.C.* case, but which was sufficient to permit registration of the foreign adoption if, having considered all the evidence, the High Court considered it appropriate and in the best interests of the children to do so. The statement in *O.C.*, however, that the discretion under s. 92 was to be exercised by reference to the Constitution and to avoid "invidious discrimination" was considered a broad statement which went far too wide; the section was to be interpreted narrowly and with great care. The best interests guarantee under Article 42A of the Constitution was not to be seen as an interpretive Trojan horse to undermine the 2010 Act. It is clear that both the majority

and minority judgments were concerned that an interpretation of the Act to permit either a domestic adoption, or a broad interpretation of s. 92, could permit the circumvention of the 2010 Act since either route would provide a means whereby non-compliant foreign adoptions could nevertheless be recognised and given effect.

42. In this case, as already noted, the Authority has refused to register the two adoptions. It should be said that the Authority has not been in any way obstructive, but rather has made extensive efforts to attempt to regularise an extremely difficult situation consistent with its statutory powers and obligations under the Act, the underlying policy of the Hague Convention, and the State's international obligations. The Authority has gone to some lengths to seek a satisfactory solution, including meetings with the Mexican authorities. Furthermore, while considering they have had no power to register the foreign adoptions in question, the Authority has maintained the position that Part 7 of the Act could provide a route whereby the children might be adopted under Irish law. Part 7 of the Act is headed "Adoption Orders in Exceptional Cases and Role of High Court" and replaced the provisions of the Adoption Act 1988 and which, in broad terms at least, permits the adoption of children of married parents where it could be said that the parents had failed in their duty towards their children, which is itself a clear reference to the then-applicable terms of Article 42.5 of the Constitution. The adoptive parents were, themselves, willing to pursue this avenue but, as already observed, that process was stymied by the fact that the Child and Family Agency considered that it was not in a position to conduct the initial assessment process which was necessary. Accordingly, these proceedings were commenced.

43. The High Court, in a comprehensive and careful judgment of Jordan J., reviewed the facts and judgment in *O.C.* It held that this case was not distinguishable from *O.C.* and that, therefore, the Authority had power to, and therefore should, enter the adoptions in the

Register of Intercountry Adoptions. The key reasoning is contained in paras. 86 to 88 of the judgment and which bears full quotation:-

> "86. When I consider the legal authorities and the provisions of the Adoption Act 1991 along with the provisions of the Adoption Act 2010 I am driven to the conclusion that the declaration of eligibility and suitability vests clear rights in the bearers of that declaration. It is a formal official document issued pursuant to statute and it has clear, important and valuable consequences for the bearers. Indeed, to repeat just one part of the letter just quoted from the Adoption Authority of Ireland dated the 27th January 2011 concerning the declarations of eligibility and suitability:-
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> > "*The bearer(s) is/are entitled to seek an entry in the register of intercountry Adoptions upon their return to Ireland*".
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> 87. It is not necessary to repeat any other portion of the documents which I have recited in full but it is an inescapable conclusion and I find that the declaration of eligibility and suitability which issued to each couple vested in each couple rights which cannot be set at nought or taken away by the Adoption Act 2010 in the absence of very clear wording – which is noticeably absent from the 2010 Act. The vested rights are clear and there is nothing in the 2010 Act to rebut the presumption against an intention to remove these vested rights.
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> 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."

44. It is apparent that these cases and the related cases have raised some intractable legal issues. There are a number of different, and sometimes competing, considerations and no simple solution. However, it is important not to lose sight of the fact that these difficult legal disputes have a real human component. In that regard, it is important to observe, first, that nothing this court can decide can have any impact on the validity of the registration of the foreign adoptions in the *O.C.* case or those affected pursuant to that judgment. As the Attorney General's submissions point out, s. 50 of the 2010 Act provides that a relevant adoption, unless declared invalid by a court, shall be deemed for all purposes to be – and at all times since its making – to have been valid and shall not be declared invalid by a court if it considers that the declaration would not be in the best interests of the child and it would not be proper to make the declaration, having regard to those interests and the rights under the Constitution. Furthermore, all relevant parties, including the Mexican authorities in their diplomatic note, seem to agree that the best interests and the future of the children must be in Ireland and, indeed, in the care of the couples who have adopted them under Mexican law and brought them to Ireland. In considering possible routes to provide any greater legal certainty for the families involved, it is important to recognise that any such routes may not only give rise to legal hurdles, foreseen and unforeseen, but also to real concerns for all the persons involved. Thus, although the Mexican authorities raise the possibility of a return to Mexico to seek a Hague-compliant adoption that would permit an Article 23 certificate to be provided, no assurance is, or perhaps could be, given in that regard. Any such proceedings might, for

example, involve setting aside the original Mexican adoption and the uncertainty of subsequent proceedings. Similarly, proceedings under Part 7 would necessitate a court application, notice to the birth parents, and, again, uncertainty as to how such proceedings might be resolved. In addition to the legal uncertainty, it would certainly involve undoubted stress and anxiety for everyone concerned. The problem in this case is not simply a legal jigsaw puzzle, but a real-life dilemma where the courses considered have a real impact on lives.

45. The first question is whether this case is capable of being distinguished as a matter of law from the decision in *O.C.*

46. It is true that the facts in this case do not replicate precisely the eight enumerated features identified and relied on by Abbott J. in *O.C.* However, there is similarity, indeed identity, in the basic structure of the facts in each case: a DES is granted before a repeal of the 1991 Act and a Mexican adoption effected thereafter which it has sought to have registered in Ireland, but which is not compliant with the procedural requirements of the 2010 Act which was by then in force in Ireland. Other factors were present in *O.C.*, such as the placing of the child in the custody of the adoptive parents almost immediately. The difference in the factual circumstances might be relevant in another case and if, for example, there was a contest in relation to the best interests of the child. However, here the issue is a legal one: whether the adoptive parents can be said to have acquired vested rights prior to the 1st of November, 2010, so that the repeal of the 1991 Act should not interpreted as removing such rights unless that result was clearly intended by the specific language of the repealing statute. It is hard to see, therefore, how any factual matter occurring in relation to the detail of the arrangements made in Mexico short of the Mexican adoption can affect that issue. In all the relevant cases, the formal Mexican adoption order, which could be said to be contemplated by the DES, was made well after

the coming into force of the 2010 Act in Ireland and accordingly cannot, itself, be said to give rise to any accrued right prior to the date of repeal.

47. The next question is whether a valid distinction can be drawn between the *O.C.* case (and those which apply that decision) and the present cases on the basis that the children in the present cases were not born until after the date of coming into force of the 2010 Act. Counsel for the Attorney General argued that the fact that the children were not born as of the 1st of November, 2010, meant that any rights were too contingent and speculative to be capable of being vested for the purpose of the accrued rights principle contained in s. 27 of the Interpretation Act. I do not agree. If the applicants are correct in other aspects of their argument, and the grant of a DES is capable of being seen in certain circumstances to give rise to vested and accrued rights, then any such right would not fail simply because the child in question was not born until after the 1st of November, 2010. In those cases where vested rights were held to have accrued, there was no requirement that the child to be adopted was born at the time of the grant of the DES. Until the 1991 Act, moreover, a DES had certain legal consequences for the duration of the lifetime of the DES. Not only was there no requirement under the 1991 Act or under the DES granted under that Act that a prospective adoptee be born at the time of the grant of the DES, it was instead to be anticipated that a child to be adopted under a DES might well not be born at the time of the grant. If, therefore, the grant of a DES gives rise to rights capable of being vested or accrued rights and obtaining the benefit therefore of s. 27 of the Interpretation Act so that an adoption effected after the date of repeal would be entitled to registration (or to seek registration) in Ireland, then there is, in my view, no logical basis to restrict such rights to adoptions which occurred in respect of children born prior to the 1st November, 2010, and Jordan J. was correct to so hold.

48. This leads to another issue which was debated at the hearing; there is a certain lack of clarity as to the nature of the precise rights said to arise on the grant of a DES. It was forcefully argued on behalf of the applicants that there was a change between the 1991 Act and the regime established under the 2010 Act, and that – under the 1991 Act – a DES was very significant and, indeed, could be said to be the last step required by Irish law prior to the registration of a foreign adoption. Once granted, then – assuming a foreign adoption was effected – a DES conferred a near-absolute right to registration (and, therefore, recognition in Irish law). Thus, it was argued that the accrued right was *a right to have a foreign adoption registered*. Thus, it was said by the applicants that "it is essential to point out that the DES is not the right. The right is the right to adopt/recognition". Furthermore, it was argued that "the right to have a foreign adoption recognised here followed automatically in the cases of a couple ordinarily resident in Ireland, in the possession of a DES, without further steps being required of the predecessor to the Authority (subject to satisfying the legislative proofs required)". It was logical that the applicants should put their case in this way, since it gave considerable force to the argument that a vested right had accrued on the grant of a DES. However, counsel for the Authority argued, persuasively, that this was to significantly overstate the legal effect of a DES under the 1991 Act. He pointed out that what the applicant describes somewhat dismissively as "legislative proofs" are significant matters. Under s. 5 of the Act, it was provided that a foreign adoption would be deemed to have been made "unless such deeming would be contrary to public policy". Public policy considerations play a significant role in the area of adoption, and in the recognition of foreign adoptions in particular. Some of those matters were also referred to in the definition of a foreign adoption contained in s. 1 of the Act, to which counsel also pointed. Section 1 included five relevant conditions which must be satisfied before a foreign adoption can be said to

be an adoption for the purposes of the 1991 Act, and therefore capable of being registered. They are as follows:-

> "(*a*) the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with under that law,
>
> (*b*) the adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties with the respect to the child in the place where it was effected as an adoption effected by an adoption order,
>
> (*c*) the law of the place where the adoption was effected required an inquiry to be carried out, so far as was practicable, into the adopters, the child and the parents or guardian,
>
> (*d*) the law of the place where the adoption was effected required the court or other authority or person by whom the adoption was effected, before doing so, to give due consideration to the interest and welfare of the child,
>
> (*e*) the adopters have not received, made or given or caused to be made or given any payment or other award (other than any payment reasonable and properly made in connection with the making of the arrangements for the adoption) in consideration of the adoption or agreed to do so."

49. These conditions, and the general requirement of compliance with public policy, required a real inquiry by An Bord Uchtála under the 1991 Act and could not be said to be mere formalities so that registration could properly be said to flow necessarily, ineluctably and automatically from the grant of a DES. It was presumably considerations of this sort which led Jordan J., at para. 88 of his judgment, to characterise the right which he found to have accrued in somewhat different terms. He described it as a licence to allow the bearer to travel abroad and to adopt a child abroad (and return to Ireland with the child

and *apply* to have the foreign adoption entered in the Register of Foreign Adoptions). This is, I think, an accurate statement of the applicants' case at the highest point to which it can be plausibly put. But, it leads to difficulties both practical and conceptual. On what basis, and by whom, would such an adoption be registered given that, after the grant of the DES, the body granting it had been dissolved and the Act, including the criteria contained in ss. 1 and 5, had been repealed? This highlights the fact that the applicants' arguments seem necessarily to amount to a contention that they are entitled to maintain in being the entire machinery of the 1991 Act, notwithstanding its repeal, for the purposes of their applications. I have some doubt that such a right can be said to be a vested right for the purposes of s. 27.

50. There are, moreover, further formidable hurdles to acceptance of the applicants' arguments. The question of whether vested rights can be said to have accrued which it would be unfair to defeat has certain conceptual similarities to the type of argument which may, for example, arise if a challenge was made to the constitutional validity of legislation because of its impact upon particular citizens and their actions. But, in the present context, the argument is not a self-standing principle of law requiring a court to consider whether it would be unfair to deprive the applicants of the possibility of registration of the Mexican adoptions. It is, rather, a principle of interpretation of legislation contained in the Interpretation Act and sets out what is merely a default position which will apply unless clear language is used showing a contrary intention. As a matter of interpretation, at least, it would be perfectly permissible for the Oireachtas to repeal legislation and, in doing so, clearly and deliberately remove any entitlements which might be said to have vested and accrued under the previous legislation but not to have been acted on or brought to finality.

51. The principle embodied in s. 27(1)(c) of the Interpretation Act is a sensible one. Legislation has a general application intended to act prospectively and establish the rules for, and legal consequences of, certain actions. Such legislation will not always address transactions and activities which may have been in train as of the date of the enactment of the legislation. Matters may have progressed to a point under the pre-existing legal regime where it would be right to assume that the Oireachtas did not intend, by the repeal of one piece of general legislation and its replacement with another, to deprive the citizen of the benefits which had been acquired under the prior legislation unless it uses clear language to show that it has specifically considered not just the general question, but also the issues arising in this specific class and has decided that it was nevertheless necessary or appropriate to do so.

52. In this case, it is apparent that, on a number of occasions, the 2010 Act considered and made provision for transitional cases in being at the time of coming into force of the Act and the repeal of the 1991 Act. Thus, s. 57 of the Act deals with the recognition of intercountry adoptions effected before the establishment day, or if effected after the establishment day, which were effected by adopters habitually resident in the State at the time of the adoption, or in any other case, which were effected in accordance with the Hague Convention or with the bilateral agreement. This provision would apply in the present cases, for example, if the Mexican adoption orders had been made prior to the date of coming into force of the 2010 Act but had not yet been registered. Similarly, s. 176 provides for a saver in respect of an application for an adoption order or recognition of a foreign adoption made to An Bord Uchtála and not determined as of the operative date. Counsel also points to the provision of s. 63A of the Act as inserted by the Adoption (Amendment) Act 2003 giving continued force to certain Declarations of Eligibility and Suitability granted under the 1991 Act in respect of the Russian Federation

which, it is argued, would be unnecessary if a DES had the legal effect contended for by the applicants. Of most significance, however, are the provisions of s. 63, providing for transitional arrangements in respect of foreign adoptions and processed immediately before the establishment day. That section provides as follows:-

"63 – (1) In this section, "foreign adoption" means a foreign adoption within the meaning of section 1 of the Adoption Act 1991.

(2) If, immediately before the establishment day, a foreign adoption described in the Adoption Act as not yet effected but still in process as provided for under that Act–

(*a*) if the persons who applied under the Adoption Act 1991 had been issued with a declaration of eligibility and suitability before the establishment day, the adoption may proceed under this Act as if–

(i) it were commenced under the Act and the date of the issue of the declaration were that day,

(ii) the persons had applied under section 37 of this Act, and

(iii) section 40(1)(*b*) of this Act read "in another contracting state or a state that, in the opinion of the Authority, applied standards regarding the adoption concerned that accord with those in the Hague Convention",

and

(*b*) in any other case,

the adoption may proceed under this Act as if it were commenced under this Act."

53. This section seems to address itself specifically to the factual situation arising in these cases: that is, where a foreign adoption had not yet been effected but where a couple had

been issued with a DES under the 1991 Act. In such circumstances, s. 63 provides that the adoption is to proceed under the 2010 Act as if commenced under that Act.

54. It was argued, however, in the High Court in both *O.C.* and in this case that s. 63 did not amount to a clear "contrary intention" for the purposes of s. 27 of the Interpretation Act. This is because it was said: first, that the Register of Foreign Adoptions was continued in force by virtue of s. 90 of the 2010 Act notwithstanding the repeal of the 1991 Act, and, in particular, s. 6 of that Act which established the register; and, second, because it is said that the Act would have been much clearer had it simply adopted the provisions of Article 41 of the Hague Convention in respect to pending applications. That Article provides:-

> "The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin."

55. Depending on the difficulty of the subject matter, the skill – or lack of it – of the drafter, and the punctiliousness of the reader, it is perhaps possible to say that many pieces of legislation or judicial decisions could be clearer or more accurate and precise. The interpretation of statutes can be difficult, but should not be a process which seeks ambiguity, confusion or lack of clarity, particularly if the effect is to defeat the apparent legislative scheme. That goes to the limit, and perhaps beyond the boundaries, of permissible interpretation. In this case, it seems plainly arguable that s. 63 applies to these cases; they were foreign adoptions in process at the time of the establishment day and persons (the applicant adoptive parents) had applied under the Adoption Act 1991 and been issued with a DES. Accordingly, s. 63 appears to provide that the adoption may proceed under the 2010 Act and that, therefore, the applicants did not need to start again and seek a DES under that Act, but could proceed as if they had obtained such a declaration. This appears, however, to be inconsistent with the 1991 regime continuing

once a DES was granted under that Act. One consequence of the continuation of the application under the 2010 Act is that the requirements of that Act (and the 1993 Convention to which it gave effect) had to be complied with and, in particular, a certificate under Article 23 of the Convention provided. In truth, it appears that all the applicants understood this and were aware that the law was changing. Indeed, it would be surprising if it were otherwise. The difficulty in these cases was not the requirement of compliance with the 2010 Act and the Convention, but rather that the Article 23 certification which the applicants in each case received is neither valid nor effective.

56. I do not think that the continuation of the register on foreign adoption under s. 90 can have an effect, still less a decisive effect, on the interpretation of s. 63 or the Act more generally. It would seem entirely logical that the register should be maintained in existence since it is the entry in the register which gives the legal right to recognition to all foreign adoptions effected under the 1991 Act. Apart from performing that important public function, it is not inconceivable that some persons affected by the registration may, at some stage after 2010, wish to seek to alter, rectify, or perhaps challenge or expunge any particular entry. It is sensible public policy to maintain the register in existence and to provide for its seamless transition to a Register of Intercountry Adoptions.

57. It is also correct that it is noteworthy that the 2010 Act appears to take a different approach to transitional cases – or at least the commencement of application of the Hague Convention rules – to that adopted by the Convention itself under Article 41, which provides that the Convention shall apply to any adoption commenced after the Convention comes into force in both relevant states. If the Oireachtas had adopted that provision then the law would not be clearer, but it would be different. However, the Oireachtas was entitled to adopt the position that pending cases should henceforth proceed under the 2010 Act, and there is some logic in doing so, since that Act embodied

up-to-date policy and provided enhanced protection for the interests of children the subject of such adoptions. There is, however, no reason to doubt the meaning of s. 63.

58. For many reasons therefore, I am reluctant to hold that s. 27 of the Interpretation Act can resolve these cases. However, it is not necessary to decide that issue definitively because it appears to me that these cases can be resolved without finally adjudicating upon the approach of the High Court in either this case or the *O.C.* case. In the particular circumstances, and given the possible impact on the lives and wellbeing of a cohort of people, I think it is desirable to refrain from doing more than indicating my views on the general question of the applicability of s. 27 of the Interpretation Act since that matter is one of more general importance.

59. The Authority, while appealing the decision of the High Court and arguing that *O.C.* was distinguishable – or, if not distinguishable, was incorrect – did not, however, argue that the legal consequence insofar as these cases were concerned should be that the children in question could neither have their foreign adoptions recognised nor themselves be adopted in Ireland. Instead, the Authority maintained the position it had taken initially: that the children could be the subject of a valid domestic adoption under Part 7 of the 2010 Act. It was, however, not possible to explore this possibility prior to the commencement of these proceedings because of the position adopted initially by the Child and Family Agency. The Authority, however, maintains that this is a viable route that would bring finality to these cases in a way which was consistent with the law. It appears that the Authority is concerned about the possible implications for further international co-operation if it were to register the foreign adoptions made in another Hague state but which did not comply fully with the requirements of the Convention.

60. It is obvious that there is no easy resolution to this case and, therefore, that any route suggested may cause difficulties whether practical, theoretical, or both. However, I am

not convinced that Part 7 of the Act provides a ready path to a solution 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 Hague country adoptions would nevertheless be capable of giving rise to domestic adoptions and thus circumventing the requirements of the Convention itself.

61. One striking feature of these cases is the fact that the Authority did not merely not appeal the decision of *O.C.*, and therefore accepted the decision as binding in that case, but went further and applied it to a number of other Mexican adoptions which exhibit the same essential features as these cases. The DES pre-dated and the relevant Mexican adoption post-dated the coming into force of the 2010 Act. Although the applicants are understandably critical of the approach taken by the Authority in differentiating between their cases and the other cases, it cannot, in my view, be characterised as giving rise to an abuse of process, estoppel, or legitimate expectations. However, the very question posed by the Authority for resolution by the court raises the question of whether, in effect, the ruling in *O'C.* can be applied to these cases where the children were born prior to the 1st of November, 2010. The difference of treatment between the cases is stark, as illustrated most tellingly by the differentiation between the position of Baby F. and their sibling. The court therefore invited counsel to consider the possible application of this court's decision in *McMahon v. Leahy* [1984] I.R. 525 ("*McMahon*").

62. In *McMahon*, the appellant sought to challenge his extradition to Northern Ireland in respect of an offence of escaping from lawful custody. He sought to invoke the political offence exemption, which provided that extradition would be refused if the offence was a political offence or one connected with a political offence. As is well known, before the appeal in *McMahon* reached this court, this court had ruled that that exception could not

apply where the individual was a member of an organisation that sought the overthrow of the State itself. However, prior to that decision, four other persons who had escaped from custody in the same incident had come before the courts and been the subject of similar extradition requests. Extradition had been refused on grounds of the political offence exemption and the State had not contested the individual claims in that regard. The outcome was that extradition was refused in the case of four persons whose surrender was sought in respect of an offence of escaping from lawful custody in the same incident, but where it was now argued that the fifth escaper, the applicant, should nevertheless be surrendered. The Supreme Court unanimously refused to permit the State to argue that in the appellant's case the same offence was not a political offence. Henchy J. relied in particular on Article 40.1 of the Constitution and held that the differentiation between the cases would be a breach of the guarantee under that Article to hold all citizens as human persons equal before the law. He said:-

> "[*I*]t would patently result in an unequal treatment, at the hands of the Courts, of citizens who, as human beings, are in equal condition in the context of the law involved. That unequal treatment would mean that four fellow-escapers would have been judicially held (with at least a tacit approval of the State) to be entitled to escape extradition on the ground of political exemption while the plaintiff, whose entitlement to that exemption cannot be differentiated on the basis of any relevant consideration, would have been invidiously chosen (at the instance of the State in the person of the defendant) for extradition to Northern Ireland where he would be liable to resumption of his imprisonment …"

This principle had been applied in a number of other cases. In *Hanley v. The Minister for Defence* [1999] 4 I.R. 392, Denham J. (as she then was) commented to similar effect and observed:-

"The constitutional guarantee of equality (Article 40.1) requires that persons be held equal before the law. There is an obligation of equal treatment. Thus, similar cases should be determined in a constant and foreseeable pattern. The concept of justice and fairness demand that the system not be a lottery".

63. There are, however, significant limits to this approach which should be noted. Each case must be decided by a court as it considers just, having regard to the evidence and the applicable law. It would be impermissible to simply start from the result in a different case considered similar and insist upon the same result irrespective of the underlying merits of the case. That would be to make a reality of Dean Swift's criticism of lawyers:-

"It is a maxim among these lawyers, that whatever has been done before, may legally be done again: and therefore they take special care to recall all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedence, they produce as authorities, to justify the most iniquitous opinions; and the judges fail of decreeing accordingly".

64. To reach the level of a breach of the constitutional guarantee of equality before the law, the cases must be essentially and intrinsically identical with no other features justifying a departure or differentiation between them to a point where a different outcome would be an affront to justice and where the differentiation does not merely have effect in relation to a fact, but involves the essential equality of citizens (and, for the reasons identified in *N.v.H. v. The Minister for Justice and Equality* [2017] IESC 35, [2018] 1 I.R. 246, where relevant, non-citizens) as human persons. Here, the differentiation which would be effected, for example, between Baby K. and their sibling goes directly to the issue of their respective legal statuses. In one case, the prospective adoptive parents would be treated by the law as parents, and in the other as legal strangers caring for a child or, perhaps, at best, as persons entitled to become guardians of a child. Similarly, the law would

distinguish between two siblings as, on the one hand, a child of a family and, on the other, as a legally parentless child being cared for by adults who could perhaps become guardians. At a most basic level, it distinguishes between the persons having the status of a family on the one hand and those living together and caring for each other but who would be told that they nevertheless do not constitute a family on the other. Where one child has a father and a mother, its sibling has two concerned adults. Where one couple has a son or a daughter, another has a child they are providing care to.

65. Significant though these matters are, the differentiation does not simply go to matters of legal status. The relationships involved are essential to the human personality protected by the Constitution in general, and in particular under Article 40.1. It is of the essence of an individual's sense of themselves to know who their parents are or were and who their children are. These are among the most intimate relationships an individual may have, not always happy, but which are intrinsic to their sense of identity. Even the person who has, perhaps justifiably, rejected their own family does not, however, doubt that the family relationships are of significance in their life to who they are and who they have become.

66. It is important to recognise that there is a point of distinction between these cases and it can be said to be a legal difference. The cases are divided by a date having legal significance since it marks the date of repeal of the 1991 Act and the coming into force of the 2010 Act. In other circumstances, this distinction could provide a clear justification, and indeed obligation, for a differential legal treatment. But, for the reasons set out above, this difference cannot, in the language of Henchy J. in *McMahon,* be a distinction based on "any relevant consideration" between the applicants' cases and those of the other Mexican adoptions which were registered by the Authority. In respect of those matters of fact relevant to the registration of the other adoptions pursuant to the decision

in *O.C.*, these cases are, I consider, identical. Together, they form 19 cases which constitute a cohort of cases where the application process was commenced and the DES granted under the 1991 Act and where the foreign adoption was effected after the date of coming into force of the 2010 Act. In my judgement, it would be a failure to hold the persons concerned equal before the law in such an important feature of their human personality if the law were to permit different outcomes in these cases. This provides sufficient justification for dismissing the appeal.

67. I acknowledge that this outcome is one that was resisted by the Authority. I apprehend that part of the Authority's concern may be that registration by the Authority of adoptions effected in Mexico would not be congruent with Ireland's obligations as a member of the community of states which adheres to the Hague Convention of 1993: a Convention which, moreover, requires a high degree of mutual trust and confidence and ongoing co-operation. If so, these are legitimate concerns. However, I observe that the Authority has already registered adoptions which are, in my view, functionally indistinguishable in that respect. Second, to permit a domestic adoption would likely have the same effect with, perhaps, more significant consequences for future cases. Finally, I note that, if the argument advanced in relation to the interpretation of Article 41 of the Convention is correct, then it would appear that the application of Hague Convention criteria to this case is a matter of Irish law alone, and it would not appear that the Convention would apply by itself in its own terms to these adoptions. However, since that matter was not addressed in argument in any detail, I would not rest my decision on it. I would, however, dismiss this appeal.

Conclusion

68. It is now necessary to return to the issues posed by the Authority in its case stated. The only issue for this court is the correct answer to the first question; Question 3 does not arise, and no appeal was taken in relation to Question 2. Question 1 is set out out at para. 28 above and is in very specific terms. It does not question the possibility of pre-existing rights to adoption arising under the 1991 Act and/or surviving the coming into force of the 2010 Act. Instead, it asks simply if such rights are capable of arising where the minor child was born after the commencement of the 2010 Act on 1st of November, 2010. For the reasons set out above, the correct, if not entirely illuminating, answer to this question is, I consider, the following: if the pre-existing rights to adoption are capable of arising under the 1991 Act and if such rights are capable of surviving the enactment of the 2010 Act (and the consequential repeal of the 1991 Act) then such rights are indeed capable of arising where the minor to be adopted was born after the commencement of the 2010 Act on 1st of November, 2010. Such a conclusion is, moreover, required by the constitutional obligation to hold all persons as human persons equal before the law. In the light of the necessarily qualified nature of this response to the precise question posed, I think it appropriate to add that the principle of equality before the law guaranteed under Article 40.1 of the Constitution means that the Authority cannot lawfully refuse to register the adoptions in this case in the Register of Intercountry Adoptions. I would accordingly answer the question posed in this way, and would therefore dismiss the appeal.