THE HIGH COURT
FAMILY LAW

[2018 No. 32 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 AND IN THE MATTER OF C.W. A MINOR BORN ON 11TH DAY OF OCTOBER 2000

BETWEEN

THE CHILD AND FAMILY AGENCY AND H.R. AND F.R.

APPLICANTS

AND
THE ADOPTION AUTHORITY OF IRELAND
AND
P.W. AND A.W.

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 6th day of September, 2018.

1. The first named applicant seeks an order pursuant to s. 54(2) of the Adoption Act 2010 (as amended) authorising the first respondent, the Adoption Authority, to make an adoption order in relation to a child C.W. in favour of the second and third named applicants. It also seeks an order pursuant to the said subsection dispensing with the consent of any person whose consent is required to the making of the adoption order, in this case the consent of the child's birth parents.

2. The first named applicant was established pursuant to the provisions of the Child and Family Agency Act 2013, and discharges functions pursuant to Part 7 of the Adoption Act 2010 as amended ("*the Act of 2010*"). The second and third named applicants are a married couple and are the foster carers of the child the subject of this application, C.W. They are also the prospective adoptive parents of C.W. who has been in their care since 24th October, 2000 when he was thirteen days old. A formal application was made by the adoptive parents to the Adoption Authority to adopt C.W. on 12th March, 2018. On 29th May, 2018, the Adoption Authority made a declaration pursuant to s. 53 of the Act of 2010 that if an order is made by this Court pursuant to s. 54(2) of the Act of 2010 in respect of the child, in favour of the second and third named applicants, it will, subject to the provisions of s. 53 of the Act of 2010, make an adoption order for the adoption of the child by the second and third applicants. In accordance with the provisions of s. 54(1) of the Act of 2010, the second and third applicants requested the first applicant to apply to court for an order pursuant to s. 52 of the Act.

Background

3. The child's birth parents were married prior to the birth of C.W. on 11th October, 2000, and including him they have six other children. An older brother was born on 31st July, 1996 and C.W. has five younger siblings who were born between November, 2001 and December, 2011. There was one other child of the marriage, Q.W., who died on 27th July, 2000. As described in evidence, the circumstances surrounding his death led to applications for and the granting of an emergency care order, interim care orders and thereafter a full care order which was made in respect of C.W. on 10th July, 2001.

4. C.W., who will attain his majority within six weeks of the hearing of this application, has expressed a strong desire and wish that his adoption be permitted to proceed.

5. C.W.'s parents are Nigerian, of the Yoruba people. They were married in Nigeria prior to their arrival in Ireland in February, 2000. On arrival, they sought political asylum on the grounds of religious persecution in their country of origin. They left their eldest son with his grandparents in Nigeria and brought their second son, Q.W., who was born on 1st July, 1999, to Ireland with them. P.W. and A.W. moved to England for the birth of their third child. They were concerned that, when born, that child might also be taken into care. They subsequently returned to Ireland and since then, they have had other children, the youngest having been born in 2011. The birth parents now live apart, with the three youngest children residing with their mother, A.W. C.W. remains the subject of the care order which was made in 2001. Contact was re-established between C.W. in 2009. A number of access visits were arranged. Initially they went well. The visits ceased in 2011 as C.W. no longer wished to have contact with his birth parents. It was deemed to be in his best interests that access would not be pursued at that time. His foster parents, with whom he has resided and has been cared for since he was thirteen days old wish to adopt him and he wishes to be adopted by them. His birth parents are opposed to the adoption. The circumstances are more fully described below.

Evidence of Conor Fox, social worker

6. Mr. Conor Fox, social worker employed by the first named applicant, has been C.W.'s care worker since August, 2016. He has sworn a number of affidavits in the proceedings and has also given oral evidence. Mr. Fox informed the Court that C.W. was received into care when he was nine days old. He was the subject of an emergency care order which was granted on 20th October, 2000. The child protection concerns giving rise to the application, related to the birth parents' ability to keep C.W. physically safe following the death of his older sibling, Q.W. In this regard, in July, 2000, the birth father, P.W., presented at St. James's Hospital in Dublin with Q.W., who was pronounced dead on arrival. Subsequent post-mortem investigations found that the infant had a number of injuries including six broken bones and severe bruising. Mr. Fox states that neither parent was able to offer an explanation for the child's injuries. Both parents claimed that only they cared for their son and no one else had access to him. The Coroner and the Deputy State Pathologist completed reports. The cause of death was described as being "*unascertained*" but likely to have been caused by non-accidental injury. While a full investigation was carried out by An Garda Síochána and a file was forwarded to the Director of Public Prosecutions, the latter issued a direction that there be no prosecution.

7. In his affidavit sworn in response to this application, P.W., avers that he did not know how Q.W. sustained injuries and also avers that when they were living in Nigeria, they availed of the services of childminders who cared for Q.W. for significant periods while they worked. He describes having suspicions that the injuries occurred during those times when carers were looking after Q.W.

8. A.W. was pregnant with C.W. at the time of Q.W.'s death. When C.W. was born on 11th October, 2000, the Health Board, the Child and Family Agency's predecessor in relation to the exercise of certain relevant functions, applied for an emergency care order. An initial application was refused but, subsequently, an emergency care order was made on 20th October, 2000. Interim care orders were made until 10th July, 2001, when a care order was made in the District Court pursuant to s. 18 of the Child Care Act 1991. This order remains in place and is effective until the child reaches the age of majority. The order of the District Court reflects the conclusions of the District Judge that, having heard the evidence tendered, he was satisfied that the child's health, development and welfare were likely to be impaired or neglected; and that he required care and protection which he was unlikely to receive unless the court made an order under s. 18(1) of the Act of 1991. The child was entrusted to the care of the Health Board (as it then was) until

10th October, 2018. Provision was made for access in favour of the birth parents on a supervised basis.

9. Mr. Fox avers in his affidavit that the birth parents attended twice weekly supervised access from the date of the child's birth on 11th October, 2000 until May, 2001. Weekly supervised access took place from June, 2001 to August, 2001 before access was revised to monthly visits for the remainder of 2001, with additional visits scheduled for special occasions.

10. Mr. Fox informed the Court that the birth mother disengaged from the social work department in November, 2001 and the birth father disengaged from February, 2002. He states that the child had no direct contact with either birth parent between February, 2002 and November, 2009.

11. During this period, the birth parents' whereabouts were unknown, although letters were sent to Ms. Mairead McDowell, social worker, and to Ms. Rachel Devlin, childcare manager, in August, 2002. Three such letters have been identified and they all appear to have been sent from an address in Nigeria at a time when it seems the birth parents were in fact residing in England. The sending of these letters was organised through a family member who then resided in Nigeria. A letter dated 5th August, 2002 was directed to the child stating that the family would be reunited with him very soon. There are also two letters dated 8th August, 2002, in the first of which a request was made that a named pastor have access to the child on their behalf. A second extensive letter of the same date, addressed a number of matters including the taking issue with the results of Q.W.'s post-mortem examination and stating that they had taken the decision to return to Nigeria without C.W., in his interests, in their interests as parents and in the interests of their two other children. The birth parents had opposed the care orders and in the said letter they described the fight for C.W.'s custody as becoming too difficult to bear and too difficult to finance on their limited means. The letter also describes how they wished C.W. to know, as he grew up, that they loved him dearly. In the letter it was further stated by the birth parents that "*we are not saying here that we have given up on [C.W.] or abandoned the fight for his custody. In fact, we are just beginning*". The letter continued by stating that the decision to return to Nigeria was taken in order to prepare, and fight, for C.W.'s custody, a battle which, it was further stated, would be continued at the right and soonest possible time.

12. Mr. Fox informed the Court that the social workers then involved in C.W's care, thought that the birth parents may have either returned to Nigeria or to have moved to England. From his examination of the files, he avers that the social work department made efforts to contact the parents during this period but without success. In his evidence he said that letters were sent to an address in Nigeria in 2002, 2004, 2006, 2007 and 2008. The letters provided updates on C.W's progress. Mr. Fox also avers that the birth parents were using alias names during this time and that no contact was made by them with the relevant social care department between February, 2002 and July 2009. They had, as it transpired, returned to Ireland, between 2003 and 2006.

13. Mr. Fox states that in 2009 the social workers in charge of C.W.'s care were contacted by a social care department in an adjoining area and it was only then that they became aware that the birth parents were in fact in Ireland. This led to contact and reengagement between C.W. and his birth parents. Between November, 2009 and April, 2011 there were nine supervised access visits. The foster carers also attended the access visits at the request of C.W. Mr. Fox states that between 2009 and 2012 the social work department, a *guardian ad litem*, and a psychologist, together with other professionals encouraged C.W. to attend access visits with his birth family. C.W. was encouraged by social workers and his foster carers to meet his birth family and while initially this went well, C.W. started to resist access visits. The services of an attachment specialist and a play therapist were retained.

14. A *guardian ad litem* was appointed in the context of a court application taken by the birth parents, which will be discussed below. Mr. Fox describes that the professional intervention and support from the foster parents was aimed at maintaining access. Eventually it was decided in C.W.'s best interests not to pursue access. This, and the efforts made at that time to arrange access and the furthering of contact by C.W. with his birth parents have been described more fully in a report of Mr. Fox entitled "*Foster Care to Adoption Case*" prepared for submission to the Adoption Authority and which is exhibited to the second affidavit of A.W., sworn on 21st August, 2018. The last official access was 25th April, 2011.

15. Mr. Fox gave evidence that at or around the time of the access C.W. had a sense of permanency and was settled. His evidence is that the birth parents' absence in C.W.'s early years had impacted on him in the sense that he did not have his birth family around him when he was growing up and when they were introduced to him in 2009 he found it stressful as he was settled and his attachments were in place. The introduction of his birth family at that time unsettled him. He also stated that C.W. was disappointed with his birth parents' opposition to the proposed adoption. Mr. Fox made reference to an email sent to C.W. by his birth father in July, 2018 and stated that C.W. felt hurt by this. Mr. Fox believes that if the adoption takes place, given his knowledge of the foster parents and C.W., the fact that C.W. has some contact through social media with his birth siblings, C.W. will maintain contact with his birth family if he so wishes. He will not be discouraged from so doing.

16. Under cross-examination by counsel for the birth father, Mr. Finn B.L., Mr. Fox accepted that he had not interviewed C.W.'s birth siblings about the adoption. He did not think it appropriate. It was C.W.'s wishes which drove the application. On further cross-examination he expressed the view that from his knowledge of matters, C.W. had been abandoned by his birth parents. He accepted, however, that the birth parents have been available for access in recent times.

17. Ms. Lee B.L., for the birth mother also cross-examined Mr. Fox. She suggested that, from an early stage, the child had been given the surname of his foster parents; and that when access had been established, it deteriorated after an issue arose about the use of his foster parents' name on his passport; and C.W.'s response to such issue. It was further suggested that the change of name was indicative of a long term placement plan and that it was effectively indoctrinated into C.W. from a very early stage that he would not be re-unified with his birth mother or father; and that this was developed over the years. Mr. Fox in response laid emphasis on the fact that between 2002 and 2009 the birth parents could not be contacted, that this was an important time in the child's upbringing when he developed attachments and it was a difficult situation for C.W. to be in.

18. Further, under cross-examination, Mr. Fox stated that he commenced the aftercare plan soon after he was allocated to C.W. in August, 2016. He was asked whether reunification was given consideration at a meeting in or around that time or the time of C.W.'s birthday. Mr. Fox said yes, reunification would have been discussed, but it was deemed in C.W.'s best interests to remain with the foster family. From his examination of the files, adoption had been discussed at an earlier stage of C.W.'s life, but the social workers and his foster parents wished to wait until C.W. was older. He stated that there is no evidence available from C.W.'s files that issues of reunification and adoption were discussed with the birth parents.

19. Mr. Fox gave evidence of being satisfied that C.W. is very clear in his understanding of what adoption entails and in his wish to be adopted by his foster parents. They have fostered two other children, one older and one younger, the eldest having been adopted by them in 2008. It was his belief that C.W. has done exceptionally well in his foster placement, is very settled in the foster family, is a recognised permanent member of his foster family, and wishes to be recognised as a permanent member of the family, in law, to ensure his future security and care. Mr. Fox stated that C.W.'s primary attachment is to his foster family with whom he has lived all

his life.

20. Mr. Fox also informed the court that C.W. has received excellent school reports and he hopes to proceed to third level education. He plays sport at a high level. He is very involved in his local hurling and rugby teams. In addition, he has very positive relationships with his two foster siblings and his foster carers. Mr. Fox confirms that it is the assessment of the Child and Family Agency that it is in the best interests of C.W. that he be adopted and, in his view, this is a proportionate means by which to supply the place of the parents.

Report of Ms. Claire O'Connor
21. The nature of the contact between the child and his birth parents is also recounted in a report prepared for the Adoption Authority by Ms. Claire O'Connor, who is described as an independent social worker. This report, which is dated 25th April, 2018, was prepared for the purposes of the prospective adoption, and is exhibited to the affidavit of Ms. Mariesa Hardiman, social worker. The Child and Family Agency requested that Ms. O'Connor meet with the child and explore his views.

22. This was the second occasion of her involvement with the child. On 5th May, 2011, she had been appointed his *guardian ad litem* in the context of a court application by the birth parents for access/variation/vacation of the care order, and remained appointed until 13th November, 2012, following their decision to withdraw the applications.

23. On her appointment as *guardian ad litem*, there were two applications before the court: an application pursuant to s. 22 of the Child Care Act 1991 to vary or discharge the care order and an application for a notice regarding access under s. 37 of that Act. Her role was to ascertain the child's wishes and feelings and convey them to the court; and to assess, on an ongoing basis, the child's best interests. When she was first engaged the child was refusing to attend access.

24. At para. 11 of her report prepared for the Adoption Authority, Ms. O'Connor records that C.W. attended approximately eight access sessions between November, 2009 and January, 2011. At that time, the foster carers reported that while C.W. presented as quiet at the first four access sessions (which took place between November, 2009 and June, 2010), he did appear to enjoy the access visits.

25. A change was then noted in C.W.'s prior to an access visit in September, 2010. The foster parents reported that there was some difficulty surrounding C.W.'s name on his passport prior to this and C.W. reportedly became upset at his birth parents for not understanding that he was a "*R*" (being the surname of his foster parents). It is also recorded that C.W. reported that he felt pressurised by his birth father at an access visit in September, 2010. An issue also arose in relation to a hairstyle which his birth mother fashioned for him on the occasion of one visit and whether the foster parents should have been consulted in advance. In her report, Ms. O'Connor described the access arrangements as being particularly difficult for the child in January, 2011. When she met him on 26th May, 2011 he informed her that while he was happy for the first number of access visits, he did not feel happy at that time.

26. Ms. O'Connor records that during her involvement between 2011 and 2012, the child, the birth parents and the foster carers were referred to a child and adolescent psychoanalytic psychotherapist with the aim to focus on attachment and ascertain how the child might be encouraged to attend access. Ms. Margaret Beaumont, child and adolescent psychoanalytic psychotherapist, prepared a report dated 4th November, 2011, and concluded that C.W. felt attached to his foster parents and felt safe. He trusted the consistency and predictability of their care for him. Ms. Beaumont is reported as having observed that the child might feel rejected and abandoned by his birth family for a long period of time and she made recommendations as to how he might eventually be encouraged to attend access. C.W. began attending play therapy sessions following such assessment.

27. Ms. O'Connor advises at para. 20 of her report that throughout her involvement with the child, his African identity was a factor which was considered. It was hoped that when he got older he would become more inquisitive which would naturally lead him back to his family of origin. Ms. O'Connor further commented that this did not happen to the extent that one might have thought. She also stated that it made sense that his foster family was where his attachments lay as he had lived with them from when he was a matter of a few days old and he had no contact with his birth parents for eight of the first nine years of his life. She also believed that while the child is very much aware of his African origin, he identifies himself as being from the county in Ireland where he now resides and as being a member of his foster family.

28. Ms. O'Connor described C.W. as being well-adjusted, talented at sport and in school, and popular amongst his peers and with adults. She is fully supportive of the application for adoption and believes that it is in C.W.'s best interests. She has concluded that C.W. is a mature seventeen year old who shows good insight into his wish to be adopted and what adoption would mean for him. In her view considerable weight should be given to his expressed wish to be adopted. C.W. informed her that he would be greatly disappointed if he were not adopted. This is clearly what C.W. wants and she believes that to go against this would likely have a significant impact on him.

Evidence of Mariesa Hardiman, social worker
29. Ms. Mariesa Hardiman is a social worker with the Child and Family Agency's adoption service department. She has sworn a number of affidavits in support of this application and her evidence is in line with that of Mr. Fox. She confirms that an assessment of the applicants was undertaken and a report compiled by a Ms. Sarah Davis, a social worker on 10th April, 2018. This report, which is known as a "*Fostering to Adoption Assessment Report*", is exhibited to Ms. Hardiman's affidavit. It was prepared in the context of an application for a declaration of eligibility and suitability. Ms. Davis recommended that those declarations be made. She assessed and considered the eligibility of both the applicants and the child for adoption. She noted that the birth parents are living apart and the birth mother has obtained a safety order against the birth father. Ms. Davis also expressed the opinion that C.W. understands that adoption would sever the legal relationship between him and his birth parents and that a legal relationship will be established with his adoptive parents. The report also records that while the relationships within the adoptive family unit will not change at a practical level, they will have the added weight of being legally recognised. The adoptive parents recognise the significance that this will have for the child, according to Ms. Davis' report. Ultimately, she assesses the adoptive parents as competent to adopt the child and concludes that they satisfy the requirements for eligibility and suitability, under ss. 33 and 34 of the Act of 2010. She also believes that the adoption of C.W. by the second and third named applicants is in the best interests of the child. Her affidavit exhibits a letter written by the child in January, 2018 in which he expressed a desire to be adopted by his foster parents. The child also expressed to her his displeasure at the opposition to his adoption by his birth parents.

Evidence of foster parent F.R.
30. The child's foster mother F.R, has sworn an affidavit and has also given evidence to the Court. She and her husband have two foster children, including C.W., and also have an older adopted child, now aged twenty, who was initially fostered by them. They adopted her when she was ten years old and when C.W. was eight years old. The youngest foster child is sixteen. F.R. gave evidence

that C.W. has been part of their lives and their family; and that they are very keen to proceed with the adoption.

31. F.R. describes C.W. as being grounded, confident, popular and emotionally mature. He is a good student, is ambitious and very involved in sports. F.R. states that she is conscious of the child's cultural background. She has attempted to ensure that C.W. keeps in contact with his culture. While the child is aware of his African origin, he identifies himself as being from the county where they now live.

32. She informed the court that both she and her husband encouraged the child to attend access with his birth parents when contact was made in 2009. Initially access went well but this changed after a certain visit when photographs were taken. He did not like his photograph being taken. He stated that he was described as chubby and an issue arose about his hair. Ultimately he found the process of access to be stressful and eventually refused to go. She stated that while they encouraged the child to attend access, he regressed and started bed wetting, something that embarrassed him. Once a decision was made that he was no longer required to attend access unless he wished to, his general presentation and mood improved greatly. She also felt that she made a significant effort to ensure that C.W. engaged with his birth family and expressed disappointment in the way things worked out in that regard. F.R. stated that C.W. communicates with two of his birth brothers, informally, through social media.

33. When the eldest foster child was adopted in 2008, F.R.'s evidence is that C.W. expressed the desire to be adopted – I note, however, that the child would only have been eight at this time. He continues to express such desire to this day. F.R. believes that adoption will enhance C.W.'s feelings of security and identity and that adoption is in his best interests. She is anxious to ensure that C.W. will have continuing contact with his birth family should he so wish. Both she and her husband love C.W. unconditionally. He has become an integral part of the family. She gave evidence that, since the time he arrived in their home aged thirteen days, they have fulfilled the role of parents to him in every respect and it is her firm belief that C.W. views them as his parents in everything but law.

34. Regarding the use of the foster parent's surname, F.R. stated that when C.W. was attending preschool, a friend who ran the school referred to him by his foster parents' surname. She accepted that it was perhaps through laziness on her part that she did not address the name change at that time. With regard to the passport issue, the birth father had consented to the foster parent's surname being placed on the passport but the authorities had omitted his birth name. When pressed, under cross-examination, about the use of the surname she stated that she did not wish to explore the matter further but confirmed that C.W. was three when the foster parents' surname was first used. It was suggested to her that by not having used his birth name from an early age, he was not identified with another, his birth, family and that this now affects his identity and the way in which he views himself. It was suggested, as I understand it on a non-blameworthy basis, that there was a certain level of indoctrination in this regard and that by not exploring his ethnic background with him that this too unintentionally had the effect of indirectly severing ties with his birth family. In response, she expressed the view that it was the birth parents who severed the ties when they left in 2001/2002; and that she and her husband had made great efforts to maintain contact with the birth family. It was C.W. who did not want to have the contact with his birth parents. She believed that his wishes had to be listened to and she hoped that someday he would make contact them.

35. F.R. also described that birthday cards and Christmas cards were sent to C.W. by his birth family between 2000 and 2002 but that after 2002 there were no further cards before 2009. She has spoken to C.W. about his birth parents and has pictures of his birth family on display in the house. She categorically rejected the suggestion that she was fostering for monetary gain. She confirmed that C.W. wants for nothing. She hoped that adoption might take place and was anxious to proceed with the adoption as soon as she knew that this is what C.W. wanted. F.R. confirmed that she too explained to C.W. what adoption meant.

36. F.R. gave evidence that she attempted to encourage C.W. to have access with his birth parents, but this has not occurred. It was suggested in cross-examination that there was no real attempt made by the foster parents to explain or engage or encourage him to engage in his Nigerian culture and Yoruba ethnicity and that the efforts made by the foster parents were reactive rather than pro-active. F.R. stated that she spoke more to him about his family rather than his ethnicity. She accepted that her approach was that if C.W. wished to find out something about his ethnicity that she would help him to research it, rather than exploring particular issues on an active basis.

Mark Kirwan

37. Mr. Mark Kirwan, manager of the Domestic Adoption Unit at the Adoption Authority confirmed that a hearing took place in respect of the application with the child and the prospective adoptive parents on 15th May, 2018 and a further hearing was held with the second and third named respondents on 29th May, 2018. He also stated that the chairperson of the authority had expressed serious concerns about the late stage in which the application had been received but having heard evidence from social workers, the views of the child, the birth parents, and also the Child and Family Agency's view that an adoption order would be the best interests of the child, the Board concluded that it would be proper for the adoption order to be made, and in the best interests of the child, in the event that this Court was to make an order under s. 54(2) of the Act of 2010.

Evidence of birth mother, A.W.

38. A.W., the birth mother, opposes the application. She does not believe that it is in the child's best interests that he be adopted. She relies on a number of reports which were prepared in 2010 when contact was initiated and access arrangements were put in place.

39. In particular, she refers to and relies on a report of Ms. Barbara Tansey, a social work team leader, dated 4th May, 2010 which was prepared in or about the time that she enjoyed access to her son. It appears from that report that Ms. Tansey was pivotal in reintroducing the child to his birth parents. It is recorded that while the social work department believed that A.W. and P.W. were in Nigeria, in August, 2009, it came to their attention that A.W., P.W. and their family were living in Dublin and in fact had been in Ireland for a number of years.

40. Ms. Tansey met with the foster carers to so inform them and to discuss and plan how best to introduce C.W. to the family. She also met with the birth parents, to ascertain their views and wishes and as to how best to introduce them back into C.W.'s life. It was agreed that C.W.'s foster carers would meet with the birth parents before introducing C.W. This meeting took place in October, 2009 and went very well, according to the report. She describes C.W. as having a healthy curiosity about his family and culture.

41. In November, 2009, C.W. met with his birth parents and in December, 2009, met with his birth siblings and birth parents, along with his foster parents and foster siblings. This was described as being a very good visit enjoyed by all. The families met in Dublin Zoo on 7th April, 2010 and it was agreed at a review at around about that time that C.W. would have monthly phone contact with his parents and siblings and they would exchange emails. An agreed plan for contact was put in place. It was considered to be in C.W.'s best interests to commence access "*slowly*" to allow him an opportunity to get to know his birth family. Ms. Tansey stated in her report that:- *"[C.W.] will dictate the level of contact*", and that "*if he feels ready for monthly contact sooner than planned it will be*

facilitated". It was Ms. Tansey's assessment at that time that neither the birth parents nor his siblings posed any threat to him. She described a good positive relationship as having developed between C.W.'s foster parents and the birth parents and stated that they were comfortable in each other's company. Ms. Tansey was unaware of any concerns regarding the birth parents' care of their children and concluded that C.W. was thoroughly enjoying getting to know his family and looked forward to the contact. The introduction of C.W.'s family into his life "*has given him that final security which will further enhance his development into adulthood*". She concluded by stating that she could not emphasise "*strongly enough the detrimental effect and long term to [C.W.] should his physical contact with his birth family be terminated*".

42. At the time of the preparation of that report, C.W. enjoyed contact with his birth family and looked forward to meeting them. It was envisaged that as he became more familiar and comfortable with the birth family, contact would increase. She described that C.W.'s ongoing contact with his birth family was of paramount importance to him and it was without doubt in his best interests that the contact with his birth parents continue. It is to be noted that in evidence Mr. Fox informed the Court that these reports/letters had been prepared in the context of a concern about the physical removal of the birth parents from the country. This was disputed.

43. The second and third respondents point to controversy surrounding the placement of the name "*R*" on the boy's passport, what they described as the reaction of the foster parents of C.W. to dressing in a suit and/or wearing of a traditional hairstyle as being responsible for the breakdown in contact.

44. A.W. also disputes the requirement for the child to have been taken into care or that there were any grounds for the making of the emergency care order or the care order. When she became pregnant in 2001 it was the fear that the child would be taken from her that led her to go to England at that time. She continued to reside in England with her husband until February, 2003.

45. A.W. gave evidence that the care order made on 10th July, 2001 was fully contested and appealed but due to financial difficulties the appeal was not pursued. A.W. states that she attempted to make contact with the HSE regarding the child between 2002 and 2009 but she was unable to contact the child directly as she had no address for him. She states that efforts were made to nominate her sister in Canada to make contact with the HSE but such contact was ignored. They nominated a pastor but it is stated that such access was refused.

46. A.W. believes that access was going well from November, 2009, until in 2011 when the child's passport was due to be renewed. The foster carers wished to have their consent to the use of their surname on C.W.'s passport, something to which objection was taken by the birth parents but eventually they agreed in order to calm matters down. They believe that the child was being negatively influenced against them. An application had been brought to discharge the full care order in or about 2011 and this was not proceeded with because the child was finding the process very stressful. She believed that the foster parents were influencing C.W. by saying such things to him as that his birth parents wanted him back so that they could bring him back to Nigeria, something which A.W. states was not on the agenda. A.W. also states that while C.W. has been living with, and has been cared for by, his foster carers since shortly after his birth, she believes that he should have at all times been informed that he was part of her family and had he been, the issue that is now before the Court would not have occurred. She fears that his biological background has been erased from his life and it has not been nurtured over the years, as it should have been. She states that the attempts to reintroduce C.W. to his birth family was not supported sufficiently by the applicants.

Evidence of birth father, P.W.

47. The birth father has sworn an affidavit in the proceedings. He attended court but did not give oral evidence. He is currently in possession of a residency visa and has applied for Irish citizenship. He also opposes the application.

48. P.W. describes being devastated when, while they were preparing for C.W.'s christening, social workers and gardaí attended at their residence and took the child into care. The care order was made against their wishes and they fought it. When A.W. became pregnant with their next son, he avers that they were given the impression that that child would also be taken into care as soon as he was born. They resolved to move away from Ireland, and moved to England even though this meant abandoning his asylum application and living in what he described as legal twilight in the United Kingdom. The child's birth mother moved to England for the birth of their next child in November, 2001 and he followed shortly thereafter in February, 2002. He confirms that A.W. returned to Ireland in February, 2003 and he returned in June, 2006. During the period when he lived in England and his wife lived in Ireland, he travelled here for visits four or five times per year. They did not live in Nigeria at any point during this period.

49. P.W. describes being quite upset when he received the letter from C.W. concerning adoption. He was very aggrieved that C.W. was taken into care in the first place and avers that all his other children are doing well in their education and life. When he was reintroduced to C.W. he initially got on well with the foster parents but believes that two incidents caused problems.

50. On the occasion of one access visit, the adoptive parents were supervising the visit through a window which he describes as having added awkwardness to the meeting. He had purchased a set of clothes for the children so that they could take a family photograph. The adoptive parents were watching from an adjacent room and C.W. seemed to be relatively comfortable during the visit when the photographs were taken. A week later, word reached the birth parents that the child had complained to his foster parents that comments had been made about the child's physical appearance and that he had been forced to smile and change clothes. He believes that the foster parents were responsible for making the complaint.

51. The second incident which he believes soured relations related to the acquisition by the child of a passport and the use of the foster parents' name on the child's passport. He states that he was threatened by H.R., (the second named applicant) that if he was not careful he would not see the child again and that access broke down thereafter. Like A.W., he wanted to ensure that the child was not harmed in any way and was persuaded to withdraw the application in the child's best interests. He hoped that withdrawing the application might have helped to put things back on track with child.

52. He complains that he was not contacted in 2013 or 2014 in respect of the care review and that the social workers had been very lax about keeping the birth parents in the loop concerning C.W. He believes that it is incorrectly recorded that he did not attend the care review meeting in 2016 as he is clear in his recollection that he did.

53. P.W. expresses his love for the child and emphasises that even though C.W. is residing with foster carers, he is still a member of his birth family, where his roots lie. This was not a case of them giving the child up for fostering, nor was he picked up on the street. P.W. emphasises that his child, C.W. was forcibly taken away from them.

54. P.W. also agrees with A.W. that C.W. does not understand what it takes to be a black child nor does he understand the challenges which he will face in the future. He has concerns that it is beyond the ability of the foster parents to develop C.W.'s sociocultural affiliations and believes that the foster parents have adopted what is described as a colour blind attitude towards his

care and upbringing. P.W. considers it important for the child's sense of identity that he understands and celebrates his African heritage.

The views of the child, C.W.
55. The views of the child have been recorded in a number of reports to which the Court has been referred. Mr. Fox has also given evidence of C.W.'s wishes. In accordance with the statutory and constitutional requirements, the Court has had the opportunity to hear from the child, C.W.

56. C.W. informed the Court that he understood what adoption meant and the effect that this would have – being that legal ties would be established with his adoptive parents and severed with his birth family. He regards himself being well integrated in his community and very much a member of the "*R*" family.

57. C.W. left this Court in no doubt but that he wished the adoption to proceed, and that while he might reengage in contact with his birth parents and birth family in due course, it is not something that he presently intends to so do. He wishes that these proceedings be resolved in favour of the making of the adoption order and he is unequivocal about this.

58. C.W.'s birth mother believes that great care should be exercised in assessing the weight to be attached to C.W.'s views. It is her belief that he is unfamiliar with his ethnic and cultural heritage background, that he is still a very young person and that issues may arise in the future. He will require to know more about his ethnic and cultural background in order to deal satisfactorily with such issues. She does not believe that he understands the significance and impact of adoption and in particular the impact it will have on his legal status with his biological siblings. None of the siblings, including adult siblings, have been consulted in relation to the application and she believes that the decision that has to be made has an impact on more people than those named in the proceedings. On her behalf, it was submitted that no real attempt was made by the foster parents or the Child and Family Agency to engage with him in respect of his culture and heritage. Their failure to so engage, and what was described as indoctrination in respect of the culture and heritage of his foster family are all matters which this Court should take into account when assessing what weight should be afforded to child's views.

59. There has been much debate and discussion as to why access broke down. It seems to me that whatever the reasons for the change in his attitude toward access arrangements, be it the taking of photographs, the hairstyle or the name on his passport, the attitude or approach of the foster parents or the birth parents, the reality of the matter is that at this stage, some seven and a half years after the last access visit, C.W. wishes to be adopted by the second and third named applicants and does not wish, at this time, to have contact with his birth parents.

Relevant statutory, Convention and constitutional provisions
60. Article 42A of the Constitution provides:-

> *"1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
>
> *2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
>
> *2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*
>
> *3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*
>
> *4 1° Provision shall be made by law that in the resolution of all proceedings–*
>
> > *i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*
> >
> > *ii concerning the adoption, guardianship or custody of, or access to, any child,*
>
> *the best interests of the child shall be the paramount consideration.*
>
> *2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."*

61. Section 54 of the Act of 2010, as amended, provides, *inter alia*:-

> *"(1) Where applicants, in whose favour the Authority has made a declaration under section 53(1), request the Child and Family Agency to apply to the High Court for an order under this section—*
>
> *(a) if the Child and Family Agency considers it proper to do so and an application in accordance with paragraph (b) has not been made by the applicants, the Child and Family Agency may apply to the High Court for the order, and*
>
> *(a) if the Child and Family Agency is satisfied that every reasonable effort has been made to support the parents of the child to whom the declaration under section 53(1) relates,*
>
> *(b) if, within the period of 3 months from the day on which the request was given, the Child and Family Agency either—*
>
> > *(i) by notice in writing given to the applicants, declines to accede to the request, or*
> >
> > *(ii) does not give the applicants a notice under subparagraph (i) of this paragraph in relation to the request but*

does not make an application under paragraph (a) for the order, the applicants may apply to the High Court for the order.

(2) On an application being made under paragraph (a) or (b) of subsection (1), the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants and to dispense with the consent of any person whose consent is necessary to the making of the adoption order.

(2A) Before making an order under subsection (2), the High Court shall be satisfied that—

(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,

(d) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents,

(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,

and

(f) that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents.

(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."

As commented in the annotations of the Law Reform Commission's Revised Act, it appears that the effect of the insertion by s. 24(1)(a) of the Adoption (Amendment) Act 2017 is that there are two paras. (a) in s. 54(1).

62. Also of relevance is s. 19 of the Act of 2010 which provides:-

"(1) In any matter, application or proceedings under this Act, which is, or are, before—

(a) the Authority, or

(b) any court,

the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.

(2) In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including–

(i) the child's age and maturity

(ii) the physical, psychological and emotional needs of the child,

(iii) the likely effect of adoption on the child,

(iv) the child's views on his or her proposed adoption,

(v) the child's social, intellectual and educational needs,

(vi) the child's upbringing and care,

(vii) the child's relationship with his or her parent, guardian or relative, as the case may be, and

(viii) any other particular circumstances pertaining to the child concerned.

(3) In so far as practicable, in relation to any matter, application or proceedings referred to in subsection (1), in respect of any child who is capable of forming his or her own views, the Authority or the court, as the case may be, shall ascertain those views and such views shall be given due weight having regard to the age and maturity of the child."

63. Thus, section 54(3) obliges the court considering an application for an order under s. 54(2) to have regard to the rights, whether under the Constitution or otherwise, 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. Section 54(3)(b) provides that in so far as it is practicable, in a case where the child concerned is capable of forming his or her own views, the court shall give due weight to the views of that child, having regard to the age and maturity of the child. In the resolution of any such application, s. 54(3) provides that the best interests of the child shall be of paramount consideration.

64. Pursuant to s. 55, the court cannot make an order under s. 54(2) without having heard the parents concerned or either of them and any other person who in the opinion of the court, ought to be heard by it.

65. The respondents also rely on the provisions of the European Convention on Human Rights and in particular Article 8, which provides:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Submissions on behalf of the applicant

66. The Child and Family Agency submits that the Court is being asked to dispense with the consent of the birth parents in the context of a factual situation where they have had little or no involvement in C.W.'s life for seventeen years. It is submitted that the child was abandoned by his birth parents in Ireland in 2001 and that they did not have contact with him until early 2009 and only then at the instigation of the Child and Family Agency.

67. It is argued that the balance of constitutional rights of the parents under Article 40.3 of the Constitution and those of the child was clarified to a certain extent by the Supreme Court in *G. v. An Bord Uchtála* [1980] I.R. 32. Thus a mother, or indeed as a corollary, a father, has a natural right to the custody of his or her child, which right is a personal right within the meaning of Article 40.3 but that this right is not absolute. Similarly, a child has a natural right to have his or her welfare safeguarded, which right is also a personal right within the meaning of Article 40.3. Reliance is placed on dicta of O'Higgins C.J. in this regard as follows (p. 56):-

"Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42, s. 5, of the Constitution, is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons. In the same way, in special circumstances the State may have an equal obligation in relation to a child born outside the family to protect that child, even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights. In my view this obligation stems from the provisions of Article 40, s. 3, of the Constitution."

68. It is further submitted that the Court must apply the provisions of Article 42A when addressing the requirements of s. 54 of the Act of 2010 and that that "*the best interests of the child shall be the paramount consideration*".

69. Dicta of Walsh J. in *G. v An Bord Uchtála* is cited as authority for the proposition that paramount is not by any means an indication of exclusivity and that (at p. 76):-

"The use of the word 'paramount' certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case."

70. Reliance is placed on dicta of Reynolds J. in *Child and Family Agency v. The Adoption Authority of Ireland* [2018] IEHC 172, where she stated (at para. 11):-

"It is clear therefore, that in determining the within application, the best interests of the child must be the paramount consideration."

It is submitted that it is in the best interests of the minor to dispense with the consent of the parents.

71. It is argued that there has been a failure by the parents in their duty towards the child because they have taken little or no part in his life for seventeen years. The child has never been in their care at any stage of life. The reason why access and contact resumed, it is submitted, was because they came to the attention of the Child and Family Agency and the Agency arranged for access. Since 2011, they have had no involvement in the child's life, they have not fulfilled a parenting role and they have failed in their duty towards the child. It is also further submitted that such failure will continue without interruption until the child attains the age of eighteen years because the parents have not sought to take responsibility for the minor in recent years and have only sought to prevent the adoption occurring but not to parent the child.

72. Regarding the question of abandonment, reliance is placed on dicta of McGuinness J. in *North Area Health Board v. An Bord Uchtála* [2002] 4 I.R. 252, where she stated (at p. 277):-

> *"As stated by Denham J. in Southern Health Board v. An Bord Uchtála [2000] 1 I.R. 165, an intention to abandon is not required. This is not in any way comparable to the situation under the Adoption Act, 1974, where a mother must 'agree to place her child for adoption' and where a free and willing consent is required, as argued by counsel for the notice party (see Walsh J. in G. v. An Bord Uchtála [1980] I.R. 32).*
>
> *This court has held that a mere statement by a parent or parents that they wish to abandon a child would not necessarily constitute proof in any particular case of the fact of abandonment. Similarly, it appears to me that a statement by a parent opposing adoption is not in itself a proof of non-abandonment. If it were otherwise, the child centred purpose of the Act of 1988 could always be defeated by a parental statement of opposition, regardless of the factual context."*

Reliance is also placed on dicta of Denham J. in *Southern Health Board v. An Bord Uchtála* [2000] 1 I.R. 165 to which I refer further below. Denham J. reiterated that the section did not require that there be an intention to abandon and that '*abandon*' has a special legal meaning. It is therefore submitted by the Child and Family Agency that the birth parents have abandoned the minor since 2001 and have not sought to remedy that abandonment since.

73. With regard to supplying the place of the parents, it is submitted that the State, in the form of the Child and Family Agency and in turn through the foster parents have been supplying the place of the parents since 2000.

74. In respect of s. 54(2A)(e)(i) and (ii), it is submitted that the minor is, and since October, 2000 has been, in the custody of the foster parents and has a home with them.

75. It is submitted that the Court must consider the wishes of the child as required under Article 42A and s. 54(3), particularly given his age.

Submissions on behalf of the birth mother

76. The birth mother submits that when the child was taken into care in October, 2000, the birth parents challenged the actions of the applicants. They enjoyed regular access with the child until November, 2001. She felt that she had no choice but to leave Ireland as she was expecting a child and she feared that that child would be taken from her. She returned to Ireland in February, 2003 and has continued to reside in Ireland since that time. She has had five children since C.W. was born and has cared for them without the assistance or concerns of the Child and Family Agency. A.W. submits that she attempted to engage in contact through social services but that this was unsuccessful.

77. Ultimately, when access was re-established in 2009, she submits that this access was not supported by the applicants. It is her case that the foster carers were fearful when access was going well that they would lose C.W. Once this fear emerged, access ceased. She believes that the Child and Family Agency supported the foster parents rather than the birth parents, and that the Child and Family Agency did not work to develop and ensure the connection between the child and his birth parents.

78. In 2011, she acceded to the wishes of C.W. and ceased contact. She consented to the name change on the child's passport. Refusal to do so would cause C.W. concern and she maintains that contrary to the view of Ms. Tansey referred to above, in 2010 the Child and Family Agency supported the severing of contact with the child in what it considered to be the best interests of C.W. at that time. The birth parents had brought an application to discharge the full care order but withdrew it when they were informed that the applicants felt that it was in the best interests of the child to do so. It is contended that this action should not now be used against them in this application, particularly where they acted upon the advices of the Child and Family Agency in withdrawing that application. It is submitted that birth parents wished to have the opportunity to raise C.W.

79. The birth mother is particularly critical that the Child and Family Agency did not make appropriate efforts to support reunification of the child with his parents and siblings and that rather than being neutral, it is supporting and promoting this application. To this end, it is submitted that adoption would be disproportionate in circumstances where such efforts at reunification had not been made and no active effort has been made to promote access with the birth family since 2011. Further, it is contended that no effort had been made by the Child and Family Agency to reunite the child with his birth family as part of their aftercare planning for the child, something which should have commenced following the child's sixteenth birthday. It is contended that the first named applicant had been fully aware since 2011 that the birth mother wished to be reunified with her son and that no plan for reunification was ever attempted – rather it was the opposite that occurred. Had the second respondent been aware of the potential for adoption at or around the time that she withdrew the application in respect of the care order in 2011, a different view would have been taken.

80. It is denied that there is no reasonable prospect that the parents would be able to care for their child in a manner that would not prejudicially affect his or her safety or welfare, and A.W. refers to the report of Ms. Tansey in this regard where she emphasised the detrimental effect and long term damage to C.W. should physical contact with his birth family be terminated. It is therefore submitted that the welfare of the child has been prejudicially affected by the actions of the applicants and that such prejudice will continue into the future. It is contended that the applicants have never supported any form of reunification between the child and his birth family; that they never supported the child in any possible return home to his parents once he turns eighteen, and that the Child and Family Agency should have adopted an approach whereby they supported a return of the child to his birth family.

81. A.W. denies that she has failed to fulfil her parental responsibilities or in the exercise of her parental rights and states that she has at all times wished for her son to be returned to her care. It is contended that she was in essence fulfilling her parental role in following the guidance of the applicants in not pressurising her son to have formal access with her. She placed her trust in the applicants by accepting their recommendations, and that this should not be used against her now. It is the birth mother's position that at all times she considered what was in the best interests of the child before her personal desire to have the child returned to her full time care.

82. A.W. denies that she has abandoned her child. Reliance is placed on Finlay C.J. in *Adoption (No. 2) Bill, 1987* where he stated:-

> *"…failure which must be construed as being total in character. No mere inadequacy of standard in the discharge of the parental duty would, in the opinion of the Court, suffice to establish this proof."*

Ultimately she submits that if the birth parents had been supported in 2010 (described as the pivotal time), the application would not be before the Court. A failure to pursue the return of C.W. in 2011/2012 and in withdrawing the application to vary the care order

cannot, it is submitted, be construed as abandonment within the meaning of the Act. In withdrawing the application, A.W. was fulfilling her role as mother to the child as she withdrew so as not to cause the child any distress. It is contended that at all times she put the best interests of her child before her personal desire to have the child returned to her full time care.

83. In so far as the child's wishes are concerned, it is contended that the child had been indoctrinated into the foster family from a very early age, when his name was changed at preschool, and that the child was unable to comprehend the impact of his decision where he had been brought up to view his family to encompass his foster carers without reference or regard to his birth family.

84. It is also submitted that adoption is not proportionate, or a proportionate means by which to supply the place of the parents. Emphasis is placed on the requirement that it is only in exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

85. It is argued that the Child and Family Agency, as an organ of the State, should at all times act in a proportionate manner, and any resulting order from the court must be made accordingly. While it is accepted that the applicable provisions regarding the adoption of the child must consider what is in the best interests of the child, it is submitted that the rights of the birth mother must also be considered when determining what is in the overall best interests of the child having regard to the overall circumstances pertaining to the matter. The position of the birth mother must be considered when making any decision and the value of the child having an ongoing relationship with his mother. It is contended that no assessment has been carried out as to the effect of the absolute severing of ties between the child and his birth mother.

86. It is argued that *Child and Family Agency v. Adoption Authority* is distinguishable from this action. The child in that case had a profound disability and its birth mother was unable to care for its needs. It is submitted that there is no such consideration in this case; the birth mother is in a position to care for the needs of the child and therefore she should be given an opportunity to do so.

87. It is further argued that the Child and Family Agency have failed to have regard for the views of the child's siblings, and that it is not just the birth parents' rights that are being severed, but also the rights of the siblings. It is argued that there is no mention in the reports relied upon which reflect that any consideration has been given for the effect of the order on the siblings. It is submitted that such effect should be taken into consideration by the Court when determining whether an adoption order should be made.

Submissions on behalf of the birth father

88. The birth father, P.W., supports the submissions made by the birth mother and emphasises Article 8 of the European Convention of Human Rights and Article 7 of the Convention of the Rights of the Child. Counsel on his behalf submits that the assessment of a failure of duty in the context of an application such as this must be an independent exercise that is not influenced by the fact that the District Court had granted a care order in respect of the child. It is submitted and indeed it is accepted on behalf of the applicant that the mere fact that the child is in care does not in itself satisfy the failure of duty criterion.

89. Further it is contended that the term "*abandon*" encompasses more than the traditional idea of parents deserting their child and never being heard of again. It is submitted that the loss of C.W. in this case was not a matter of volition, but rather was a state of affairs which was imposed upon the birth parents by the making of the care order - something which they opposed in the first instance in 2000. Further, when they left to go to England, this was not in any sense directed at abandoning C.W. but was due to a fear that the impending birth of their next child would result in that child being taken into care. It was not in any sense intended that they would separate themselves permanently from C.W.

90. Further, it is submitted that the parental failure must be complete; that is a comprehensive and total collapse of all aspects of care and protection. It is argued that the birth parents' application to the District Court in 2011 to vary the access provisions applying to the care order or to dispense with the care order was an exercise of one of those rights. That was not pursued because it was deemed to be in the best interests of the child (on advice which they were given, in terms of reports, legal advice and, according to A.W., the advice of a social worker Ms. Tansey at that time). It is submitted that in withdrawing the application, they were acting in the best interests of the child. Since that time it is the child who has refused access but the biological family have at all times been willing to meet and contact him. It is thus contended that in circumstances where the breakdown in contact was not the wish of his parents, the position could hardly be considered as an abandonment of C.W.

91. P.W. points to the fact that both he and his wife have had *de facto* care of six siblings of C.W., that they have been well cared for, educated and have good prospects in life. It is also recalled that the bringing of C.W. into care was not related to any specific neglect or abuse by his parents but related to two alleged concerns arising from the death of Q.W.

92. Great emphasis is placed on the child's African heritage and the Court has been urged not to undervalue or to gloss over the importance of such feature. It is the contention of the father that the child's biological family, including his siblings, are best placed to nurture and give context to the various overlapping layers of identity that will manifest the child in the future. Both P.W. and A.W. emphasise that the child may not adequately appreciate or comprehend how such layers of identity can give him a sense of who he is and how he should operate in Irish society as a racial minority. This is not something that his Irish family are in a position or indeed have done. In this context significant emphasis is placed on the birth family's connection with its Yoruba and Nigerian culture.

93. Mr. Finn B.L. on behalf of P.W. relates that at this point in time, when C.W. is under two months from his majority, the question of his welfare in the context of the remainder of his childhood is of a different character than that of a much younger child. The question of welfare is not so much concerned now with the material side of his life rather with the broader questions of his identity and sense of self. It is suggested that in some sense the controversy over the surname he should use and the surname that should appear on his passport may be indicative of a struggle and confusion which may remain unaddressed.

94. It is contended that the making of an order dispensing with the consent of each of the birth parents is not in C.W.'s best interests and welfare. Mr. Finn B.L. argues that the order sought is not appropriate or proportionate and for example states that the child could change his name by deed poll if he wished to and that the adoption in any event would not appear to be necessary. The making of the declaration sought, it is submitted, is not a reasonable response in the balancing of the rights which the court must address.

Adoption Authority

95. Oral submissions were made on behalf of the Adoption Authority. It is broadly supportive of the application, but describes such support as being with a small "s". I propose to address such submissions in the decision below.

Decision
96. Article 42A of the Constitution makes it clear that it is only in exceptional cases, where parents fail in their duty towards their children to such extent that the safety or welfare of a child is likely to be prejudicially affected, can the State intervene to supply the place of those parents. Such intervention must be by proportionate means. It is clear, therefore, that it is only in exceptional cases that an application such as this, to dispense with the consent of the birth parents of the child to the adoption of that child, may succeed.

97. The application before the Court has been described by counsel for the Adoption Authority as rare and difficult. The difficult nature of the case is amplified not least because, having heard and considered the evidence of the parties, including the oral evidence of the birth mother and foster mother, I am satisfied they are very genuine people. I am also satisfied that the respective positions adopted by them are borne out of a desire to do what they consider to be in the best interests of the child, C.W. He will attain his majority on 11th October, 2018, that is within six weeks of the court hearing of this application during the vacation. He has expressed a strong desire and wish that he be adopted by his foster parents. He has lived with them since he was thirteen days old and has had minimal contact with his birth family. While I am particularly cognisant of the Court's obligation to listen to and take into account and have due regard for the views of the child, I am also cognisant of the Court's obligations to uphold, and in so far as is possible, vindicate the constitutional rights of the family and the birth parents. 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.

98. In *The Adoption (No. 2) Bill, 1987* [1989] I.R. 656, Finlay C.J. in considering the provisions of s. 3 of the Bill, (subsequently the Act of 1988) emphasised that each of the requirements of that section had to be fulfilled before the court could make an authorising order. He stated at pp. 663 to 664:-

> *"In s. 3 the provisions of sub-clause I (A) to II (B) inclusive provide a series of matters which seriatim must be established to the satisfaction of the court. They are not merely matters to be taken into consideration by the court in exercising a general discretion but are framed in the much more stringent form of being absolutely essential proofs requiring separately to be established. Failure in any one of these proofs absolutely prohibits the making of an authorising order, no matter how strong might be the evidence available of its desirability from the point of view of the interests of the child."*

99. Similar considerations apply to an application under s. 54(2) of the Act of 2010 in so far as the requirements specified therein are concerned. Each of the requirements specified in that subsection must be fulfilled before a court may make an order dispensing with the consent of any person whose consent is necessary to the making of the adoption order. To adopt dicta of Finlay C.J. these are not merely matters to be taken into consideration by the court in exercising a general discretion, but are framed in the much more stringent form of being absolutely essential proofs requiring separately to be established.

100. Nevertheless, following the constitutional amendment and the adoption of Article 42A of the Constitution there is now an overarching constitutional imperative, as statutorily enacted in section 54(3), that in a consideration of an application under section 54(2) and having regard to the rights of all persons concerned, the court is obliged to consider the best interests of the child as being the paramount consideration. In this case, the rights to be considered are those of the birth parents, their family and the natural and imprescriptible rights of the child. Further, in considering what is in the best interests of the child, I must in so far as is practicable give due weight to the views of the child having regard to his age and maturity. The provisions of s. 54(3) thus reflect the constitutional dictate contained in Article 42A.4 that in the resolution of proceedings concerning the adoption, guardianship or custody of, or access to any child, the best interests of the child shall be the paramount consideration.

101. It has been suggested (see Shannon, *Children and Family Relationships Law in Ireland: Practice and Procedure*, Clarus, 2016 commenting on the then published Bill) that the amendment of s. 54 of the Act of 2010, as contained in the Adoption (Amendment) Act 2017 and now reflected in subsections 54(2) and (3), allows non voluntary adoption to take place in situations that are less exacting than those set out in the original s. 54. Whether and to what extent this may be the case remains to be considered. 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. In this regard, Ms. Phelan B.L. on behalf of the Child and Family Agency lays particular emphasis on the wording of Article 42A and suggests that the starting point for the consideration of the Court should be the best interests of the child. Whether it should be considered the starting point or not, it is clearly of central significance and is constitutionally and statutorily the paramount consideration in the resolution of these proceedings.

102. In *Child and Family Agency v. Adoption Authority of Ireland* [2018] IEHC 172, Reynolds J., having recounted the provisions of s. 54(2) of the Act of 2010 and Article 42A of the Constitution, ratified since 28th April, 2015, observed at para. 11 that:-

> *"It is clear therefore, that in determining the within application, the best interests of the child must be the paramount consideration."*

Later in her judgment, she stated at para. 26:-

> *"The best interests of the child, as a constitutional right, must be the paramount consideration in this application."*

103. This central requirement is also reflected in s. 19(1) of the Act of 2010, as amended, which provides that in any application or proceedings under the Act which are before the Authority or the Court, regard shall be had to the best interests of the child as the paramount consideration. Section 19(2) provides that in determining, for the purposes of s. 19(1), what is in the best interests of the child, the Authority or the Court, as the case may be shall have regard to all of the factors or circumstances that it considers relevant to the child, the subject matter of the application. These include the child's age and maturity, his physical, psychological and emotional needs, the likely effect of adoption on the child, the child's view on his or her proposed adoption, the child's social, intellectual and educational needs, the child's upbringing and care, the child's relationship with his or her parents, guardian or relative as the case may be and, any other particular circumstances pertaining to the child.

104. A number of general propositions may be stated. The requirement at subsection (a) involves an analysis of parental failure of

duty towards the child, whereas subsection (c) focuses on such failure of duty constituting an abandonment of all parental rights.

105. In *Northern Area Health Board v. An Bord Uchtála* [2002] 4 I.R. 252, McGuinness J., at p. 270, accepted as a correct proposition that what is meant by parental duties is the normal day to day care of the child. She also described the test of abandonment as being an objective one and she held in the context of the facts of that case that acquiescence in regard to:-

> *"…crucial decisions regarding [the child]'s health and education and the carrying into effect of those decisions, together with the by no means insubstantial financial costs that arise from them. In my view, this situation amounts in a real and objective sense to abandonment of her rights as a parent."*

The learned judge observed that the Supreme Court has held that failure of duty does not necessarily or invariably amount to abandonment, the requirement of abandonment is not to be considered in isolation or separate from the failure of duty. It is such failure of duty, she observed, that may amount to abandonment (see p. 276).

106. It is also clear from the dicta of Denham J. in *Southern Health Board v. An Bord Uchtála* [2000] 1 I.R. 165, that abandonment has a specific legal meaning and that the section then under consideration (and indeed the section now under consideration, s. 54(2)) does not require that there be an intention to abandon.

> *"It is understandable that the word 'abandonment' in its ordinary meaning, would distress parents. The Concise Oxford Dictionary defines 'abandon' as:-*
>
> > *'1. give up completely or before completion (abandoned hope; abandoned in the game).*
> >
> > *2. a forsake or desert (a person or a post of responsibility).*
> >
> > *b leave or desert (a motor vehicle or ship)*
> >
> > *3. a give up to another's control or mercy.*
> >
> > *b …'*
>
> *and 'abandoned' is defined as:-*
>
> *'1. a (of a person …) deserted, forsaken (an abandoned child) …'*
>
> *Thus, it raises images of deserting or forsaking a child. However, in s. 3(1)(I)(C) the word 'abandonment' is used as a special legal term.*
>
> *The section does not require that there be an intention to abandon. While there may well be cases under s. 3 where there is simple abandonment of a child and an intention to abandon a child, these are not the only circumstances where s. 3 may be applied. The legal term 'abandon' can be used also where, by their actions, parents have failed in their duty so as to enable a court to deem that their failure constitutes an abandonment of parental rights. The parents in this case did not abandon F O'D. in the sense of deserting him physically in a place, but that does not preclude the operation of the section. The word 'abandon has a special legal meaning."*

107. It is urged by the second and third named respondents that the fact of the making of the care order in this case is not something that this Court should regard as being indicative of a failure in parental duties to the child or in assessing whether those failures constitute an abandonment on the part of the parents of all parental rights. There was a level of agreement between the parties in argument before the Court that the fact of the making of a care order is not and should not be construed or interpreted, in and of itself, as evidence of abandonment. Indeed, in this regard, the Court is conscious of the submission made by counsel for the birth father, Mr. Finn B.L., that were the position otherwise, then the making of a care order might become a gateway to adoption. I am satisfied that this cannot and should not be the case. In my view it is the totality of the facts and circumstances, objectively assessed, which must be considered in determining whether there has been a failure of duty and whether that failure constitutes an abandonment of parental rights.

108. Before considering the application of the criteria specified in s. 54(2) to the facts of this case, I should address an argument made by Ms. Lee B.L. that there has been a failure on the part of the Child and Family Agency to be satisfied that every reasonable effort has been made to support the parents of the child to whom a declaration under s. 53(1) relates. This obligation arises by virtue of s. 54(1)(a) of the Act of 2010 as amended by the Act of 2017. On my interpretation of that section it appears that this is a matter upon which the Child and Family Agency must satisfy itself before it makes the application which is now before the Court. Section 54(1) addresses issues and requirements which must be fulfilled before the application is made; section 54(2) concerns the jurisdiction of the court on the hearing of such application. Section 54(1)(a) therefore appears to stipulate that this is a matter within the competency of the Agency. It is not specified in section 54(2) that this Court must also satisfy itself that the Child and Family Agency has complied with the provisions of section 54(1) before it may consider the making of an authorisation order or an order dispensing with the consent of a person whose consent is required, or that the application under section 54(2) should act as an appeal from a decision, declaration or determination of the Child and Family Agency in that regard. On the face of it, therefore, it seems to me that any remedy or challenge to compliance with the provisions of s. 54(1)(a) may lie in a different forum. But even if I am incorrect in this and it is a matter that ought now to be considered, and to the extent that I ought to address such concerns on this application, I am satisfied that such support was afforded to the parents in this case. It is clear from the reports relating to issues concerning access and the breakdown in access in 2010/2011, that supports were put in place in the form of the engagement of a psychologist, social workers, a child care worker, a play therapist, and a guardian ad litem to assist in the facilitation of access to the parents. It is also clear from the reports that the social workers were in contact with A.W. and P.W. at that time. While it may be said that this intervention was primarily with, and to support C.W., it appears to me that the purpose of such intervention was to persuade C.W. to engage in access with his birth parents, and thereby to support the parents in their attempts to have access to their son. Despite the efforts of all involved, the fact is that C.W. did not wish to have access and all appear to have agreed that it was in his best interests that the issue of access would not be pushed upon him. These matters have been addressed in particular in Mr. Fox's "*Foster Care to Adoption Case report*", and in particular when he deals with issues concerning access in June and July, 2011.

109. Turning then to application of the criteria in s. 54(2A) to the facts of this case, it is quite clear that the birth parents have not

been involved in the day to day care of C.W. for a period of 36 months immediately preceding the making of this application, nor indeed, with the exception of a few short days in the early stages of the child's life, have they been so involved throughout the lifetime of the child.

110. While reasons for this have been proffered including those relating to the suggested unjustified obtaining of the care order in the first place, the inability to appeal that order due to lack of finance and fears and concerns regarding the potential for other children of the couple to be taken into care, objectively viewed, the above is and remains the situation.

111. The birth parents contend that they were effectively dissuaded by reason of advice received, either from care workers or the lawyers representing them, or both, that it was in the best interests of the child not to pursue an application for variation or vacation of the care order or to seek access. It is submitted that this should not now be held against them. I accept that while I must give due consideration to their actions in this regard, it must be reiterated that the overriding consideration is what is now in the best interests of the child on this application. A decision to make, or not make, the orders sought is not a reward or punishment for any party, nor should it be seen as such. In reality, however, and objectively, the birth parents have had no involvement in C.W.'s upbringing for the last three years. They have not been involved in the day to day management and the making of crucial decisions regarding his health and education and the carrying into effect of those decisions. The facts establish that as and from 2002, the child was in the care of the HSE and his foster parents, who cared for and made all necessary and important decisions in relation to his upbringing and welfare. The birth parents lived in England for a portion of this period although a Nigerian address was supplied. It has been suggested that they wished to continue contact with their child, but I am satisfied on the evidence and on the balance of probabilities, that they did not make direct contact with the social workers who had made provision for the placement of the child for adoption, between 2002 and 2009, apart from certain letters which were written in 2002.

112. Further, but for the fact that the birth parents were contacted by the authorities in 2009 once their whereabouts became known, whether according to A.W., the garda authorities because of their presence in the country, or whether as a result of contact by social workers, it may be that no contact would have been had, or sought, with the child for some considerable period thereafter. A.W. has described her very real concern and fear that had she made her whereabouts known, when her other children were young, that they would also be taken into care. While it was her aspiration and hope to reengage with C.W., no firm plans had been made to this end, particularly when her other children were young. Ms. Lee B.L. submitted that A.W. in more recent years and within the last 36 months, was at all times available for access and had made inquiries about access. She also refrained during this period from bringing any further application for access because that was considered to be in the best interests of the child. It was also submitted that various factual matters, events, and developments, disputed or otherwise, which took place over the years should be looked at in the assessment of any alleged failure on behalf of the birth parents. I accept that I should take all of these matters into consideration but I cannot but come to the conclusion that it is impossible to divorce the last three years from the previous fourteen, and in particular that period in the child's life between 2002 and 2009 when the birth parents did not seek access to C.W. or indeed to seek to exercise such rights of access as they had enjoyed at an earlier stage of his life. These periods of time, in my view, are inextricably linked, particularly because of the long lasting effects which are evident from C.W.'s attitude and opposition to any access with his birth parents. In my view, there has been a failure by the parents in their duty to C.W. within the meaning of s. 54(2A) which has continued up to the time of the making of this application. In the circumstances, having considered the facts, I conclude that the provisions of s. 54(2A)(a), have been satisfied and that for a continuous period of not less than 36 months immediately preceding the time of the making of this application, the parents of the child C.W. 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.

113. Regarding the requirements of subsection (b) I must be satisfied that 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. Mr. McGarry S.C. submits that while the expression "*no reasonable prospect*" sets quite a high bar, nevertheless this must be read in a qualified way: it is qualified by the expression "*in a manner that will not prejudicially affect his or her …welfare*". In this case, C.W. has expressed in trenchant terms that he does not wish to return to his birth family or indeed to have contact with them. It is pointed out by counsel that there is a care order in place and that realistically this will remain in place until the child is eighteen years of age, in approximately six weeks.

114. I have come to the conclusion that there is no reasonable prospect that the birth parents would be able to care for C.W. in a manner that will not prejudicially affect his welfare between now and the time he is eighteen years of age. The reality of the situation is that he has not been in the care of or cared for by them throughout his lifetime. It seems to me that it would be somewhat artificial to suggest that that situation could and would alter between now and the time the child is eighteen. In the circumstances, and bearing in mind the obligation on the Court to regard the best interests of the child as being the paramount consideration in the resolution of this application and in considering the necessary criteria, I am satisfied that there is no reasonable prospect that the birth parents would be able to care for C.W. in a manner that will not prejudicially affect his welfare between now and the time he is eighteen. 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.

115. With regard to the contents of subsection (c) I am satisfied, on the facts, that there has been abandonment. Objectively analysed, once again the birth parents have not been involved in *crucial decisions regarding the health and education of the child and the carrying into effect of those decisions*. It has been submitted that the application to vary the care order which was made (and withdrawn) in 2012, is evidence of the intention that the parental rights were not being abandoned. Contrariwise it is suggested that it is a matter of fact that the care order has been in place since 2001 and remains in place. It appears to me that if the fact of the making of the care order is not, in and of itself, to be regarded as evidence of failure in parental duties or an abandonment of parental rights, and if intention is not required for the purposes of satisfying the objective test of abandonment, then the same may be said of the actions of seeking to vary the care order. The same may be said in respect of the decision to withdraw the application, and in respect of the stated intentions regarding what course of action the birth parents may or may not have taken had they known that an adoption was a possibility, or that it may have or had been discussed in the foster home before that time. While these are matters and circumstances which I have considered, so also must I take into account that the child no longer wished to have birth parental access throughout the period since 2012. Such a state of affairs, in my view, cannot be divorced from the circumstances that pertained in the early years of his life up to and including 2009 when he had no contact with his birth parents and when, in my view, abandonment of all parental rights commenced.

116. The fact and reality of the situation is that, at 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. Further, I am also satisfied that the fact that the adoption has been opposed by the birth parents, does not in and of itself contradict the fact of abandonment – per McGuinness J. in *Northern Area Health Board v. An Bord Uchtála*.

117. With regard to subsection (d) the Court must assess whether the failure of the parents' duty towards the child, dictates that as guardian of the common good, the State through the Child and Family Agency and ultimately the foster parents have and should supply the place of the parents – a state of affairs which has continued since the child was thirteen days old and will continue until he is eighteen. In this regard, reference should be made to dicta of Finlay C.J. in *The Adoption (No. 2) Bill, 1987* regarding the issue of whether the place of the parents might require to be supplied. He offered an example of a hypothetical situation where such might not appear to be so, perhaps being a case where a 16 year old child is found to have sufficient maturity not to require the replacement of his or her parents' duty to him or her. It must be borne in mind, however, that that case preceded the amendment introduced by the Adoption (Amendment) Act 2017, and in particular section 54(3). It has been submitted to the Court and I accept, that in most cases the greater the age and maturity, the greater the weight should be attached to the views of the child. On the evidence, C.W. is a young person who I find to be of significant maturity. Thus, on such analysis, it follows that the views of C.W. should be afforded great weight. I do not believe that subsection (d) should be interpreted in a manner inconsistent with the objective of the adoption, in appropriate circumstances, of all children under the age of 18 years including children of greater maturity. To interpret the section as implying that the greater the child's maturity, there is necessarily a lesser requirement for the State to supply the place of the parent, while on one interpretation may be arguable and permissible, such interpretaction may have the unintended effect of excluding more mature children, who have not yet attained majority, from the benefits of adoption. I do not believe that this section should be interpreted as effectively leading to the blanket exclusion of more mature children from the benefits of adoption. Each case must be determined on its own facts. The provisions of s. 54(3) emphasising the paramountcy of the best interests of the child are important in this regard. Further, there are many decisions that are taken and may require to be taken on behalf of the child up to the time that he or she reaches majority. I am therefore satisfied, bearing in mind the overriding obligation on the court outlined in s. 54(3) that the requirements of s. 54(2A)(d) have been complied with in this case.

118. It is clear that the provisions of subsection (e) are satisfied. The child has a home with the applicants for a continuous period of not less than 18 months immediately preceding the making of the application.

119. The next issue which I must address is whether the provisions of subsection (f) have been complied with. The Court must be satisfied that the adoption of C.W. by the applicants is a proportionate means by which to supply the place of the parents. Again, it appears to me that this subsection must be viewed in the light of the provisions of s. 54(3) and in assessing proportionality I must regard the best interests of the child as the paramount consideration and in so doing give due weight to the views of the child having regard to his age and maturity.

120. In this context, it is also relevant to consider the submissions of the second and third named respondents regarding proportionality and the European Convention on Human Rights. Counsel has submitted that the doctrine of proportionality introduces a number of fundamental restrictions on the rights enshrined in the Convention and involves balancing the rights of the individual and the interests of the State. It is further submitted that any interference in family life can only be justified under Article 8(2) if three particular conditions are fulfilled – that the interference is in accordance with law, that the interference is in pursuit of one of the legitimate aims defined in Article 8(2), this being, in this context, the protection of the rights and freedoms of others, which encompasses the interests of the child, and that the intervention must be necessary in a democratic society. Thus, it is argued that restrictions on fundamental rights that are necessary in a democratic society for a clearly defined social goal such as maintaining public health or public order should therefore not be used if there is an approach which is less severe but is likely to have similar consequences. It is submitted by on behalf of the second and third respondents that the making of the adoption order would be disproportionate to the aims sought to be achieved. Reliance is placed on the decision of the European Court of Human Rights on *K. and T. v. Finland* (2003) 36 EHRR 18 where the court stressed that the mutual enjoyment by a parent and child of each other's company represent a fundamental element of family life. At para. 151, the court stated:-

> *"As is well established in the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, among others, Johansen v. Norway, judgment of 7 August 1996, Reports 1996-III, pp. 1001-02, § 52). The impugned measures, as was not disputed, evidently amounted to interferences with the applicants' right to respect for their family life as guaranteed by paragraph 1 of Article 8 of the Convention. Any such interference constitutes a violation of this Article unless it is 'in accordance with the law', pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as 'necessary in a democratic society'."*

121. The respondents also rely on a number of English authorities as to the meaning of proportionate. In *In re B-S* [2013] EWCA Civ 1146, Sir James Munby P., delivering the decision of the court stated at para. 26:-

> *"…although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible.*
>
> *27. Second (Re B para 77), as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court 'must' consider all the options before coming to a decision. As Lady Hale said (para 198) it is 'necessary to explore and attempt alternative solutions'. What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long. We return to the implications of this below.*
>
> *28. Third (Re B para 105), the court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer…"*

It seems to me that, although the Act of Parliament there being considered makes provision for a different statutory framework, the decision is of some assistance in the context of considering the question of proportionality. There, the court laid emphasis on matters that should be considered before the making of an adoption order and that the evidence must address all of the options which are realistically possible which should contain an analysis of the arguments for and against the adoption.

122. Ms. Lee B.L. argues that the birth mother is in a position to care for the needs of the child and therefore she should be given the

opportunity to do so. It is also submitted that regard should be had to the views of the child's siblings, none of his adult siblings, nor indeed his minor siblings were consulted in relation to the proposed adoption. It is submitted that it is not just the birth parents' rights that are being severed but also the rights of his birth siblings. No particular right of a birth sibling, beyond that of being a member of the family unit has been identified in submissions. However, from a practical perspective, it has been submitted that the effect of the adoption order will be that the child's siblings will no longer have their brother C.W. as part of the family. Counsel for the father has also pointed to other more practical issues, such as for example, if C.W. was to require a kidney, blood transfusion, etc. in the future, that the most obvious and first port of call might be a sibling.

123. 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.

124. It is common case and accepted by all parties that in this case, two alternatives are available – that the *status quo* be maintained, or that the declarations sought be granted. In so far as the *status quo* is concerned, it is clear from the report of Ms. Claire O'Connor that C.W.'s aftercare plan has been considered. At para. 42 of her report, she states that she has spoken to the community care social work team leader, a Ms. McGonigle, who advised that while C.W. does not have an allocated aftercare worker, his social worker, Mr. Conor Fox, who has given evidence to the Court, will act as his aftercare worker until he is allocated an aftercare worker. It is indicated in that report that the aftercare needs assessment will be completed in the near future and that this will be followed by a draft aftercare plan. It is also recorded in that report that Ms. O'Connor was assured that C.W. will be entitled to an aftercare financial package no matter what the outcome of the adoption proceedings. Under cross-examination, Mr. Fox stated that he was involved in the aftercare plan from soon after he was appointed as C.W.'s care worker and that the issue of reunification was discussed at a child care review meeting but it was deemed to be in C.W.'s best interest to remain in the care of the Child and Family Agency and in his placement with the foster family. Mr. Fox stated that issues of reunification and adoption are commonly raised at such meetings but he could not say from his examination of the files if they were discussed with the birth parents. Nevertheless, Mr. Fox's evidence and the report of Ms. O'Connor relating to the aftercare plan, indicates to the Court that alternatives were and have been considered by the Child and Family Agency.

125. I am also conscious of the requirement to consider the constitutional rights of the family, rights that were considered by the Supreme Court in *The Adoption (No. 2) Bill, 1987*. Finlay C.J. stated, however, at p. 663:-

> *"The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose. The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family."*

No specific right of a sibling has been identified, distinct from those relating to the family, which rights are not absolute. While it may or may not have been a better approach to have contacted C.W.'s birth siblings to ascertain their views in advance of this application, the parties have been unable to identify any such specific right or obligation as a matter of law, separate and distinct from the rights of the family. Even if there existed such a right, it must be remembered that the voice which the court is obliged to hear is that of the child the subject of the application.

126. As I have previously stated, there is no realistic prospect of his birth parents having access or custody between now and the time C.W. reaches majority. While it is true that the making of the adoption order will result in the severing of the legal ties which he has with his birth family, I am satisfied that the making of that order, in this case, will provide greater security, provide him with greater legal rights within the adoptive family and is likely to fortify his sense of belonging and comfort. In my view, the adoption by his foster parents is likely to further the betterment of his psychological and emotional needs. Considering the overall circumstances, I believe it is highly likely that the adoption will have a positive effect on him. I am satisfied that the making of the orders sought is proportionate. An analysis and application the provisions of s. 19 of the Act of 2010, in the consideration of what is in the best interests of the child, strongly indicated that the making of the order in this case is in the child's best interest.

127. In the circumstances, I find that the requirements of s. 54(2) have been complied with and that in balancing the rights of the parties, at all times bearing in mind the paramount consideration being the best interests of this child, I am satisfied that in all the circumstances, including what I consider to be the best interests of the child, that the orders sought ought be made and I propose to so do.

128. Many questions and issues have been raised in the case concerning and exploring the reasons why matters have progressed as they have to the point at which we have now arrived. There are many *'what ifs'*. What if the care order had been successfully appealed? What if the birth parents pursued the application to vary the care order or to seek access? What if that application was successful? What if it were unsuccessful? What if the child had a greater or different sense of his ethnicity, culture and background such as may have influenced his wishes otherwise than those now expressed? What if the birth parents had not gone to England? What if they had not gone to England under the guise that they had returned to Nigeria? What if the birth parents' whereabouts did not become known to the social workers in 2009? It may be that if some or all of these eventualities and occurrences had or had not taken place the child might have had a different path in life, in his development, in his education, where he resides and in whose care he might have been or now be. One can only speculate. In my view, however, on the application of the objective test set out by McGuinness J., the Court must face the reality of the situation that now exists and that has existed for in excess of three years prior to the making of this application.

129. It is only in exceptional cases that the consent of birth parents to an adoption should be dispensed with. That is particularly so in a case such as this where the birth parents have been married for many years, although recently separated, and have other children for whom they care. This makes the application highly unusual and difficult. Nevertheless, in my view, in the particular circumstances, this must be regarded as an exceptional case.

130. The child is on the cusp of adulthood. He has been in the care of the foster parents for practically all of his life. He has significant ties to his foster family including his foster siblings. He regards himself as a *de facto* a member of the family. He is opposed to being reunited with his birth parents. His sense of belonging is to the foster family and the county in which he lives. He has close ties not only with his foster family but in the local community. He has excelled in his education and sport. He wishes to be adopted by his foster family. He has been raised in an exemplary manner, something which has been very fairly acknowledged by his birth mother.

While it has been suggested that adoption is not necessary and that all of the above mentioned and all such ties will remain, the strong desire of the C.W. to be regarded as a legal member of his foster family should not be understated. On the other hand his blood link is with his birth parents and family, in what might be described as his natural place of succour, support and security in life. His birth parents have rights to his care and to be involved in his upbringing. But none of these rights are absolute and they must be balanced.

131. This has been a most difficult decision. It is clear to me that in evidence to the Court the birth mother wishes it to be recorded that she has and has had a long felt desire and hope to reengage with C.W., to welcoming him back into his birth family and to making him feel wanted and a member of her family. She also wished to make it clear that it was never her intention to abandon him. She wishes C.W. to be aware of her intentions, hopes and aspirations in this regard as he grows into adulthood. It is important that this is recorded in this judgment and it also important to reiterate that the concept of abandonment within the meaning of the Adoption Acts centres not on the intention of the birth parents but must be objectively assessed in a strict legal sense. There is of course no bar on C.W. re-engaging with his birth parents or birth siblings should he wish to do so in the future.