Neutral Citation [2016] IEHC 738

THE HIGH COURT

FAMILY LAW

[2016 No. 325 S.S.]

IN THE MATTER OF THE ADOPTION ACT 2010, SECTION 49(2)

AND IN THE MATTER OF J.B. (A MINOR) AND K.B. (A MINOR)

BETWEEN

C.B AND P.B.

APPLICANTS

AND

ÚDARÁS UCHTÁLA NA hÉIREANN

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 25th day of November, 2016

1. This case came before the High Court on 17th October, 2016. This is a case stated by the Adoption Authority of Ireland (herein after referred to as the "Authority") pursuant to the provisions of Section 49(2) of the Adoption Act 2010 at the request of C.B. and P.B., for the determination of a number of questions of law set out hereunder arising on an application for an adoption order by C.B. and P.B., a married couple (herein after referred to as the "applicants"), in respect of the children named in the title of these proceedings, J.B. and K.B.

2. The Authority has referred the following questions of law to this Court:

> (a) Is the Thai Adoption recognisable in Ireland under Part 8 of the 2010 Act or common law?
>
> (b) On the facts disclosed in this Case Stated, does the Authority have jurisdiction to make an adoption order in respect of the children, having regard to the pre-existing Thai adoption, section 45 of the Adoption Act 2010 and any other relevant provision?
>
> (c) Does *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399 remain good law following the passing of the 2010 Act and, specifically, the incorporation of the Hague Convention into Irish law (section 9)?
>
> (d) If so, and on the facts disclosed in this Case Stated, and assuming the Thai Adoption is not recognised in Ireland, does the original status of the children remain (per *M.F. v. An Bord Uchtála* [1991] ILRM 399 at 402 (MacKenzie J.))?
>
> (e) On the facts disclosed in this Case Stated, are the children eligible for adoption under section 23 of the 2010 Act, having regard to sections 9 and 45 of the 2010 Act?

Background

3. Certain facts were outlined in the case stated which counsel for the Adoption Authority submitted were the only relevant facts for consideration by this Court. They are set out at para. 6 of the case stated as follows:-

> "(a) C.B.B. and P.B. were married in the United Kingdom in August 2008 and have resided in Ireland since October 2006 and December 2007, respectively. They have been Irish citizens since March 2013 and October 2013, respectively.
>
> (b) The children are sibling minors born in Thailand on 24 November 2006 and 30 September 2008, respectively.
>
> (c) Their natural father and mother are unmarried.
>
> (d) They are the niece and nephew of P.B. by virtue of their natural father being her brother.
>
> (e) By email dated 16 June 2011, C.B.B. was advised by the Authority that in order to adopt, prospective adoptive parents must be assessed and be legally resident in Ireland for at least one year and, accordingly, was advised to contact the HSE for advice on the process. No such assessment was applied for at that time.
>
> (f) Instead, on 7 September 2011, P.B. (at the time solely a Thai citizen) applied solely to the Social Development and Human Security Office of Prachuabkhirikhan to adopt the children in Thailand. The Social Development and Human Security Office of Prachuabkhirikhan is not the Central Authority or the Competent Authority in Thailand for the purpose of inter-country adoption, as provided for in the Hague Convention.
>
> (g) The adoption of the children was approved by the Child Committee of Prachuabkhirikhan province on 25 January 2012, which approval was notified to P.B. in Thailand by letter dated 6 February 2012. The adoption (hereafter, the "Thai Adoption") was registered in Thailand on 21 February 2012.
>
> (h) On 25 April 2012, the children arrived in Ireland with C.B.B. and P.B. and, since that date, have lived in the care of

C.B.B. and P.B. at their home in Malahide, Co. Dublin.

(i) By email dated 3 May 2013, C.B.B. and P.B. commenced their application for a domestic adoption in respect of the children (the "Application").

(j) In accordance with sections 37 and 39 of the 2010 Act, the Child and Family Agency prepared an assessment report and recommendation in respect of C.B.B. and P.B. (the "Assessment Report and Recommendation"). The Assessment Report and Recommendation were furnished to the Authority on 12 December 2014.

(k) On 16 March 2015, the Authority made a declaration of eligibility and suitability in respect of C.B.B. and P.B. under section 40 of the 2010 Act (the "Declaration of Eligibility and Suitability") having considered the Assessment Report and Recommendation.

(l) No application has been submitted to the Authority seeking an entry on the register of inter-country adoptions in relation to the Thai Adoption and the Authority has not been invited to make and has not made any determination as to the recognition of the Thai Adoption."

4. It may be noted that Thailand has ratified the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption 1993. However, it is accepted by all parties that the Thai authorities processed this adoption as if it were a domestic Thai adoption and did not involve the Central Authority or meet the Hague Convention requirements.

5. Counsel for the applicants wanted the affidavits, particularly that of C.B. dated 29th April, 2016, to be considered also and the Court accepts that these facts are part of the background of the case. The Court can not and is not making any finding of fact in relation to the affidavits before it.

The Law

6. This case stated asks the Court to assess the Adoption Act 2010. Section 49 of that Act provides the Adoption Authority with the jurisdiction to bring this case stated to the High Court as follows:-

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

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

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

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

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

(3) The Authority shall refer any question in relation to public policy arising with respect to entries in the register of inter-country adoptions to the High Court for determination.

(4) Subject to rules of court, a question referred under this section to the High Court may be heard in private."

7. The Adoption Act 2010 brought the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993 into Irish law. Section 9 of the Act states clearly that the "Hague Convention has the force of law in the State". The Hague Convention specifically states at Article 40 that no reservation to the Convention is permitted.

8. The 2010 Act places particular importance on the welfare of the child:-

"19. – In any matter, application or proceedings before –
(a) the Authority, or

(b) any court,

relating to the question of the arrangements for the adoption of a child, for the making of an adoption order or for the recognition of an inter-country adoption outside the State, the Authority or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

This provision can be considered to have been supplemented by Article 42A of the Constitution.

9. Section 3 of the 2010 Act deals with interpretation, of particular importance is the definition of "adoption order" as follows:-

"adoption order" means an order for the adoption of a child made—

(a) before the establishment day, by An Bord Uchtála under the Adoption Acts, or

(b) on or after the establishment day, by the Authority under this Act".

Section 23 of the 2010 Act sets out the circumstances in which a child may be adopted as follows:-

"23. – (1) The Authority shall not make an adoption order unless the child –

(a) resides in the State,

(b) at the date of the application, is not more than 7 years of age,

(c) is an orphan or is born of parents not married to each other, and

(d) has been in the care of the applicants for the prescribed period (if any)."

Section 24 is pertinent in relation to these children as they are now over 7 years of age:-

"24. – (1) Notwithstanding section 23(1)(b), if satisfied that in the particular circumstances of the case it is desirable to do so, the Authority may make an adoption order in relation to a child who was more than 7 years of age at the date of the application for the order.

(2) Before making an adoption order under subsection (1), the Authority shall give due consideration to the wishes of the child, having regard to his or her age and understanding."

10. Section 33 of the Adoption Act 2010 may have particular relevance to this case:

"33. – (1) (a) The Authority shall not make an adoption order, or recognise an inter-country adoption effected outside the State, unless –

(i) the applicants are a married couple who are living together,

(ii) the applicant is the mother or father or a relative of the child, or

(iii) the applicant, notwithstanding that he or she does not fall within subparagraph (ii), satisfies the Authority that, in the particular circumstances, the adoption is desirable and in the best interests of the child."

11. Of particular relevance to this case is s. 57(2)(b):

"(2) Subject to subsections (3) and (4), an inter-country adoption effected outside the State that –

(…)

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

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

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

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

(I) the date of the adoption;

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

12. The Act requires the Court to have judicial notice of the Explanatory Report on the Convention on Protection of children and Co-operation in Respect of Inter-Country Adoption drawn up by G. Parra-Aranguren.

Submissions of the Authority

13. It is the Authority's position that they are restricted by the Adoption Act 2010. The Authority is a statutory authority established by s. 94 of the 2010 Act and such a public body can only act in accordance with its statutory powers. The Adoption Authority is both the central authority and the competent authority in the State for the purpose of the Hague Convention. Counsel for the Authority made the Court aware of the fact that there are nine similar cases outstanding for the Authority to rule on.

14. Counsel on behalf of the Authority submitted that they cannot make a domestic adoption order in this case as it would circumvent the application of the Hague Convention. The Hague Convention was described by counsel for the Authority as the "gold standard" for the best interests of the child and it was considered that the best interests of children are achieved through the implementation of the Hague Convention. It was submitted on behalf of the Authority that the distinction between "domestic adoption" and "inter-country adoption" in the Act is of particular importance. It was submitted that the Explanatory Report clarifies the mandatory nature of the Convention and that no state can recognise a foreign adoption that is non-Hague compliant.

15. Counsel for the Authority submitted that children who have already been adopted cannot be re-adopted unless their adoptive parents have died and this is provided for under s. 45 of the Act. It was therefore submitted that these children are not eligible to be adopted as there is an existing Thai adoption in place.

16. Counsel for the Authority stated that s. 23 cannot be read in isolation. It was accepted that s. 23 sets out a minimum standard to be met before an adoption order can be granted by the Authority but the meeting of those conditions does not require the Authority to grant an adoption order. Counsel for the Authority outlined that the requirements for a domestic adoption set out in Chapter 2 of the 2010 Act cannot now be met by the Authority as there would be practical impediments to getting consents from the natural parents in Thailand. The powers of the High Court to make orders dispensing with consent are set out in s. 31 and s. 54 of the 2010 Act. Counsel for the Authority submitted that the framework of the 2010 Act is set out to deal with what might be termed ordinary domestic adoptions. He further submitted that there is no provision within the Act that deals with this particular set of circumstances. It was submitted that the present situation where there has been a non-Hague compliant adoption and a subsequent application for an adoption order within the State is not regulated by the Act. It was submitted that, as the Authority cannot act outside the remit of the legislation, they have no jurisdiction to make an adoption order in these circumstances.

17. In *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399, the judgment of MacKenzie J. was given at a point in time when there were no statutory rules providing for the recognition of foreign adoptions in Ireland. It was noted that Abbott J. held in *M.O'C. and B.O'C v. Adoption Authority* [2014] IEHC 580 that, although a limited power to recognise adoptions at common law survived the introduction of the Adoption Acts of 1991 and 2010, foreign adoptions involving children from Hague Convention countries must meet the requirements of the Hague Convention. It was also noted that the common law powers remain in England expressly set out under s. 66(1)(e) of their Adoption and Children Act 2002 and this can be distinguished from the Irish adoption legislation. It was submitted that, in Ireland, there is an entirely new statutory framework in place now including the Adoption Act 2010 and the Hague Convention and no common law power remains. It was submitted on behalf of the Authority that there can be no common law recognition of this Thai adoption. It was further submitted that it would be an error for the Authority or the Court to process this adoption as a domestic adoption.

18. The Authority proposes a somewhat restrictive interpretation of the Adoption Act 2010. The Authority is concerned that it may be seen as breaching the Hague Convention as the foreign element in this case means that Article 2 of the Hague Convention applies in this case. It was submitted that the procedural safeguards that are set out in the Convention must be followed and these safeguards have not been fulfilled in this case. Of particular concern to the Authority is that there is no certificate from the competent authority of Thailand confirming the consent of the natural parents. It was submitted that there is no requirement within the Convention to show that there was *mala fides* on behalf of the applicants when not meeting the procedural safeguards of the Convention and that there is no suggestion of *mala fides* in this case.

19. Counsel for the Authority proposed a solution under the "Guide to Good Practice" which provides some guidance as to what steps might be taken where an adoption which falls within the scope of the Convention is erroneously processed as a national adoption at para. 533 as follows:-

> "The two countries involved might wish to consider healing the defects which occurred by trying to do what should have been done, had the provisions of the Convention been respected."

Counsel for the Authority suggests that the Thai and Irish authorities will need to co-operate to perform their respective functions under the Hague Convention retrospectively and then this adoption may be recognised as an inter-country adoption. The Authority, through their counsel, made it clear that they do not want to forcibly return the children to Thailand.

20. The Authority submitted that it cannot assume that the Thai adoption was in accordance with the Hague Convention or in accordance with the Irish procedures. The Authority is concerned that making a domestic adoption order in this case to "fix" the defects in the inter-country adoption will undermine the safeguards established by the Hague Convention and discourage future adopters from complying with the terms of the Convention. Allowing a domestic adoption order in this case would circumvent the rights of the natural parents.

21. Counsel for the Adoption Authority also set out a "floodgates" argument. It was submitted that there is a risk that this would open the way for adoptive parents in general to circumvent the provisions of the Adoption Act 2010 by travelling abroad. It was further submitted that this would undermine the safeguards established by the Hague Convention to ensure that inter-country adoptions take place in the best interests of the child. The Authority is concerned that future adopters may be discouraged from complying with the terms of the Hague Convention as a result.

22. Counsel for the Authority emphasised that "in-family" adoption such as in this case expressly fall within the scope of the Hague Convention. The Authority highlighted the fact that Germany's suggestion to exclude such adoptions was rejected and the reasons for this are stated at para. 92 of the Explanatory Report by G. Parra-Aranguren:-

> "the application of the Convention to all kinds of adoption was sustained because there is no guarantee that abuses of children do not occur in cases of adoptions within the same family."

23. It was submitted on behalf of the Authority that while the welfare of children is a paramount consideration for the Authority and the Court this cannot be used to override binding provisions of the 2010 Act. It was submitted that the paramountcy principle only applies where the Authority has some degree of discretion.

Submissions of C.B. and P.B.

24. For simplicity, C.B. and P.B. who have applied to be the adoptive parents of these children may be referred to as the applicants. It is the applicants' case that they tried their best to act within the legislation and the Hague Convention and they should not now be prevented from adopting these children as there was no *mala fides* and none has been alleged. It was submitted that there can be no suggestion in this case that the applicants were involved in any of the activities which it is an expressly stated aim of the Hague Convention to prevent as is set out in the preamble as being to prevent "the abduction, the sale of, or traffic in children".

25. It was submitted that these children are habitually resident in Ireland. The children have their habitual residency independent of their natural parents. Counsel for the applicants cited the case of *E.B. v. D.E.* [2015] IEHC 180. Counsel for the applicants rely on the fact that the children are habitually resident in the State as giving the Authority jurisdiction to make an adoption order in this case.

26. Counsel for the applicants criticised the legal absolutism of the Authority's approach. He stated that he admires the aims of the Hague Convention to protect children around the world but he stated that the facts of this case do not fall into that type of situation. It is further submitted that the constitutional amendment at Article 42A places the best interests of the children in a primary position. It is submitted that the best interests of these particular children would be served by making the adoption order in favour of the applicants.

27. Counsel for the applicants submitted that the children are legally eligible for adoption under the 2010 Act. Counsel for the applicants highlighted the definition of "domestic adoption" under s. 3 of the Adoption Act 2010 as follows:-

> "an adoption of a child who was habitually resident in the State before his or her adoption by a person or persons habitually resident in the State".

This is the route that is proposed by the applicants. It was submitted that the children satisfy the necessary legal criteria under s. 23 of the Act. It was further submitted that there are no special bars to the Authority in granting an adoption order in this case. While there are certain requirements within the Act including seeking consents from natural parents, it is submitted that these are not absolute requirements. Counsel for the applicants noted, in particular, the term "such steps as are reasonably practicable" in Part 3 of the Act to point to the flexibility and amenability of the legislation.

28. The applicants are not seeking recognition of a foreign adoption. No application has been made to the Authority for recognition or entry in the Register of Inter-country Adoptions of the adoption of the children in Thailand. It is accepted that the Thai adoption is not recognisable under Irish law. It was submitted that the proposed domestic adoption order would not be a "re-adoption" because there has been no adoption order within the meaning of the Adoption Act 2010.

29. Counsel for the applicants submitted that the common law powers for the recognition of an adoption order outlined in *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399 continue to exist as they have not been repealed by the Adoption Act. The English High Court did not find that leaving such common law powers in place undermined the Hague Convention. However, counsel for the applicants also submitted that it is not necessary for this court to determine whether M.F. remains good law.

30. It was submitted that the floodgates argument does not stand as the only people who would be able to avail of this exception are people such as the applicants who have attempted to do the best they could and mistakenly did not comply with the Hague Convention requirements. It was submitted by counsel for the applicants that if the sole reason for refusing to grant an adoption order in this case is the Authority's policy concerns around floodgates this is inappropriate and disproportionate having regard to the Constitutional and Convention rights of these children.

Submissions of the Attorney General
31. It was submitted on behalf of the Attorney General that while the best welfare interests of the child are given paramountcy in the legislation and our Constitution this cannot be construed to surpass the technical legal issues that are before the Court in this case.

32. It was submitted that the Attorney does not accept that there ever was a common law power to make adoption orders. It is the position of the Attorney General that she does not believe that *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399 establishes that there was, at any stage, a common law jurisprudence within the State providing for the recognition of foreign adoptions on the basis of domicile, notwithstanding section 2(2) of the Adoption Act 1991. It was submitted with reliance on the decision of Abbott J. in *M.O'C. & B.O'C. v. Udaras Uchtála na hÉireann* [2014] IEHC 580 that, if a common law power did exist, it would be applicable only to situations which are not covered by the Convention and the 2010 Act. While there is no express repeal of any common law power to recognise a foreign adoption in any of the relevant legislation there have been legislative innovations in the period since *M.F.*, in particular, the bringing into national law of the Hague Convention by the 2010 Act.

33. The situation in this jurisdiction can be put in contrast with that of the UK where the common law power to recognise foreign adoptions is expressly preserved in s. 66(1)(e) of the Adoption and Children Act 2002 which operates in parallel with the Hague Convention scheme. It was submitted on behalf of the Attorney that this is illustrative of the contention that provided the exceptions are of a limited character and are not permitted by the courts as a gateway to circumvent the Convention, some latitude is compatible in the international adoption framework.

34. It was submitted on behalf of the Attorney that *M.F.* is authority for the proposition that the effect of non-recognition of a foreign adoption is that the status of the child is to be understood within Ireland as that prior to the foreign adoption. It was further submitted that the 2010 Act would have to go further than it does in terms of an explicit prohibition on a domestic adoption in circumstances where there exists a foreign adoption that cannot be recognised.

35. The Attorney General submitted that the children are eligible for a domestic adoption in Ireland and the Court does not need to consider whether the Thai adoption is recognisable.

36. The Attorney General submitted that the core question before the Court is as follows:

> Does a foreign adoption which does not comply with the Hague Convention and is not recognisable under Irish law have any effect within the State?

37. Counsel for the Attorney submitted that the Court should adopt a purposive interpretation of the Adoption Act 2010. It was stated that this Act is a comprehensive code for the Irish law, in relation to adoption.

38. It was submitted that the Thai Adoption is either an adoption or it is not and if it is not a recognised adoption it cannot preclude the Authority from making an adoption order in relation to these children.

39. Counsel for the Attorney sought to rely on the Supreme Court decision in *B. & B. v. An Bord Uchtála* [1997] 1 I.L.R.M. 15 in relation to s. 18 of the 1952 Act (s. 45 of the 2010 Act echoes this provision) where Murphy J. set out that a second adoption order may be made outside the restrictive scope of a situation where the adopters have died. Murphy J. stated at p. 26 as follows:-

> "A second adoption order may be made in relation to a child in respect of whom the adopters have failed in their moral duty. Accordingly it would seem that the concept of permanence as an incident of adoption is not absolute in this jurisdiction."

Counsel for the Attorney highlighted the provisions of s. 45 of the 2010 Act where a "further adoption" may be ordered if the adopters of the child have died and this would not involve any annulment of the original adoption order. It was further noted that s. 45 is drafted in permissive terms and does not forbid any other kind of further adoption order. Therefore, it was submitted that there should be no bar on an adoption order being made in this case as these children have not been made the subject of an adoption order in the State as defined in the legislation.

40. It was submitted on behalf of the Attorney that the High Court's powers under the 2010 Act are co-extensive with the Authority's powers and therefore, if the children are eligible for a domestic adoption the Authority has jurisdiction to make that order without the direction of the High Court.

41. Counsel for the Attorney submitted that the concept of habitual residence should be applied in relation to this Hague Convention as it is in relation to other international instruments. It was submitted that the children in this case have acquired habitual residence in Ireland in accordance with the national and international jurisprudence on the definition of habitual residence as they have been in the State for an appreciable period of time and for a settled purpose. It was further submitted that the children in this case are legally living in Ireland under our national visa laws and not on the basis of any unrecognisable foreign adoption which may have been a barrier to their gaining habitual residence here. The habitual residence of the children in Ireland, it was submitted, makes them eligible for a domestic adoption.

42. The practicalities argument put forward by the Authority does not stand up according to counsel for the Attorney. It was

submitted that situations often arise where a person whose consent is required for a domestic adoption may be difficult to contact and there are procedures in place to overcome this.

43. Counsel for the Attorney submitted that this is an exceptional case and, if treated as such by this Court should assuage any concerns about floodgates and leaving the system open to abuse by international adopters generally.

Conclusions

44. This Court is confined to the questions in the case stated sent to it from the Adoption Authority. This is an established principle in the decision of Fennelly J. in *McGinley v. Criminal Assets Bureau* [2001] IESC 49.

45. This Court notes that the Adoption Act 2010 is an Act to provide for the dissolution of "An Bord Uchtála" and the establishment of "Údarás Uchtála na hÉireann", known in the English language as "The Adoption Authority of Ireland". The 2010 Act further sets out in the preamble that the purpose was to

> "provide for matters relating to the adoption of children; to give the force of law to the Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption signed at the Hague on 29th May, 1993; to provide for the making and recognition of inter-country adoptions in accordance with bilateral agreements and with other arrangements; to provide for the recognition of certain adoptions effected outside the State; to repeal the Adoption Acts 1951 to 1998; to make consequential amendments to other Acts and to provide for related matters."

46. This Court also notes that the Preamble to the Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption states as follows:-

> "The States signatory to the present Convention,
>
> Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
>
> Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,
>
> Recognising that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,
>
> Convinced of the necessity to take measures to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,
>
> Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986)"

The Convention then sets out the various articles and scope of the Convention.

47. It is common case that the Thai adoption is not recognisable in this jurisdiction. It is agreed that the Thai adoption was not carried out in accordance with the Hague Convention by a central or competent authority and various requirements of the Convention were not met. Counsel for the applicants stated that they are not seeking recognition of a foreign adoption and that no application has been made to the Authority for recognition or entry in the Register of Inter-country Adoptions of the adoption of the children in Thailand. They accept that the Thai adoption is not recognisable under Irish Law. Therefore, this Court considers that the answer to question (a) from the case stated is that the Thai Adoption is not recognisable in Ireland under Part 8 of the 2010 Act or at common law.

48. The applicants, through their counsel, submit that the proposed adoption order would not be a "re-adoption" because there has been no "adoption order" within the meaning of the Adoption Act 2010 as the Thai adoption is not recognisable.

49. Reliance is placed by the Attorney General on the decision of Abbott J. in *M.O'C. & B.O'C. v. Údarás Uchtála na hÉireann* [2014] IEHC 580 that, if a common law power did exist, it would be applicable only to situations which are not covered by the convention and the 2010 Act. It is emphasised by the Attorney General that, while there is no express repeal of any common law power to recognise a foreign adoption in any of the relevant legislation, there have been legislative innovations in the period since *M.F.* The Attorney points, in particular, to the bringing in of the international law of the Hague Convention by the 2010 Act. The Attorney General does not accept that there ever was a common law power to make adoption orders. The Adoption Authority takes the view that, since there is now a new statutory framework in place including the Adoption Act 2010 and the Hague Convention and that no common law power remains, that there can be no common law recognition of this adoption.

50. The Attorney General makes the persuasive submission that it is illustrative of the contention that, provided exceptions in terms of recognition of foreign adoptions are of a limited character and are not permitted by the courts as a gateway to circumvent the Convention, some latitude is compatible with the international adoption framework.

51. The second question posed is whether the Authority has jurisdiction to make an adoption order in respect of the children having regard to the pre-existing Thai adoption, s. 45 of the Adoption Act 2010 and any other relevant provision. It is the view of this Court that, since the previous purported adoption obtained in Thailand is not recognisable in this jurisdiction the Court will then turn to the issues in relation to s. 45 of the 2010 Act. This Court notes the submission on behalf of the applicants that the children are legally eligible for adoption under the 2010 Act and the definition of "domestic adoption" under s. 3 of the Act is cited as follows:-

> "Means the adoption of a child who was habitually resident in the State before his or her adoption by a person or persons habitually resident in the State"

It is accepted by this Court that the reference to such steps "as are reasonably practicable" in Part 3 of the 2010 Act point to the flexibility and amenability of the legislation as described by the applicants.

52. As set out above, the core question posed in the Attorney General's submissions is whether a foreign adoption which does not comply with the Hague Convention and is not recognisable under Irish law has any effect within the State. It is the view of this Court that, given that the Thai adoption is not a recognised adoption in this State, it cannot therefore preclude the Authority from making an adoption order in relation to the children.

53. The Court is applying and adopting a purposive interpretation of the Adoption Act 2010. In the Supreme Court decision of *B. v. An Bord Uchtála* [1997] 1 I.L.R.M. 15, in relation to s. 18 of the 1952 Act (s. 45 of the 2010 Act echoes this provision), Murphy J. set out that a second adoption order may be made outside the restrictive scope of a situation where the adopters have died. Murphy J. set out that a second adoption order could be made where adopters have failed in their moral duty as parents and this means that there is no absolute permanence in relation to adoption in this jurisdiction. Submission was made that s. 45 was drafted in permissive terms and does not forbid any other kind of further adoption order. It is accepted, therefore, that there should be no bar to an adoption order being made in this case as these children have not been made the subject of an adoption order in the State as defined in s. 3 of the Adoption Act 2010.

54. Regarding the question posed in the case stated at (c), counsel for the applicants have submitted that it is not necessary to determine whether M.F. remains good law. The Attorney General takes the view that there was never a common law power to make adoption orders and reliance is placed in the Attorney's submissions on the decision of Abbott J. in *M.O'C. & B.O'C.* as set out above. This Court does not feel it is necessary to come to any further conclusion on this issue with reference to this case stated.

55. Regarding the question at (e), this Court notes that significant emphasis was placed by the applicants on the fact that the children are and have been habitually resident in Ireland for a significant period of time at this stage. The children are habitually resident in Ireland in a fashion independent of their natural parents. The applicants argue that, as a result of this, this gives the Authority jurisdiction to make an adoption order in this case based on the habitual residence of the children in this jurisdiction. The submission is further made that, pursuant to the constitutional amendment of Bunreacht na hÉireann at Article 42A, which places the best interests of the children in primary position, the best interests of these children would be served by making an adoption order in favour of the applicants.

56. As appears above, the position of the Attorney General is that if there is non-recognition of a foreign adoption then the status of the child is to be understood within Ireland as that prior to the foreign adoption. Therefore, it can be said that these children remain the un-adopted children of natural parents who are not married and who are consenting to the adoption. The Attorney General submits that the children are eligible for a domestic adoption in Ireland. This Court is of the view that, in answer to the question at (e), these children are eligible for adoption under s. 23 of the Adoption Act 2010 as set out earlier in this judgment.

57. The Court accepts the submissions of the Attorney General as set out above that the High Court powers under the 2010 Act are co-extensive with the Authority's powers and that, if the children are eligible for a domestic adoption, the Authority has jurisdiction to make that order without the direction of the High Court.

58. In summary, the answers to the questions posed in the case stated are:

(a) No

(b) Yes

(c) Not necessary

(d) The original status of the children remains

(e) Yes