THE HIGH COURT
JUDICIAL REVIEW

2018 No. 752 J.R.

BETWEEN

A FOSTER MOTHER

APPLICANT

AND
THE CHILD AND FAMILY AGENCY

RESPONDENT

THE BIRTH MOTHER
THE PROSPECTIVE ADOPTIVE PARENTS

NOTICE PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered 21 December 2018.

REPORTING RESTRICTIONS

1. The within proceedings (i) relate to a minor, (ii) relate to issues concerning the minor's foster care and subsequent placement for adoption; and (iii) require consideration of sensitive personal information relating to the minor. Accordingly, I made an order at the outset of these proceedings pursuant to section 45 of the Courts (Supplemental Provisions) Act 1961 directing that the proceedings be heard otherwise than in public. I also gave directions pursuant to section 40 of the Civil Liability and Courts Act 2004 (as amended) prohibiting the reporting, publication or broadcasting of any information which might enable the minor or the parties to the proceedings to be identified. In particular, I directed that none of the names of the parties, nor of the hospitals or medical personnel involved, be disclosed. (The order was varied on the second day of the hearing so as to allow publication of details of the proceedings to the Adoption Authority of Ireland. This was done so as to ensure that the parties could rely before the Authority on the agreement reached between the foster mother and the prospective adoptive parents (see paragraph 5 below).) These orders remain in force.

2. This judgment has been prepared on the same basis, and for this reason I refer to the parties simply by reference to their role, e.g. "foster mother" or "prospective adoptive parents", and not by their actual names or initials. Similarly, I will refer to the minor the subject of the proceedings simply as "the child", and use the pronoun "their" to avoid disclosing the child's gender. The use of these impersonal terms should not be mistaken for any lack of empathy by the court; rather, the sole purpose is to preserve the anonymity of the child. For the same reason, the timing of certain events is not stated by reference to the precise dates.

OVERVIEW

3. These proceedings relate to events leading up to the placement of a young child for adoption. The child had been born prematurely, and, as a result, suffers serious health complications. In particular, the child has had difficulty feeding, and has required a number of surgical procedures in this regard. The child spent the first [number redacted] months of their life in hospital. Thereafter the child remained in the care of their foster mother for approximately thirteen months before being placed with prospective adoptive parents in April 2018. It is to the great credit of the child's foster mother, and, more recently, the child's prospective adoptive parents, that they were willing to take on the challenge and responsibility of caring for such a sick young child. Their efforts and the love which they have shown to the child have contributed to the child making significant progress. The evidence before me indicates that the child is thriving and happy.

4. These judicial review proceedings are taken by the child's former foster mother. In brief, the foster mother alleges that the procedures leading up to the termination of the foster arrangement with her, and the transfer of the child to the care of the prospective adoptive parents, were not in accordance with law. The foster mother maintains that the statutory report prepared by the Child and Family Agency ("CFA") for the Adoption Authority of Ireland ("Adoption Authority") was deficient and, in particular, failed to include an up-to-date medical and psychological assessment of the child. The foster mother also complains that the statutory report did not communicate to the Adoption Authority that she wished to be considered as an adoptive parent herself.

5. The precise nature of the relief being sought by the foster mother has evolved during the course of the proceedings. As pleaded in the statement of grounds, it appeared that the foster mother might be seeking the return of the child to her care. However, on the opening day of the case before me, senior counsel on behalf of the foster mother indicated that she was not now seeking any such relief. Thereafter, on the second day of the hearing, a written agreement was entered into between the foster mother and the prospective adoptive parents. This agreement was handed into court, and indicates that the foster mother shall not seek (a) to adopt the child; (b) to delay or in any way interfere with the adoption process; or (c) to seek custody of the child. As discussed at paragraph 90 below, the existence of this agreement has significant consequences for the reliefs which the foster mother is now entitled to seek. An application to amend the statement of grounds to include additional reliefs was made on the last day of hearing. I address this at paragraph 97 below.

6. The most striking feature of the proceedings is the parties are now all agreed that it is in the best interests of the child that they remain in the care of their prospective adoptive parents. As noted above, the foster mother has expressly disavowed any relief which would delay or in any way interfere with the adoption process. Notwithstanding these concessions, it was nevertheless submitted that the court should grant certain declaratory relief. More specifically, it was submitted that the court should make some sort of declaration to the effect that there was a (historic) failure to have regard to the child's best interests in March and April 2018. This failure was said to represent a breach of the child's constitutional rights, and that the court had an obligation to vindicate that breach by way of the granting of declaratory relief.

7. One of the principal issues to be addressed in this judgment is, first, whether the making of such declaratory relief would be in the best interests of the child, and, secondly, if so, whether there is a proper legal and evidential basis for making such a declaration.

8. It will also be necessary to address an objection raised by the Child and Family Agency that the proceedings are inadmissible by reason of delay.

SUMMARY OF FACTUAL BACKGROUND

9. The child the subject of these proceedings is what is described as a micro premature baby. The child was born at twenty-three plus six weeks gestation, and weighed only 720gms. The child spent the first [number redacted] months of their life in hospital. During this period, the child suffered a collapsed lung and pneumonia.

10. The child's birth mother formally applied to have the child admitted to care towards the end of March 2017. An Admission to Care

Form was completed and signed by the birth mother. A second form describes the child as having been placed in "pre-adoption foster care" with the Child and Family Agency. It appears, however, that the birth mother might not have formally consented to the placement of the child for adoption until August 2018.

11. The foster mother's first involvement with the child was when she responded to an urgent request by the CFA for volunteers to visit the child in hospital. The concern at that time was that the child did not have much human contact other than with their nurses. The foster mother entered into a foster care contract towards the latter end of March 2017. (It seems that the contract may not have been signed until towards the end of April 2017 but nothing turns on this). Upon the discharge of the child from hospital in mid-April 2017, the foster mother brought the child to her own home.

12. There is no doubt but that the foster mother provided excellent care to the child for the period of the fostering arrangement. Moreover, the foster mother made significant efforts to ensure that the child received the best medical attention. By way of example only, the foster mother secured—on her own initiative and at her own expense—an appointment for the child with a leading consultant in gastroenterology at a private hospital. As a direct result of this appointment, the child was referred onwards to another consultant for an urgent surgical procedure. The surgical procedure was ultimately carried out in mid-April 2018. It seems that the surgical procedure was successful, and has greatly improved the quality of life of the child.

13. It is the events in the lead-up to, and immediately after, this surgical procedure that are the focus of the judicial review proceedings. Before turning to those events, it is first necessary to rehearse the steps which had been taken in respect of the adoption process.

14. It seems that the necessary paperwork to allow the child to be placed for adoption was completed by the birth mother in August 2018. As part of this process, the birth mother completed a detailed form which set out her preferences in terms of prospective adoptive parents. The birth mother expressed a strong desire that the child be adopted by a couple. The birth mother explained that she herself had been brought up by a single parent, and she was anxious that, if possible, her child would have the support of two parents. The birth mother also felt that, given the very real health difficulties which the child had, the support of two parents would be required.

15. In circumstances where the identity of the father was not known, it was necessary for the Adoption Authority to make an application to the High Court for an order pursuant to section 18(7) of the Adoption Act 2010. Section 18(7) provides as follows.

> "(7) Where the mother or guardian of a child provides or provide, as the case may be, an accredited body with a statutory declaration stating that he or she or they, as the case may be, is or are unable to identify that father, then —
>
> (a) the Authority may, after first obtaining the approval of the High Court, authorise the accredited body to place the child for adoption, and
>
> (b) the accredited body may, at any time thereafter, place the child for adoption, if the accredited body has not any other practical way of ascertaining that father's identity."

16. A letter was sent from the Adoption Authority to the CFA dated 7 December 2017 confirming that the High Court order had been made on the same date, and authorising the beginning of the matching process.

17. The matching process involves seeking to match a child with appropriate adoptive parents. An email request was sent on 25 January 2018 to senior social workers within the CFA seeking profiles of suitable adoptive parents. The child's development was described as follows in a report prepared by the CFA which accompanied the email request.

> "Development: While [the child] was discharged to a foster placement on 19th April 2017, [the child] has had a number of admissions to the Paediatric Ward in [the hospital] with feeding issues and poor weight gain. From a feeding viewpoint, [the child] has had input from both the Dietetic department and the Speech and Language Therapist in that same hospital. [The child] continues to have feeding issues and poor weight gain.
>
> [The child] has had laser treatment for prematurity of [their] eyes and continues to attend Ophthalmology services in [a second hospital].
>
> In view of [their] extreme prematurity, it is considered likely that [the child] will have a significant level of disability with a query of Cerebral Palsy.
>
> An adoptive placement is required by parents who can deal with the uncertainty surrounding both [the child's] diagnosis and long term requirements."

18. Given that the child has very serious health issues, it seems that there were only two sets of potential adopters who had the necessary skills in order to be considered as adoptive parents. The birth mother then expressed a preference for one of these two couples. Significantly, this couple had been issued with a statutory certificate pursuant to section 40 of the Adoption Act 2010 which confirmed that they were suitable and eligible.

19. The identity of this couple was notified to the Adoption Authority in early March 2018. The Adoption Authority then issued an authorisation on 21 March 2018. (It may be that this was a written confirmation of an earlier verbal authorisation).

20. The prospective adoptive parents were notified, and the CFA began to prepare what was described as a transition or familiarisation plan whereby the adoptive parents would be introduced to the child over the course of several weeks prior to their taking over the care of the child.

21. In parallel with the above statutory process, it seems that at some point in the first quarter of 2018 the foster mother expressed a wish to be considered as a potential adoptive parent herself. There is some dispute as to the precise date upon which this desire was communicated to the CFA. The foster mother maintains that she contacted the child's foster social worker on or about 22 February 2018, and requested that she be considered as an adoptive parent. The CFA suggest that they were not notified of this until some time later.

22. At all events, the foster mother was informed by officials within the CFA that she could not adopt the child. Three reasons were put forward: (i) the foster mother was a lone parent and the birth mother had expressed a preference that the child be adopted by a

couple; (ii) the foster mother did not have the statutory declaration of eligibility and suitability under section 40 of the Adoption Act 2010; and (iii) in any event, the CFA had a policy against allowing the foster parents of children for adoption to become adopters. Insofar as this third reason is concerned, it seems that at some stages it was mistakenly suggested to the foster mother that there was a statutory impediment to a foster parent adopting; in fact, any impediment in this regard was as a result of a policy adopted by the CFA. It remains a fact that the foster mother never applied for a declaration of suitability and eligibility.

23. The foster mother maintains that she was only told, for the first time, on or about 16 March 2018 that the child was to be handed over imminently to prospective adoptive parents. The foster mother accepts that she had known the child was in pre-adoptive care, but she suggests that officials within the CFA had led her to believe that an actual placement would not occur for some considerable period of time.

24. The original intention of the CFA had been that a familiarisation transition period would commence prior to the surgical procedure. At that stage, the surgical procedure was scheduled for mid-March 2018. In the event, however, the procedure did not go ahead on that date as the child became unwell. The surgical procedure was then rescheduled for mid-April 2018. On the day upon which the surgery was to take place, the CFA issued a further revised draft of what was described as a transition program. This involved the prospective adoptive parents attending at the hospital immediately after the surgery, and a series of phased visits. Ultimately, ten days after the child's discharge from hospital to the care of foster mother, the adoptive parents were to take the child home to their home on a full-time basis.

25. The foster mother was strongly of the view that it would be ill-advised to transfer the child's care in the run up to, during, or in the period of recuperation from major surgery. In this regard, the foster parent had the support of the child's general practitioner. By email dated 22 March 2018 the general practitioner advised as follows.

> "Thank you for the recent update on [the child]. It is great to hear that [they] will soon be getting [their] [surgical procedure]. I note with some concern your details about the proposed adoption of [the child]. I would have to say that I have some concerns about this plan. The immediate post operative period is not the best time for [the child] to be transferred over to a new family. I would have thought such an important transfer of [their] care would be planned in a more systematic and coordinated way, in conjunction with your good self who has provided all the parental input for [the child] since birth. Furthermore, I am happy for you to convey my concerns to all parties involved."

26. There then ensued correspondence between the foster mother's solicitor and the Child and Family Agency's solicitors.

27. The position of the CFA was stated as follows in a letter from their solicitors dated 28 March 2018.

> "A familiarisation plan will usually involve a schedule of meetings increasing incrementally with overnight visits and then a final move. In [the child's] case, surgery is indicated and that surgery is scheduled to take place on the 16th day of April. Initially, our client's plan was to move [the child] in advance of surgery but our client, having heard your client's views, has reconsidered the issue. The team has had discussions and an agreement has been made that while the process may commence in advance of the surgery, the child will remain placed with your client until such time as [the] surgery is over and [the child] is stable. Our client has given this matter full consideration and has consulted with an expert on attachment in this regard.
>
> Our client notes and understands your client's belief in regard to what is in [the child's] best interest however you can absolutely reassure your client that a comprehensive assessment has taken place to include consultation with experts taking into account the high medical needs of this child. The conclusion of that assessment is that [the child] can successfully transfer [their] attachment to the proposed adoptive carers and that this process should commence in a timely way. It is our respectful view that a medical opinion would be of no assistance to the matter at issue here as medical expertise does not include expertise as regards attachment or development in children. That expertise resides with the Child and Family Agency."

28. The foster mother issued District Court proceedings on 17 April 2018 pursuant to section 47 of the Child Care Act 1991.

29. The District Court made the following order on 24 April 2018.

> "Under section 47 of the [Child Care Act 1991] for an order giving directions on the following question affecting the welfare of the above-named child who is in the care of the Child and Family Agency in the said Court district: –
>
> THE COURT having heard the evidence tendered, and being satisfied that the welfare of the child so requires,
>
> HEREBY DIRECTS under the said section 47 as follows: –
>
> That the Child and Family Agency inform the hospital that the child is to be placed with the prospective adopters rather than the applicant and for the hospital to confirm that this is in order, if so discharge to adopters to proceed."

30. The child was then transferred to the care of the prospective adoptive parents.

POSITION OF THE BIRTH MOTHER

31. The court has had the benefit of helpful written and oral submissions on behalf of the birth mother from Mr Alan D. P. Brady, BL. Counsel confirms that the birth mother opposes the application for judicial review, and takes view that the child should be adopted by the prospective adoptive parents. No criticism is made of the care given by the foster mother.

32. Counsel emphasises that the objective of adoption is to find a family for a child not vice versa. The birth mother made a conscious decision, based on her own experiences, that the best interests of the child would be served by their being adopted by a couple.

33. Counsel emphasised that this is a voluntary adoption and suggests that, under the new constitutional order, the birth mother's voice must be given some presumptive weight. The birth mother was shown profiles of prospective adopters and chose between them. Her voice is important and significant.

LEGAL BASIS FOR THE APPLICATION FOR JUDICIAL REVIEW

34. In brief, the foster mother complains, first, that the effecting of the transition of the child from her care to that of the

prospective adoptive parents should not have been done at a time when the child was undergoing, and subsequently recovering from, major surgery. The foster mother has cited in this regard (i) the views of the child's general medical practitioner as recorded in an email of 22 March 2018, and (ii) certain comments attributed to the consultant who carried out the surgery. The foster mother has also relied upon an affidavit sworn in these proceedings by a psychologist (albeit that the psychologist has not, in fact, had an opportunity to examine the child personally).

35. The second complaint is that the report made by the Child and Family Agency to the Adoption Authority was deficient. In particular, it was alleged that the report omitted an up-to-date medical report, and that there was no assessment of the child's foster care arrangement, and, in particular, no assessment of the child's attachment to their foster mother (and her children).

36. The third complaint made is that no proper consideration was given to the foster mother's request to be considered as an adoptive parent herself. Nor was there any assessment of the benefits of an adoption by the foster mother herself as compared to an adoption by the prospective adoptive parents.

37. The precise legal basis for the application for judicial review has evolved as between the filing of the statement of grounds in September 2018 and the hearing before me in December 2018. As discussed below, the case appears to be based on two broad themes as follows.

(i) Article 42A / Section 19

38. The legal argument advanced on behalf of the foster mother in the written legal submissions is that the events of March and April 2018 gave rise to a breach of Article 42A of the Constitution, and a breach of section 19 of the Adoption Act 2010. In brief, it was alleged that there had been a failure to consider the best interests of the child.

39. Article 42A.4.1° of the Constitution provides as follows.

> "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."

40. The extent, if any, to which Article 42A.4.1° can be relied upon directly, as opposed to through the medium of legislation, has been considered by the Supreme Court in *In the matter of JB (A minor)* [2018] IESC 30. Both the majority and minority judgments address the issue. Strictly speaking, it would seem that the discussion is *obiter dicta*.

41. O'Donnell J. stated as follows, at [5] to [7].

> "Article 42A was introduced into the Constitution by the 31st Amendment, and came into force on 28 April 2015. Article 42A.4.1° provides that:-
>
> > "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."
>
> Article 42A.4.1° does not stand alone. It was introduced as part of an amendment designed to ensure that the Constitution was more clearly child-centred. For that reason, for example, the new Article 42A.1 states explicitly that 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". As I understand it, the amendment as a whole was directed towards a perceived approach of statutory and constitutional interpretation as matter of history, which was considered to be unsatisfactory in principle, and to give rise to potentially unsatisfactory results. That is because it was considered that issues in relation to children could be skewed by the emphasis placed by the Constitution as originally enacted on the family as the natural and primary educator of children, and as a moral institution possessing rights anterior and superior to positive law, which might lead to cases being resolved a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents. This occurred perhaps most clearly in the field of the possible adoption of children born to married parents, or parents who were subsequently married. Article 42A can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children, and indeed explicitly permitting the adoption of children whatever the marital status of their parents. In that context, Article 42A.4 was unremarkable, and perhaps the least significant aspect of the amendment. It is unnecessary at this stage to consider whether concerns as to the interpretation of the Constitution were justified, or to what extent any unhappy outcomes were the consequence of the text of the Constitution or the interpretation applied to it. However, the very fact that there were concerns as to the interpretation and application of the pre-2015 provisions is itself a warning against further glosses of the new provisions.
>
> While I appreciate the attraction of placing some rhetorical reliance in this case on an Article of the Constitution making reference to the best interests of the child in adoption proceedings, I do not think that in truth Article 42A.4.1° can be usefully called in aid in the resolution of a case like the present. First, as McKechnie J. observes, the constitutional obligation contained in Art.42A.4.1° has been complied with. It is, explicitly, a requirement to introduce into legislation dealing with proceedings in the specified areas a provision requiring that the interests of the child be considered paramount: that is, superior to other interests that might be engaged. Such a provision is, however, set out in unambiguous terms by s. 19 of the Act of 2010. Furthermore, I consider the requirement that "provision shall be made by law" is not merely a well worn constitutional phrase, but rather has substantive importance. This is so because the 'best interests of the child' is a phrase with a long history in the law relating to children. There is near universal agreement on

the merit of the test, but considerable scope for vehement disagreement on what the test implies in a particular case, whether between parents and children, parents themselves, relatives, social workers, lawyers, and indeed judges. The best interests test involves both broad societal judgments and individualised determinations in a particular case. In the context of a statute, it does not authorise the court to exceed the statutory limitations of the decision making process: rather, it means that, within the area in which a court has to make a decision, where there is a discretion, the decision should be made on the basis that the paramount consideration should be the best interests of the child, rather than the interests of parents, relatives, or the State itself. Article 42A.4.1° now underpins that. However, the area for decision making in which those considerations apply is defined by the statute.

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

42. Although O'Donnell J. was in the minority (together with McKechnie J.) on the *substantive* issue in the appeal, it does not necessarily follow that the sentiments expressed by O'Donnell J. on this issue are different from those of members of the majority. Indeed, O'Donnell J. himself states at the next paragraph of his judgment that he does not understand the decision of the majority in that appeal to give any support to the approach in the previous paragraph.

43. At all events, it seems to me that insofar as the issues in the present proceedings are concerned, the passages from O'Donnell J.'s judgment are very helpful in explaining the relationship between (i) the constitutional imperative, and (ii) the legislation giving effect to that imperative. I respectfully adopt same as a correct statement of the law.

44. It seems to follow, therefore, that the foster mother's allegation that there was a failure to have regard to the best interests of the child falls to be assessed by reference to the legislation giving effect to Article 42A.4.1°, namely section 19 of the Adoption Act 2010, rather than by direct reliance on the Constitution. This is especially so in circumstances where (i) there is no complaint made in these proceedings that section 19 does not properly give effect to Article 42A.4.1°, and (ii) section 19 has been amended since the judgments of the Supreme Court in JB (A minor) and the amended version sets out a detailed set of criteria to which regard is to be had in determining what is in the best interests of a child. The Oireachtas has thus given effect to Article 42A.4.1°, and has properly exercised its legislative function by fleshing out the constitutional imperative by prescribing criteria to inform the concept of "best interests of the child". See section 9 of the Adoption (Amendment) Act 2017.

45. At all events, it is not necessary for the purpose of this judgment to say definitively whether the right which a child enjoys to have his or her best interests considered is a statutory right or a constitutional right. For the reasons set out at paragraph 64 *et seq*. below, I have reached the conclusion that the best interests of the child require me to refrain from making declarations of the type sought by the foster mother.

46. I turn now to consider the argument based on section 19. Subsections 19(1) and (2) of the Adoption Act 2010 (as amended by the Adoption (Amendment) Act 2017) provide as follows.

"19. (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 —

(a) the child's age and maturity,

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

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

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

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

(f) the child's upbringing and care,

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

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

[…]"

47. At the hearing before me, all parties were prepared to assume for the purposes of the argument that the adoption process in this case is governed by the amended version of section 19. This is so notwithstanding that the relevant amendment was not commenced until 19 October 2017. With respect, I think that this assumption is correct. Even though the foster mother's consent to adoption was signed prior to that date, the key administrative steps occurred after 19 October 2017. In particular, the application to the High Court pursuant to section 18(7) was made in December 2017, and the Adoption Authority's authorisation to place the child for adoption was

made in March 2018.

48. Leading counsel on behalf of guardian *ad litem*, Gerard Durcan, SC submitted that the phrase "the resolution of such matter, application or proceedings" in section 19 should be understood as encompassing a decision by the Adoption Authority to place a child for adoption. Counsel went on to suggest that these judicial review proceedings are not proceedings under the Adoption Act 2010, and are thus not governed by section 19. I return to this point at paragraphs 66 and 67 below.

49. In the written legal submissions filed on behalf of the foster mother, it is stated that the constitutional obligation to place the best interests of the child as the paramount consideration in adoption proceedings is given statutory form in the Adoption Act 2010 at section 19. At the hearing before me, senior counsel for the foster mother, John Rogers, SC, laid particular emphasis on the statutory requirement to have regard to the "physical, psychological and emotional needs of the child" and "the likely effect of adoption on the child" under subsections 19(2) (b) and (c) respectively. It was suggested that these matters were not properly addressed in the statutory report prepared by the Child and Family Agency for the Adoption Authority.

50. The difficulty with this line of argument is that, in a sense, it proves too much. The argument, when pursued to its logical conclusion, suggests that the decision of the Adoption Authority to authorise the placement of the child for adoption might be invalid. This is because section 19 of the Adoption Act 2010 (as amended) is not directed to the Child and Family Agency at all, but rather is directed to the Adoption Authority and to a court. Thus if there has been a breach of section 19, then it must be as a result of a failure on the part of the Authority to have regard to all of the statutory criteria to which regard must be had when determining the best interests of the child. It is true, of course, that the ire of the foster mother is directed to the conduct of the Child and Family Agency, and what are said to be deficiencies in the reports it prepared for submission to the Adoption Authority. However it occurs to me that—in the circumstances of this case—section 19 could only ever be relevant to an argument that the alleged deficiencies in the report prepared by the Child and Family Agency impaired the ability of the Adoption Authority to comply with section 19. Certainly, this seems to be how the argument is formulated in the written submissions filed on behalf of the foster mother on 3 December 2018. See in particular paragraphs [35] to [37], and [49] to [52] as follows.

> "The pre-adoption placement
>
> 35. It is submitted that the process of selection of a pre-adoptive family in this instance should be set aside by reason of the infirmities in the process, the failure to respect the constitutional provisions of Article 42A, the failure to respect the provisions of the Adoption Act 2010, in particular s.19 thereof and the provisions of SI 260/1995.
>
> 36. In all [the child's] special circumstances, [their] history, [their] social, family and care environment, [their] medical and psychological challenges, it is submitted that as soon as the Respondent was told on 22 February 2018 of the applicant's willingness and request to be considered a prospective adoptive parent, due process would require that the Respondent would inform the Adoption Authority. Section 19 of the Adoption Act would engage. This was not done. There was also a duty to inform the birth mother. This was not done.
>
> 37. At a minimum, once Applicant had put forward such proposition a thorough evaluation of the proposition was a necessary step precedent to radically changing [the child's] care arrangements if [their] constitutional rights were to be vindicated. This is because it was necessary to know how continuing care with the Applicant might compare with any new arrangement.
>
> […]
>
> 49. It would appear that the Adoption Authority was only made aware of the Applicant's request to be considered as an adoptive parent after the pre-adoptive parents selected by the Respondent. The Applicant has no reason to believe that the Adoption Authority was aware of the failure of the Respondent to assess [the child] and [their] needs. The Authority were not informed of the fact that the birth mother was, through all these processes, left unaware of the Applicant's interest.
>
> 50. These failures mean that neither the Respondent, nor the Adoption Authority had information that was necessary to properly inform, or to ensure or assert, that it was likely that [the child's] best interest would be vindicated by transferring [their] care and custody. It is submitted that that process did not and could not do so.
>
> 51. Those procedural failures amounted to a complete negation of [the child's] right to have [their] best interest considered properly or at all. It is submitted that due to these failings of process and procedure, the Respondent's selection of the pre-adoptive parents should be set aside. That decision can only be said to be made adequately if it was informed by an appropriate assessment of [the child] and [their] needs.
>
> 52. It is submitted that the best interests of [the child] will only be vindicated if the selection of the pre-adoptive family is subject to a thorough, expedited, fair and comprehensive process that will take into account all the relevant options and factors to vindicate [the child's] constitutional rights.

51. As appears, there is a direct attack made against the Adoption Authority's decision at paragraph [50]. It is asserted that neither the Child and Family Agency nor the Adoption Authority had information that was necessary to properly inform, or to ensure or assert, that it was likely that the child's best interest would be vindicated by transferring their care and custody to the prospective adoptive parents. This assertion is made by reference to section 19 of the Adoption Act 2010. At the risk of belabouring the point, I reiterate that section 19 imposes an obligation on the Adoption Authority and not on the Child and Family Agency. Accordingly, an argument grounded on section 19 could only ever succeed by establishing a failure on the part of the Adoption Authority to have regard to all statutory criteria (albeit this is a failure which, on the foster mother's case, was caused by an earlier failure on the part of the Child and Family Agency).

(ii) Article 16 report

52. In oral argument before me, senior counsel for the foster mother submitted that there had also been a breach of the requirements of article 16 of the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption ("the Hague Convention"). This argument is not expressly pleaded in the statement of grounds, and is not addressed in the written legal submissions filed on 3 December 2018.

53. In order to put this argument in context, it is necessary to rehearse briefly how the Hague Convention has been incorporated in national law.

54. Section 9 of the Adoption Act 2010 provides that the Hague Convention has the force of law in the State. Section 10 provides that judicial notice shall be taken of the explanatory report prepared by G. Parra-Aranguren in relation to the Hague Convention, and that a court shall pay due regard to that explanatory report when interpreting any provision of the Hague Convention.

55. The Hague Convention is, as its long title indicates, intended to regulate inter-country adoptions. For this reason, many of its provisions are directed to the interactions between the Central Authority of the State of Origin and the Central Authority of the Receiving State. These terms are inapt to describe the process involved in a *domestic* adoption where, of course, there will only be a single central authority, i.e. the Adoption Authority. Notwithstanding this, it appears—both from the facts of this case and from guidance issued by the Authority—that the Adoption Authority takes the approach that even a domestic adoption must comply with the requirements of the Hague Convention.

56. The Adoption Authority's guidelines state as follows. (An extract from the guidelines has been exhibited at these proceedings).

> "Hague process in Domestic Infant Adoption
>
> The Hague Convention 1993 was incorporated into Irish law through the Adoption Act 2010. A Hague-compliant domestic adoption process is therefore a legal requirement in Ireland. The Hague process in domestic adoption is that an Article 15 and Article 16 are forwarded to the Adoption Authority of Ireland by the Child and Family Agency/accredited body, prior to notification of prospective adoptive parents, and the Adoption Authority may then authorise the placement of the child for adoption by granting an Article 17 approval for the placement to proceed."

57. Article 16 of the Hague Convention provides as follows.

> "Article 16 — Report by Central Authority of State of origin.
>
> (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall—
>
> (a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
>
> (b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
>
> (c) ensure that consents have been obtained in accordance with Article 4; and
>
> (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.
>
> (2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed."

58. The Adoption Authority's guidelines explain how article 16 is to apply to domestic adoptions as follows.

> "Article 16:
>
> Article 16 information includes proof that the child is eligible for adoption, information about "identity, background, social environment, family history, medical history including that of the child's family, any special needs of the child", "child's upbringing" and "ethnic religious and cultural background". The information includes proof of counselling of birth parents and that all consents were given freely and without inducement compliant with Article 4 of the Hague Convention. Information is also required on the matching process. When the match has been decided and prior to the prospective adoptive parents being informed, all papers relating to Article 15 and 16 in the specific case are sent to the Adoption Authority of Ireland to determine "whether the envisaged placement is in the best interest of the child".
>
> The Article 16 information process and professional functions have been delegated, along with the assessment functions of the Article 15, to the CFA/accredited bodies by the Adoption Authority.
>
> ARTICLE 17:
>
> Article 17 relates to any decision "that a child should be entrusted to prospective adoptive parents" and states that this happens with prospective adoptive parents' agreement and when the Adoption Authority has approved the decision. The Hague Guide to Good Practice Section 7 states that "the decision on the matching should be communicated first to the Central Authority (A.A.I.) … before any notification of the prospective adoptive parents"; the prospective adoptive parents "should be informed by the Central Authority about the decision on matching"; and the "acceptance of the match/referral by prospective adoptive parents signals the end of the matching process". The Adoption Authority cannot delegate the Article 17 function of approving the placement as this is a significant procedural safeguard in the event of any defects in the procedure, or if it becomes apparent that the proposed adoption is not in the child's best interest."

59. It is stated as follows at page 332 of the guidelines.

> "Submitting an application for an Article 17 certificate – permission to place the child.
>
> The following documents should be submitted together when requesting an Article 17 certificate to allow the placement of a child for adoption.
>
> 1. Child's medical background report.
>
> 2. Social work report on the child's progress in pre-adoptive foster care.
>
> […]"

60. Counsel for the foster mother, having referred to these parts of the guidelines, submitted that the Irish State has, by way of the Adoption Act 2010 which incorporates the Hague Convention, sought to vindicate the rights of a child under Article 42A of the Constitution. Counsel went on to say that matters of proof which ought to be in the article 16 report include *inter alia* an assessment of the medical history of the child; of any special needs of the child; and of the child's upbringing. Complaint is also made that there was no social work report on the child's progress in pre-adoptive foster care.

61. Counsel then sought to identify alleged deficiencies in the article 16 report submitted by the Child and Family Agency to the Adoption Authority on 8 March 2018. First, it was said that there was no up-to-date medical assessment. Although a report from the child's consultant paediatrician had been included as part of the package of documents sent to the Adoption Authority, it appeared on closer examination that this report was identical to a report date-stamped 28 June 2017. This suggested that the report had been written some nine months earlier. The consultant paediatrician's report thus did not address events post-June 2017, and, in particular, did not address the surgical procedure which was imminent in March 2018. Counsel acknowledged that there was reference to the surgical procedure in the body of the article 16 report itself, but suggested that this was not sufficient and that there should have been a report by a medical consultant, possibly a gastrointestinal consultant.

62. In fairness to the CFA, it should be noted that one of the documents submitted with the Article 16 report is a document entitled "Domestic Infant Adoption Second Assessment Report". In that report, in the context of assessing the suitability of the prospective adoptive parents in accordance with section 34 of the Adoption Act 2010, it is stated as follows. This suggests that consideration was given to the implications of the child's medical condition for the success of any adoption.

> "(IV) providing the necessary health, social, educational and other interventions for the child.
>
> Throughout the assessment [the prospective adoptive parents] demonstrated an awareness that the child that they adopt may require specialist support throughout childhood and perhaps even into adulthood. They recognise that their child may have speech and language delays and that speech therapy may be necessary. They are aware of the many emotional and or behavioural difficulties that may manifest for children who have been adopted and they are prepared to access special counselling services, [name of service redacted] or occupational therapy if necessary.
>
> [Names redacted] also understand that there child may suffer with learning difficulties and they are prepared to be supportive in helping their child to deal with any learning difficulties."

63. Secondly, the criticism was made that there was no assessment of the child's progress in pre-adoptive care. In particular, there was no assessment of the attachments which the child formed with their foster mother (and her children), nor any assessment of the implications for the child of a change of carer.

BEST INTERESTS OF THE CHILD

64. The one thing upon which all of the parties to the proceedings are now agreed is that it is in the best interests of the child that they remain with their prospective adoptive parents. The foster mother has expressly disavowed any relief which would seek to set aside the placement with the prospective adoptive parents. Leading counsel on her behalf confirmed at the hearing before me that no claim for substantive relief is being pursued. In particular, the claims for *certiorari* in respect of certain decisions were not now being pursued.

65. Notwithstanding these concessions, and notwithstanding the existence of the agreement between the foster mother and the prospective adoptive parents, it was nevertheless submitted that the court should grant certain *declaratory* relief. More specifically, it was submitted that the court should make some sort of declaration to the effect that there had been a (historic) failure to have regard to the child's best interests in March and April 2018. This failure was said to represent a breach of the child's *constitutional* rights, and that the court had an obligation to vindicate that breach by way of the granting of declaratory relief.

66. I fully recognise my obligation as a judge of the High Court to ensure that the Constitution is upheld, and to seek to grant an effective remedy in the event of a breach of a person's constitutional rights. However, this court must also recognise that the best interests of the child are the paramount consideration. In this regard, I take the view that the within judicial review proceedings are subject to Article 42A of the Constitution and/or section 19 of the Adoption Act 2010. This is because—as explained in more detail under the next heading below—I regard the proceedings as involving a collateral challenge to the Adoption Authority's decision to authorise the placement of the child with the prospective adoptive parents. An allegation that the article 16 report was deficient must carry with it the implication that the output of the process, i.e. the article 16(1)(d) and article 17 decisions, is similarly tainted.

67. As noted earlier, counsel for the guardian *ad litem* has suggested that the judicial review proceedings are not proceedings subject to section 19 of the Adoption Act. If I am incorrect in thinking that the within judicial review proceedings are of a type which attracts Article 42A and/or section 19 of the Adoption Act 2010, there can be no doubt that the court is entitled to take into account the best interests of the child in the exercise of its *discretion* in judicial review proceedings. It is well established that judicial review is a discretionary remedy, and that one of the factors which a court can consider in the exercise of its discretion is whether the proceedings serve any useful purpose. It must follow a *fortiori* that a court is entitled to consider whether the proceedings, far from serving any useful purpose, might actually have a detrimental effect on the interests of a child.

68. For the reasons which follow, I am unable to accept that it is in the best interests of the child to embark on the exercise of reviewing the events of March and April 2018 with a view to issuing a declaration. This is because, on the particular facts of this case, such a course of action on the part of the court runs the risk of producing precisely the result which all of the parties insist should not occur, namely undermining the child's placement with the prospective adoptive parents.

IMPLICATIONS FOR THE ADOPTION AUTHORITY'S DECISION

69. The principal arguments advanced on behalf of the foster mother have been summarised earlier. The difficulty with all of these related lines of legal argument is that they tend to suggest that the Adoption Authority's decision to authorise the placement of the child with the prospective adoptive parents may have been invalid. The logic of the foster mother's case is that the Adoption Authority did not have adequate information before it when it reached its decision of 21 March 2018. In particular, it is alleged that the Adoption Authority (i) did not have full up-to-date details of the child's medical condition; (ii) did not have details of the foster care arrangements and the attachment which had been established between the child and their foster mother (and her children); and (iii) did not know that the foster mother wished to be considered as an adoptive parent herself.

70. The complaints are all predicated on there being a failure of assessment by the Adoption Authority. Although no criticism is made of the Adoption Authority directly—in fact, the opposite is the case, all the criticism is directed towards the Child and Family Agency—the case as argued by necessary implication involves a *collateral challenge* to the validity of the Adoption Authority's decision to

authorise the placement of the child for adoption.

71. The legal act which resulted in the child being placed with the prospective adoptive parents was the authorisation issued by the Adoption Authority on 21 March 2018. In this regard, I accept the submission by senior counsel on behalf of the guardian *ad litem*, Mr Durcan, SC, that the language of section 19—and in particular the use of the term "matter"—indicates that section 19 applies to each step in regard to the adoption process. Section 19 applies to the resolution of any "matter", and not just the ultimate decision to make an adoption order. Each step along the adoption process is subject to the requirement that it must be resolved in the best interests of the child. The adjudication and granting of authorisation of the placement for adoption is a "matter" for the Adoption Authority under section 19.

72. This is consistent with the procedure envisaged under article 16 and article 17 of the Hague Convention. The Hague Convention places great importance on the decision to place a child for adoption, and makes it clear that the decision cannot be delegated. As explained in the Hague Convention explanatory report (to which the court must have regard under section 10 of the Adoption Act 2010) at §318 and §324 to §329, the placement is a crucial step in the adoption process, and even though it is not the final order authorising the adoption, it does attract all of the safeguards provided for under articles 16 and 17. Article 16(1)(d) requires the central authority to determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the *best interests of the child*.

73. If the allegation that the report submitted to the Adoption Authority by the Child and Family Agency was legally deficient were to be upheld, then it follows as a corollary that the decision of the Adoption Authority to authorise the placement of the child is also vitiated. It would involve a breach of both section 19 and of article 16. It would be a classic case of a decision-maker failing to take into account a relevant consideration. The fact that any such failure had occurred as the consequence of an *earlier* failure on the part of the Child and Family Agency does not affect the legal analysis. The Adoption Authority is the designated decision-maker, and unless the important procedural safeguard is to be set at naught, a decision reached on the basis of a flawed report must be amenable to judicial review.

74. None of this is to suggest that I have come to a conclusion that the report and other documents submitted to the Adoption Authority in this case were flawed. I have formed no such view. Rather, the purpose of this exercise is to examine what the consequences of the court wading in on these issues might be. It seems to me that were the court to embark on a consideration of the robustness of the article 16 report (and supporting documents), it just might lead to a finding that the report was deficient, and that, as a consequence, the authorisation was also deficient. This could then produce an outcome whereby a shadow might be cast over the legal basis for the child's care with the prospective adoptive parents. Such an outcome would not be in the best interests of the child. All of the evidence before the court confirms that the child is thriving and that the adoptive parents are providing a loving and caring home for the child. I rely in this regard in particular on the affidavit (and exhibited report) of the guardian *ad litem*, and the report of the post-placement visit by the social worker.

75. The conclusion and recommendations of the guardian *ad litem* are set out as follows in her report of December 2018.

> "It is the writer's opinion and recommendation on the balance of information available, that it was in [the child's] best interest to move to the care of [the adoptive parents] and it is in [the child's] best interest that [they] are adopted by [the adoptive parents]."

76. The conclusion of the-post placement report of August 2018 reads as follows.

> "Conclusion
>
> [The prospective adoptive parents] are very proud of their [family]. They are very family orientated and the needs of the children are of paramount consideration for them. They are very capable and are managing the needs of [the child] very well as [they] has had very significant additional needs which are ongoing. It is hoped by doctors that [the child] might be off the PEG in a year or as soon as possible.
>
> The prospective parents are open to some form of contact with the birth mother in the future with the support of an adoption Social Worker if she wishes it and they would encourage it also.
>
> At this 3 months post placement visit [the child] presents as a very content, happy child who is making steady progress in all areas of development and in developing a secure attachment with [their] parents and [siblings]. [Names omitted] are very attentive to all [the child's] needs and their joy and delight at having [the child] in their lives is very evident. [The child] is clearly thriving as a result of the love, care and attention [they are] receiving from them."

77. This is confirmed by an affidavit filed by a social worker employed by the Child and Family Agency. This affidavit is dated 30 November 2018. See in particular paragraphs 28 to 32 thereof.

78. There is simply no evidence to the contrary. I cannot attach any weight to the report of 12 September 2018 and the affidavit of 7 December 2018 filed by the psychologist engaged by the foster mother. The report and affidavit are generic in nature, and are not based on an actual assessment of the child. Moreover, the affidavit of 7 December 2018 does not address the recent events. In particular, it does not refer to the post-placement report prepared by the social worker in August 2018. There is thus no commentary on this very detailed post-adoption report, which concludes that the child is thriving.

79. In circumstances where none of the parties wish me to do anything which might imperil the continued placement of the child with the prospective adoptive parents, and where all the evidence confirms that the child is thriving, I decline to make any declarations as to the historic events of April and May 2018. Not only would the making of such declarations serve no useful purpose, it might actually be detrimental to the best interests of the child.

80. The Adoption Authority is aware of these proceedings, and I understand it has been agreed that a final adoption order would not be made until the determination of same. It is therefore in the best interests of the child that the proceedings be brought to a conclusion, and that the Authority be allowed to consider whether to make a final adoption order on the basis of the post-placement reports.

TERMINATION OF THE AGREEMENT

81. The foster mother alleges that she received no notice of the intention to terminate her foster care agreement. It is further alleged that the termination of the agreement was inconsistent with regulation 22 of the Child Care (Placement of Children in Foster Care)

Regulations, 1995 (S.I. 260 of 1995). See paragraph (e).41 of the statement of grounds.

82. Some reliance was placed in this regard on the fact that there is a document generated within the CFA dated 30 April 2018 which refers to the agreement having been terminated. This date is, of course, some time after the actual transfer of the child to the care of the prospective adoptive parents on 24 April 2018. (This document is exhibited as Exhibit 18 to the grounding affidavit of September 2018).

83. Regulation 22 of the 1995 Regulations provides as follows.

> 22. (1) Where a health board which has placed a child with foster parents—
>
> (a) proposes to reunite the child with a parent, or
>
> (b) considers that the continued placement of the child with those foster parents is no longer the most appropriate way of performing its duty to provide care for the child under section 36 of the Act,
>
> the board shall inform the foster parents of its intention to remove the child from their custody and of the reason thereof.
>
> (2) In any case where foster parents object to the proposed removal of a child from their custody in accordance with sub-article (1) of this article, the health board shall afford the foster parents an opportunity to make representations to the board in the matter and if, having considered any such representations, the board decides to proceed with the removal, the board shall give notice in writing to the foster parents of its decision and the reason thereof and shall request them to deliver up the child on such date and at such time and place as may be specified by the board.
>
> (3) Where foster parents refuse or neglect to comply with a request of a health board to deliver up a child in accordance with sub-article (2) of this article, the board may apply to the District Court for an order under section 43 (2) of the Act.
>
> (4) This article is without prejudice to the power of a health board to apply for an order under Part III or IV of the Act.

84. As appears, there are three procedural requirements which must be met before a child is removed from the custody of foster parents. First, the foster parents must be informed of that intention; secondly, the foster parents must be allowed an opportunity to make representations (and to have those representations considered); and thirdly, the foster parents are entitled to notice in writing of the decision and reasons thereof.

85. There is no doubt but that the first of these two requirements were satisfied on the facts of this case. The foster mother has confirmed that she was informed of an imminent transfer of the child to the care of the prospective adoptive parents on 16 March 2018. Thereafter there was an exchange of correspondence between solicitors acting on behalf of the foster mother, and the solicitors acting on behalf of the Child and Family Agency. The foster mother thus had an opportunity to make representations and to have those representations considered.

86. It is less clear as to whether there was strict compliance with the requirement to notify a reasoned decision. If and insofar as there was any technical breach in this regard, I find that same was *de minimis*. The removal of the child from the care of the foster mother was ultimately carried out pursuant to the terms of the District Court order of April 2018. The foster mother was thus fully aware of the date of the removal, and also aware of the reason for same, having been the moving party in the District Court proceedings.

87. For the sake of completeness, it should be noted that a District Court order is not a prerequisite for a lawful termination of a foster care agreement. Regulation 22(3), on its proper interpretation, is confined to circumstances where a foster parent withholds a child. (There is, of course, no suggestion that this happened in this case). In such an event, the CFA may have to apply to the District Court for an order. In all other cases, i.e. where the child is returned voluntarily, there is no requirement for an application to the District Court.

88. Finally, the logic of a finding that the agreement was unlawfully terminated would be that the agreement subsists, and that the child should be returned to the care of the foster mother. The foster mother is not now entitled to pursue any claim for wrongful termination of the agreement in circumstances where (i) she has expressly abandoned the corresponding order of *certiorari*; and (ii) she has entered into the agreement with the prospective adoptive parents.

PARTIES NOT BEFORE THE COURT

89. The nature of the relief which might otherwise have been open to the foster mother is also constrained by the fact that certain parties are not now before the court. First, the prospective adoptive parents have, in effect, been released from the proceedings by the foster mother by virtue of an agreement entered into on the second day of the hearing. Secondly, the Adoption Authority was never a party to the proceedings. I address each of these in turn.

(i) Proposed adoptive parents

90. The prospective adoptive parents had initially been joined to the proceedings as notice parties in circumstances where they are persons "directly affected" by the proceedings within the meaning of Order 84 of the Rules of the Superior Courts. The child has been in the care of the prospective adoptive parents for a period of almost eight months now. By all accounts, the child has thrived during that time. The placement of the child with the adoptive parents had been authorised by the Adoption Authority. In all the circumstances, the prospective adoptive parents have a right to be heard before any order is made by this court which might impact on the making of a final adoption order by the Adoption Authority in respect of the child.

91. The prospective adoptive parents filed an affidavit in the proceedings, and were initially represented at the hearing by solicitor, junior counsel and senior counsel. An agreement was, however, subsequently reached between the prospective adoptive parents and the foster mother. The existence of this agreement was made known to me, and a signed copy of same was handed into court. The operative clause of the agreement reads as follows.

> "Notwithstanding that [the foster mother] might succeed in obtaining some, one, or more of the reliefs sought by her in this suit, as more particularly set out in the Statement of Grounds of the […] day of September 2018,
>
> a. She shall not seek to adopt [the child];

b. She shall not seek to delay or in any way interfere with the Adoption process concerning [the child];

c. She shall not seek to custody (sic) of [the child] under any circumstance."

92. The legal team representing the prospective adoptive parents then withdrew on the afternoon of the second day of the hearing.

93. The fact that the prospective adoptive parents have, in effect, been released from the proceedings by the foster mother has the inevitable consequence that no relief can now be granted in the proceedings which might affect the decision to make a final adoption order. This includes any collateral challenge to an adoption order which is based on an allegation that the initial decision to place the child with the prospective adoptive parents was invalid, whether by reason of alleged deficiencies in the report made to the Adoption Authority or otherwise at all.

(ii) Adoption Authority

94. The Adoption Authority has never been a party to these proceedings. For reasons similar to those discussed above—in the context of the prospective adoptive parents—the fact that the Adoption Authority is not before the court also constrains the nature of the relief which can be granted. It would be inappropriate to make any order, or to grant any relief, which suggests that the Adoption Authority's decision of 21 March 2018 authorising the placement of the child for adoption is invalid without hearing from the Authority.

95. It would also be inappropriate to make any final decision in respect of the interpretation of the key provisions of the Adoption Act 2010 without hearing from the Adoption Authority. For example, one of the issues discussed briefly in the proceedings was as to whether the Hague Convention, as incorporated into national law by the Adoption Act 2010, properly applies to a domestic adoption at all. The language of the Hague Convention is, in terms, directed to inter-country adoptions. It is not immediately apparent that the requirements as between central authorities intra se can meaningfully be applied to a *domestic* adoption where, of course, there is only one central authority, namely the Adoption Authority.

96. In summary, the absence of these two parties, namely the prospective adoptive parents and the Adoption Authority, has very real implications for the utility of these proceedings, and for the relief which can be granted.

APPLICATION TO AMEND STATEMENT OF GROUNDS

97. As appears from the summary of the factual background set out towards the start of this judgment, relationships between the foster mother and the CFA deteriorated significantly over the period March to April 2018. The focus of the foster mother's concerns at that time were, in particular, that the CFA had not given proper consideration (i) to the implications for the child of transferring their custody to the prospective adoptive parents at a time when they were scheduled for major surgery; (ii) to the implications for the foster mother herself and her children of removing the child from their care; and (iii) to the foster mother's request to be considered as a potential adoptive parent herself.

98. There was a dispute at the hearing before me as to whether the case as pleaded in the statement of grounds went beyond these complaints. In particular, senior counsel on behalf of the foster mother sought to contend that the case also raised complaints as to the *earlier* medical treatment of the child. Specifically, it was said that concerns relating to the child's health which had been raised by their general practitioner in January 2018 and which had been made known by the foster mother to officials in CFA had not been acted upon.

99. Having carefully considered the statement of grounds in this case, I have come to the conclusion that the case as pleaded is narrower. The gravamen of the case as pleaded relates to the events over the period March and April 2018. The focus of the proceedings is in relation to the transfer of the child from the care of the foster mother to that of the prospective adoptive parents. The only reference in the pleadings to correspondence from the child's general practitioner is to an email sent in March 2018. This email is directed to the specific issue of the then proposed transfer of the child to the care of the prospective adoptive parents. I do not think that on a fair reading of the pleadings it can be contended that reference is made to the wider medical issues being suffered by the child.

100. It should be acknowledged that the foster mother made Trojan efforts to obtain the best medical attention for the child. In particular, and as noted earlier, the foster mother personally secured an appointment for the child with a leading gastroenterologist at a private hospital, and did so at her own expense. This appointment led directly to the referral of the child for the surgical procedure ultimately carried out in April 2018. All of this is very much to the credit of the foster mother. However, the court's jurisdiction to determine the case is circumscribed by the terms of the order granting leave to apply. This order was granted on the basis of the statement of grounds. As explained above, the legal issues in the case are confined to the events of March and April 2018.

101. An application was made on the sixth day of the hearing before me to amend the statement of grounds so as to encompass the wider complaint in relation to general medical issues (as opposed to what was referred to at the hearing by the shorthand attachment /transition issues).

102. Senior counsel on behalf of the CFA, Mr Barry O'Donnell, SC, objected to this thirteenth hour application to amend. Counsel made the point that the factual basis for such a claim was very different, and that it would have necessitated an adjournment of the trial in order to allow the CFA to adduce evidence on the specific issue.

103. Mr O'Donnell referred me to the judgment of the High Court (Costello J.) in *Word Perfect Translation Services Ltd. v. Garda Commissioner* [2015] IEHC 668. Having reviewed the case law, including, in particular, the judgment of the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570, Costello J. provides a very helpful summary of the legal principles governing an application to amend.

"14. Applying these two judgments to the issues in this case, the following points emerge:

a) The onus is on the applicant to satisfy a court that there were good reasons to explain why the amendment now sought was not set out in the proceedings as originally drafted;

b) The courts are reluctant to introduce what amounts to a claim for an entirely new relief;

c) The courts are reluctant to introduce what amounts to a challenge to a different decision;

d) If the amendment amounts in essence to a question of pure law and if it does not significantly enlarge the case,

the amendment is likely to be permitted;

e) If the amendment is likely to involve new affidavits and new facts then the courts may be less inclined to allow the amendment sought;

f) An amendment is likely to be permitted if adding the point will assist in the final disposal of the proceedings. Conversely, if it will not, the courts may be less inclined to permit the proposed amendment;

g) The courts will ask whether the issue arises naturally or by implication out of the existing proceedings. If it does not, the courts may be less inclined to permit the proposed amendment;

h) If the proposed amendment is likely to cause delay, the courts may be less inclined to permit the proposed amendment. There is a public interest in the swift disposal of public procurement litigation and there are special and stricter statutory rules applying to this area for that very reason;

i) In considering a proposed amendment the courts will have regard to the prejudice likely to be caused not only to the respondent but also to third parties who may have incurred interests in the intervening period between the impugned decision and the proposed amendment to the existing pleadings; and

j) If an applicant has acquiesced in the situation arising from the decision he later seeks to challenge, this is a factor a court may take into account in deciding whether or not the plaintiff has established good reasons to justify a court permitting the proposed amendment."

104. I respectfully adopt this as a correct statement of the law. Subparagraphs (b), (c), (e), (h) and (i) are especially apposite to this case.

105. For the reasons which follow, I refuse the application to amend. As discussed below, there is already an issue in these proceedings in relation to delay. Having made a late start, it behoved the foster mother to ensure that all issues which she wished to ventilate were put before the court at the time of the ex parte application for leave. It is not appropriate, in my view, to seek to amend the proceedings on the final day of a six day trial. The points made by Mr O'Donnell, SC on behalf of the CFA are well made. In particular, the effect of permitting the proposed amendment would be to change the scope of the case significantly, and would have required an adjournment in order to allow the CFA an opportunity to adduce rebuttal evidence on the new issues. The court has an obligation to ensure that proceedings concerning the adoption of a child are determined expeditiously. To permit the amendment, and to delay the hearing further, would be inimical to this.

DELAY / THREE MONTH TIME-LIMIT

106. I have deliberately postponed to this point of the judgment any consideration of the objection that the proceedings are inadmissible by reason of delay. I have done this because I wished to avoid a situation whereby the proceedings were resolved on the narrow ground of delay, without any consideration of any of the other issues in the proceedings. The case ran before me for some five and a half days, and it seems appropriate that, having heard full argument, I attempt to address the substantive issues raised in the proceedings. This is especially so where the case involves a child. To have decided the case solely on the issue of delay would have run the risk that that finding might be subsequently set aside on appeal, and the parties would then have to rerun the entire case before the High Court, with all the attendant cost and stress to the participants.

107. Notwithstanding my finding in relation to the time-limit (set out below), I have also addressed the merits of the case on a *de bene esse* basis. I do this in the hope of expediting matters in case there is an appeal. The appellate court will have the benefit, for what it is worth, of my conclusions not only on the issue of delay but also on some of the others issue raised in the proceedings.

108. In order to protect the identity of the child, I will refer to the relevant dates in general terms only in the chronology which follows. In reaching my decision on this aspect of the case, however, I have, of course, considered the precise dates.

109. The transfer of the care of the child from the foster mother to the prospective adoptive parents occurred shortly after the surgical procedure, i.e. in mid-April 2018. The application for leave to apply for judicial review was not moved, however, until mid-September 2018. This lapse of some five months is greater than the three month period prescribed under Order 84 of the Rules of the Superior Courts.

110. As a result of the amendments introduced in 2011, the High Court's jurisdiction to grant an extension of time is limited. Order 84, rule 21(3) provides as follows.

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension."

111. The foster mother argues, first, that the fact that the judge hearing the ex parte application for leave to apply for judicial review granted an extension of time means that this issue is now *res judicata*. The foster mother goes on then to argue (i) that she had formed the intention to apply for judicial review in June 2018 and moved with expedition thereafter; (ii) that she had to await receipt of a report from a child psychologist before applying for leave; and (iii) that she had been pursuing other avenues of redress, including a complaint to the hospital, and an internal procedure within the CFA.

112. The CFA maintained that none of the criteria under Order 84, rule 21(3) are met on the facts of the case. The CFA submits that the foster mother is incorrect in suggesting that the fact that an extension of time was granted at the time of the application for leave to apply means that this issue is *res judicata*. Instead, the CFA relied on the principle that any *ex parte* order is open to be

revisited on an inter partes hearing. Counsel referred me in particular to the judgment in *Cornec v. Morrice* [2012] 1 I.R. 804 where Hogan J. emphasised that the courts cannot constitutionally make an order on an *ex parte* basis which finally affects the rights of the parties.

113. See also the judgment of the Supreme Court in *O'Flynn v. Mid Western Health Board* [1991] 2 I.R. 223 at 236.

> "[…] Where the time limit prescribed by rules of court has passed (as was the case here) the judge should be furnished with the reasons for the delay in the grounding affidavit and he should decide whether there are grounds for excusing the delay. Even if leave is granted at the ex parte stage, nonetheless, when the trial judge comes to hear the matter he must adjudicate on whether the delay was reasonable and such as may be excused or not. I am satisfied that in all the circumstances of this case there was undue delay in applying for judicial review and for that reason, also, I would refuse the relief sought."

114. Counsel for the CFA has directed my attention to a number of contemporaneous documents which indicate that the foster mother was able to articulate the precise complaints which ultimately form the subject-matter of these judicial review proceedings as early as March and April 2018. In particular, I was referred to a letter from the foster mother's solicitor of 23 March 2018 which identified the following complaints.

> 6. [The foster mother] does not believe that such a course is based on any proper or full assessment of the welfare of [the child] and the problems [the child's] care involves and has not received any written notification of the plans of the adoption section of the CFA for [the child],
>
> 7. [The foster mother] believes, that this is not in the best interests of the child, and would like a guardian *ad litem* appointed to ensure the best interests of [the child] are assured since it has been confirmed [they] will lose some vital services […] with the move which took [the foster mother] a year to get.
>
> 8. On the basis of her care for [the child] and the progress [the child] has made in her care, and the bonding that has taken place between them over 12 months, and her own experience as an adoptive parent, that in the best interest of [the child] [the foster mother] should be considered as a potential adoptive parent."

115. Indeed, the foster mother had gone as far as threatening legal proceedings by letter dated 9 May 2018.

116. For the reasons which follow, I have decided that the foster mother is not entitled to an extension of time, and that the proceedings are inadmissible by reason of delay. The fact of the matter is that the foster mother has had, at all material times, the benefit of legal advice from an experienced solicitor. She had legal advice throughout the events during March and April 2018. Her solicitor was actively engaged in correspondence on her behalf with the CFA at that time.

117. In addition, the foster mother had the benefit of counsel, and was able to institute proceedings in the District Court in April 2018. The District Court judge ruled that he did not have jurisdiction to interfere with an ongoing adoption process, and instead confined his order to directions as to the care of the child once they were discharged from hospital.

118. All of this indicates that the foster mother would have been in a position to institute judicial review proceedings at that time had she wished to do so. Instead, it seems that having been unsuccessful in her proceedings before the District Court, the foster mother decided instead to pursue non-legal remedies. These included, as indicated above, a complaint to the hospital and an internal review procedure before the CFA. It is well established that the pursuit of non-legal remedies cannot provide a justification for a delay in bringing judicial review proceedings. This is especially so on the facts of the present case where the foster mother had been told that the informal procedure before the CFA was not intended to address the specific legal issues she had raised. See CFA's solicitor's letter of 10 May 2018.

119. At all events, it seems that the foster mother ultimately changed her mind and decided to institute review proceeding before the High Court. It is suggested in the affidavit grounding the application for judicial review that an intention to institute judicial review proceedings was formed some time in June 2018. With respect, the three month time-limit under Order 84 must be calculated from the date giving rise to the grounds for challenge. It is not a time-limit that runs from the date upon which a party forms an intention to pursue an application for judicial review.

120. The foster mother had all the relevant information, and had legal advice available to her in April 2018. She had an intimate knowledge of the events, having been a key participant. Any application for judicial review should have been moved within three months of the date upon which the child was removed from her foster care. The legal grounds of challenge had crystallised at that time.

121. The foster mother was not entitled to await receipt of the psychologist report before making an *ex parte* application for judicial review. The objective of the three month time-limit is to ensure that persons directly affected are put on notice of a legal challenge within a reasonable period of time. Provided this is done, and provided that the grounds of challenge are notified within time, an applicant has some leeway in adducing evidence to support those grounds thereafter. See, by analogy, *McNamee v. An Bord Pleanála (No. 2)* [1996] 2 I.L.R.M. 339. On the facts of the present case, the principal ground of challenge, namely the alleged failure to consider attachment issues, had crystallised in April 2018. The foster mother was able to articulate her complaint in this regard to CFA through her solicitor in correspondence, and to the District Court judge. A statement of grounds could have been drafted at this time. If and insofar as the foster mother wished to bolster her case by way of expert evidence, she could have adduced the report post-leave. If something unanticipated had arisen from that report, she could have made an application to amend her grounds at that stage. None of this relieved her of the obligation to ensure that all affected parties were put on notice of the legal challenge. Promptness is crucially important in child care cases. In the event, however, the foster mother allowed five months to lapse before instituting her proceedings. This is not acceptable on the facts.

122. Finally, I do not think that the reliance which counsel for the foster mother sought to place on *State (Furey) v. Minister for Defence* [1988] I.L.R.M. 89 is justified. In that well-known judgment, McCarthy J. indicated that different considerations apply to time-limits in cases which involve an ongoing wrong. First, I think that, pace McCarthy J., the judgment has to be read now in light of *de Roiste v. Minister for Defence* [2001] 1 I.R. 190. Keane C.J. stated that the relevant passage from *Furey* cannot be regarded as a correct statement of the law.

123. Secondly, an argument that an ongoing wrong has been suffered by the child in this case is not open on the evidence. As indicated above, all of the evidence points in the other direction, i.e. to the effect that the child is thriving.

124. Thirdly, the suggestion that there is an ongoing wrong is inconsistent with the relief sought in the case, which is confined to a historic declaration, with no prospective relief sought, and is inconsistent with the terms of the agreement reached between the foster mother and the proposed adoptive parents.

SUMMARY OF CONCLUSIONS

125. The proceedings are inadmissible by reason of delay. The application was made outside the three month period allowed under Order 84, rule 21. I refuse an application for an extension of time. The fact of the matter is that the foster mother has had, at all material times, the benefit of legal advice from an experienced solicitor. She had legal advice throughout the events of March and April 2018. Her solicitor was actively engaged in correspondence on her behalf with the CFA at that time. The foster mother had all the relevant information, and had legal advice available to her in April 2018. She had an intimate knowledge of the events, having been a key participant. Any application for judicial review should have been moved within three months of the date upon which the child was removed from her foster care. The legal grounds of challenge had crystallised at that time.

126. The application to amend the statement of grounds is refused. Having made a late start, it behoved the foster mother to ensure that all issues which she wished to ventilate were put before the court at the time of the *ex parte* application for leave. It is not appropriate, in my view, to seek to amend the proceedings on the final day of a six day trial. The effect of permitting the proposed amendment would be to change the scope of the case significantly, and would have required an adjournment in order to allow the CFA an opportunity to adduce rebuttal evidence on the new issues. The court has an obligation to ensure that proceedings concerning the adoption of a child are determined expeditiously. To permit the amendment, and to delay the hearing further, would be inimical to this.

127. It seems to me that were the court to embark on a consideration of the robustness of the article 16 report (and supporting documents), it just might lead to a finding that the report was deficient, and that, as a consequence, the authorisation was also deficient. This could then produce an outcome whereby a shadow might be cast over the legal basis for the child's care with the prospective adoptive parents. Such an outcome would not be in the best interests of the child. All of the evidence before the court confirms that the child is thriving and that the adoptive parents are providing a loving and caring home for the child.

128. In circumstances where none of the parties wish me to do anything which might imperil the continued placement of the child with the prospective adoptive parents, and where all the evidence confirms that the child is thriving, I decline to make any declarations as to the historic events of April and May 2018. Not only would the making of such declarations serve no useful purpose, it might actually be detrimental to the best interests of the child.

129. The nature of the relief which might otherwise have been open to the foster mother is also constrained by the fact that certain parties are not now before the court. First, the prospective adoptive parents have, in effect, been released from the proceedings by the foster mother by virtue of an agreement entered into on the second day of the hearing. Secondly, the Adoption Authority was never a party to the proceedings.

130. In the premises, the application for judicial review is dismissed.