Neutral Citation: [2014] IEHC 580

THE HIGH COURT

FAMILY LAW

[2013 No. 89 MCA]

IN THE MATTER OF THE ADOPTION ACT 2010, AND IN THE MATTER OF A.O.B. (FORMERLY T.) A CHILD

BETWEEN

M. O'C. AND B. O'C.

APPLICANTS

AND

UDARAS UCHTÁLA NA hÉIREANN

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered the 30th day of May 2014

1. This judgment relates to an application by the applicants to have a child, A. O'B. formerly T., adopted by them by having the applicants adoption of the child registered in the Register of Inter Country Adoptions maintained by the respondent pursuant to the Adoption Act 2010. The child was born on the 22nd October, 2010, and was placed in the applicants care on the 26th October, 2010, following which a Mexican court made an adoption order on the 24th March, 2011.

2. Difficulties in having the child's adoption registered as a foreign adoption in Ireland have arisen by reason of the intervention of the passing and commencement of the Adoption Act 2010, between the commencement by the applicants of a process for a foreign adoption of a child in Ireland and ultimately, a declaration of eligibility of the applicants for such an adoption under the then existing legislation and the time for the registration under the Act of 2010 of the adoption made by the said order of the Mexican court dated the 24th March, 2011.

3. The Adoption Act 2010, commenced on the 1st November, 2010, and Ireland thereby ratified the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption – (hereinafter "the Hague Convention"). Since that date, and pursuant to article 2 of the Convention, all adoptions between Ireland and Mexico are subject to the terms and conditions of The Hague Convention. After the adoption procedure relating to the child in Mexico, and when the child was removed to this country from Mexico, by and in the care of the applicants, the applicants applied to the respondent for an entry in the Register of Inter Country Adoptions pursuant to s. 90 of the Act of 2010 of the adoption of the child.

Essence of Dispute

4. The essence of the dispute between the applicants and the respondent may be conveniently summarised by quoting a letter from the Inter Country Adoption Unit of the respondent dated the 22nd July, 2011, responding to the application for an entry in the Register of Inter Country Adoptions pursuant to the s. 90 of the child as follows:-

> "I refer to your clients' application for an entry in the Register of Inter Country Adoptions (RIA) in respect of an adoption effected by them in the United States of Mexico on 28th March, 2011.
>
> As you know, Ireland ratified "*The Hague Convention on Protection of Children and Cooperation in respect of Inter Country Adoption*" on 1st November, 2010. Since that time and pursuant to Article 2 of the Convention, all adoptions between Ireland and Mexico are subject to the terms and conditions of The Hague Convention.
>
> Since your clients effected an adoption in Mexico after the enactment date, the terms and conditions of The Hague Convention apply to it.
>
> Your clients have submitted various documents in support of their application for an entry in the RIA. One of these purported to be an Article 23 Certificate issued by the judiciary of the State of BC Mexico.
>
> Article 23 of The Hague Convention states:-
>
> *'Recognition of adoption certified by a competent authority of state of adoption*
>
> *(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph (c), were given.'*
>
> I am to say that the Adoption Authority of Ireland (AAI) has not yet been requested to approve nor has it approved any placement of a child in Mexico pursuant to Article 17 of the Convention for your clients. Since no Article 17 approval was issued by the AAI to the placement you might address how the Article 23 Certificate can be valid.
>
> There is no provision in Irish legislation for the recognition of an inter country adoption from a Hague Convention state that has not been carried out in accordance with the terms and conditions of The Hague Convention."

The Facts

5. The applicants are wife and husband respectively, both in their mid forties having married in 1998. Both applicants have at all material times lived and continued to live in Ireland. It was always their desire to have children, but they experienced fertility difficulties and undertook a number of procedures to counteract these difficulties without having the success of the conception of a child.

6. The applicants applied to the respondent's statutory predecessor for assessment of eligibility and suitability for adoption in or about early 2007, by sending an informal letter stating as follows:-

"To whom it may concern,

> We _____ and _____ would like to go forward with applying for adoption so would you please send us on the package and information for us to get started.
>
> Thanking you"

7. Written communication between the respondent's predecessor and the applicants ensued as a result whereof an adoption assessment was carried out by the Health Service Executive dated the 3rd July, 2009. The assessment recommended that the applicants be approved to adopt a baby girl as young as possible under the age of nine months. An addendum to this report issued on the 2nd October, 2009, granting approval to adopt one child as young as possible under the age of nine months. It appears that the addendum report was necessary by reason of the fact that the applicants originally intended and hoped to adopt a child from Vietnam, but due to restrictions and difficulties which arose in the context of such adoptions, they decided to adopt from Mexico. The issues arising from the change of destination of hoped for adoption were addressed in the context of this addendum report. By declaration of eligibility made by the respondent's predecessor, An Bord Uchtála, it declared pursuant to s. 5(1)(iii)(11) of the Adoption Act 1991, that it was satisfied:-

> "(i) That they are eligible to adopt by virtue of s. 10 of the Adoption Act 1991, and
>
> (ii) That they are suitable to adopt by virtue of s. 13 of the Adoption Act 1952."

The declaration was stipulated only to apply in relation to adoption effected during a period of twelve months from the 20th October, 2009, and this period was duly extended so as not to be an issue in this case.

8. An Bord Uchtála then issued a letter signed on their behalf dated the 29th June, 2010, headed "To whom it may concern", which may be regarded as a letter of introduction of the applicants to the authorities in Mexico from which they might seek adoption arrangements. The applicants made an agreement in July, 2010, in relation to post placement assessments of the child in Ireland, when they returned to Ireland under the adoption arrangements contemplated for Mexico.

Journeys to Mexico and Adoption

9. The applicants travelled to Mexico on the 23rd October, 2010, and the applicants first met the child on the 26th October, 2010. The applicants set about pursuing a Mexican adoption. It should be said that under the then existing law, (primarily dictated by the Adoption Act 1991), it was perfectly appropriate for the applicants to pursue what was then known as a private placement adoption. A temporary residency visa was obtained from the Mexican Department of Immigration and the applicants, together with their witnesses in the adoption procedure and also, the birth mother, were thereafter interviewed separately by the judge dealing with the matter and the court registrar. In addition, the applicants were interviewed by a Mexican social worker from the Department of Comprehensive Development of the Family. The social worker met the applicants both separately and then together with the child for the purpose of assessing their parental suitability and interaction with the child. Thereafter, the social worker provided her recommendation to the Mexican court. Then the applicants applied for an adoption permit from the Department of Immigration enabling them to remove the child from the Mexican jurisdiction. The birth mother placed the child in the applicants care on the 26th October, 2010, and whereas the adoption process in Mexico as understood by the applicants would have allowed them to return to Ireland and place the child in foster care (in Mexico), they decided to remain with the child in Mexico between October, 2010 and March, 2011, when the Mexican adoption order was made. During this time the child became an integral part of what they regarded (and still regard) as their family unit. The court papers for the adoption were lodged in or about January, 2011 and there was a full court (in Mexico) hearing with different parties being heard on different dates. Both applicants were interviewed by court officials and in mid February by the Mexican judge hearing the case. The Mexican adoption order was made on the 24th March, 2011. The applicants were allowed to travel with the child to Ireland and enter same with an authorisation from Mexico, and by an authorisation from the Irish Department of Foreign Affairs, the child having being issued with a separate passport prior thereto.

10. By application form dated the 12th May, 2011, the applicants applied to the respondent to have the child's adoption entered in the Register of Foreign Adoptions. The applicants received no correspondence from the respondent relating to any alteration or changes which could have arisen from the Adoption Act 2010, prior to the adoption of the child in Mexico. They had an application to extend their declaration of eligibility and suitability granted on the 22nd June, 2010, and the letter accompanying such extension dated the 23rd June, 2010, did not make any reference to any impending changes in the statutory regime or the requirements relating to Mexican adoptions.

11. However, the respondent, claimed (and it is accepted by the applicants), that a notice was posted on the Adoption Board (Bord Uchtála) website on the 13th October, 2010, stating as follows:-

> "The enactment of the Adoption Act 2010, will bring about Ireland's accession to the Convention of 29th May, 1993, on Protection of Children and Cooperation in respect of Inter Country Adoptions ('The Hague Convention').

Article 2 of The Hague Convention states:-

> *'(1) The Convention shall apply where a child habitually resident in one contracting state ("a state or origin") has been, is being, or is to be moved to another contracting state ("the receiving state") either after his or her adoption in the state of origin by spouses or a person habitually resident in the receiving state, or for the purpose of such adoption in the receiving state or in the state of origin.'*
>
> Persons proposing to adopt abroad should always seek independent legal advice prior to doing so.
>
> Persons proposing to adopt abroad from a Hague Convention country AFTER 1st November, 2010, should satisfy themselves:-

- that their adoption complies with the terms and conditions of The Hague Convention

- that the agent/agency they have engaged as properly accredited by the central authority in the country of origin

- that the agent/agency they have engaged can produce valid Article 23 Certificate from a competent authority in the state of origin in respect of that adoption.

Details of The Hague Convention and a list of central authorities the accredited bodies and the competent authorities are available on The Hague Convention's website."

12. It is not contested that the applicants had no knowledge of this notice posted on the Bord Uchtála website, however, as pointed out below they did become aware of article 23 certificates in Mexico and had assurances in relation thereto from their Mexican lawyer while in Mexico.

13. From the date of the application to have the adoption registered in the Register of Foreign Adoptions, the respondent remained in what could, in general terms, be a state of concerned indecision. At one stage by letter dated the 26th September, 2012, the respondent wrote indicating that it intended bringing the matter before the High Court for directions under the Act of 2010. In the meantime, the child was bonding with the applicants having lived with them more or less since he was four days old, and progress reports from post placement reports were already being prepared by HSE staff which indicated, and continue to indicate, positive progress of the child and suitability of the applicants to be his parents. The applicants' solicitor sent a letter to the respondent dated the 20th February, 2013, requesting the respondent to liaise with the applicants' barristers with a view to moving matters forward. The applicants complained at this hearing that entirely without warning the applicants' solicitor received a letter dated the 26th February, 2013, wherein the respondent stated that it was refusing to register the adoption and that it was taking no steps other than to notify the HSE that it was so refusing. The applicants complain that they were taken by surprise by this attitude, but this may not be entirely a fair reflection on the situation as they already had received the more neutral, (if slightly apocryphal), letter already referred to above dated the 22nd July, 2011, from the respondent.

14. The order of the Mexican court was published on the 25th March, 2011. This order, (as appears from the translation of the original Spanish version), is comprehensive, and also shows the detail of consideration of the documents, evidence and reports from third parties, and an assessment of the actions taken by the parties, such that it appears to match the highest standards of care and propriety for an adoption process. I do not propose to set out same in full in this judgment, however, there are two aspects which, in addition to the general probity of the order, are of relevance to the further consideration of this judgment as follows:-

1. *Reference to the Hague Convention*

In Recital VI the order states as follows:-

"However, I have to manifest that the Hague Convention accords of 29th day of May, 1993, regarding the Protection of the Child and the Cooperation on International Adoption is formally current in Ireland…

Therefore, these procedures of adoption aim to comply with its Article 23 of the before mentioned Convention which states that:

"(1) A certified adoption as per the Convention, by the relevant authority of the state where this has been taken place, will be fully legally recognised in all other undersigned states. The certificate will specify when and by whom the acceptance (to which Article 17, para. (c) is referred) has been granted.

(2) All the undersigning states, at the moment of the signature the ratification, acceptance, approval or excision must notify the depository of the Convention the identity and the role of the authority or authorities that are competent in order to issue the certificate in the mentioned state. They must notify any change in the appointment of these authorities – and therefore, given the circumstances the applicants …….and ……..also known as …….. and ……, fulfilled the requirement stated in Article 387 of the Civil Code and 908 of the Code of Civil Proceedings and likewise they comply with the existent part and applicable to Mexico with regards to the Convention of the Hague. According to the details in the evidence presented as follows."

COMMENT

This Recital and the purported certification by the Mexican Judge in the order is an anomalous aspect of this case and some background to it is given by an undated letter sent by the applicants to the individual members of the respondent's Board after difficulties had emerged in relation to having the adoption of the child registered in the Register of Foreign Adoptions from which it may be inferred, that whereas the applicants did not receive notice of the article 23 certificate requirement of the Convention through the website they had, through their Mexican lawyer, found out about a s. 23 certificate requirement but were assured that the Mexican judge could deal with same. This anomaly becomes more complex when it is realised (as it was drawn to the attention of the court by Ms. Browne S.C. counsel for the applicants), that in 1995 the Mexican Government reported to the Working Committee on The Hague Convention that certain Mexican judges were competent authorities for the purpose of issuing Article 23 Certificates.

2. *Temporary Guardianship*

The order later refers to the declaration of consent given by the birth mother of the child stating as follows:-

"In which it is stated, summarising, that the said consent was freely given, and she was aware of all the consequences that it brings to giving her minor son up for adoption, she also manifests to be aware of the fact that the minor could be adopted by a couple that may reside abroad, and therefore she is informed of the filial bonds that are generating and those that are breaking being above to withdraw her consent before the civil judge of the first instance, given that afterwards her consent will be irrevocable; giving also temporary guardianship of the minor

to the intending adopting parents."

The Third Party Notice
15. Following intense and frequent meetings and correspondence between the Mexican authorities and the respondent in relation to the lack of an article 23 certificate in relation to a number of Irish cases, including that of the applicants and also investigations into alleged irregularities regarding Mexican adoptions generally (but which have not been linked to this case), the Embassy of Mexico issued a third party notice dated the 12th June, 2012, addressing these two issues stating that:-

> "The central authority in Mexico does not have the powers under the said Convention to regularise migration matters in the adopted country of minors, to address the existing inconsistencies in the adoption proceedings made an infringement of the provisions set in the Convention, but is impeded to issue the certificate referred to in Article 23 of the International Instrument."

The Third Party Notice proceeds from para. 3 to state as follows:-

> "3. If the Irish authorities wish to assist to regularise a situation it is their prerogative and it should be in accordance with their legislation. However, it would be deemed as strange if they were to seek to proceed with the regularisation of migration cases that are clearly in violation of the rules and procedures contracted bilaterally. It would also be a concern as it could be construed as encouragement to violate Mexican procedures and then to have them validated by Irish authorities. The Hague Convention contains no provisions to make up or improve the processes of adoption made outside its jurisdiction. In fact, it presupposes that those procedures are only valid in the Convention. However, the adopters could, under their own volition, attempt to get judgments to remedy the mistakes which occurred in the previous procedure and argue the case in the best interest of the child. This might perhaps mean that the adoptions referred to the Mexican authorities would be nullified and that they would have to restart the process of application through the mechanism of The Hague. In this vein, the Mexican authorities should not be obliged to provide the elements that enable the adopters to nullify such decisions, but only to maintain official contact with the Irish authorities for the purpose of The Hague Convention as set out in Article 4.
>
> 4. The above comments are made independently of the conclusions that the Attorney General's office or any other authority could reach on cases in analysis and administrative responsibilities that may distance themselves as a result thereof.
>
> 5. The wellbeing of the child must prevail over the multiple considerations. Under the circumstances and given the social acclimatisation and the familiarity of the children, it is not advisable to remove the children and return them to Mexico but to keep them in Ireland. The children are the victims here of procedure errors which occurred. Therefore, if the granting of Irish citizenship is to occur, this will be determined by the Irish authorities, experts in Irish legislation."

The Problem
16. The applicants have not, nor do they intend to pursue the possible route suggested by the third party notice of having the adoption process commence again under the Convention. One major reason for not pursuing this route and, in fact, making it wholly unrealistic, is the fact that the Mexican Central Authority have notified to the parties that, subject to certain exceptions for siblings, that children under five years and are not suffering from a disability may not be adopted under the Hague procedure. The problem so dramatically set out in the third party notice from the Mexican Embassy on the general facts of this case (if it has a solution), may only be solved in the context of the proceedings in this Court, rather than in Mexico.

Attorney General
17. Prior to the hearing of this application the Attorney General was joined to the proceedings pursuant to s. 92(7) for the purpose of making submissions to the court in relation to the application without being added as a party to the application proceedings.

The Submissions
18. Ms. Dervla Browne S.C.,, counsel for the applicant made the following submissions on behalf of the applicants. The court has a common law power to recognise foreign adoption as a matter of status. She referred to *Re Goodmans Trusts* [1881] 17 Ch. Div. 266 as being one of the earlier authorities for this proposition and referred to Re Valentine Settlement [1965] Ch. 831, an authority accepted by MacKenzie J. in this jurisdiction. She further suggested that recent United Kingdom decisions indicate that the power of the court to recognise an adoption may even occur in a case where the adoption has been affected in a state with is a contracting state to The Hague Convention but where the adoption does not comply with the Convention. She referred the court to the following cases *Re N.D. & Anor (Children) (Recognition of Foreign Adoption Orders)* [2008] EWHC 403; *Re J.* [2013] 1 F.L.R. 298 and *Re R.* [2013] 1 F.L.R. 1487. She examined the provisions of s. 20 of the Act of 2010 and stated that if a case to which that section relates falls within the definition of "an inter country adoption" set out in s. 3 of the Act, it can only be recognised by the authority if it is "in compliance with the applicable provisions of this Act and The Hague Convention". She also submitted that s. 20 by regulating the power of the authority to effect recognition cannot exclude the inherent power of the High Court to recognise adoptions. To do this, she submitted that the legislation must be clear and explicit and by setting out circumstances whereby some foreign adoptions are given automatic recognition (as set out in s. 57), the legislature cannot be presumed to intend to remove from the court its power to recognise adoptions otherwise, and indeed legislation cannot be interpreted to remove the power of the court to continue to develop and apply those common law rules, and referred to *McG. v. W. (No.1)* [2000] 1 I.R. 96. She stated that the applicants did not necessarily rely on common law principles for the recognition of the adoptions in this case, but that the continued existence of these powers must inform the court in relation to the manner in which the legislative scheme introduced by the Act of 2010 is interpreted. She referred to *Northumberland County Council v. X. (A child*) [2008] EWHC 1324 and the decision of O'Neill J. in *W.S. v. Adoption Board & Ors* (Unreported, High Court, 6th October, 2009) indicating that the welfare principles governs all functions of the court in respect of any arrangements made for adoption and as regards the making of the order itself. She said that nowhere is this principle more clearly seen than in the case of *Attorney General v. Dowse* [2006] IEHC 64, [2007] 1 I.L.R.M. 81 in which the court, pursuant to s. 92(1)(b) directed the respondent to procure the cancellation of entry concerned in the Register. In that case the court made extensive orders relating to the welfare of the child, including orders which, strictly speaking, were outside the terms of the subsection and this showed the extent to which the welfare principle would inform that actual operation of the Act of 2010. Ms. Browne acknowledged that there was no recognised right to form a family, but yet on the facts of this case, a family recognised by the Constitution does exist. She claimed that article 8 rights as guaranteed by the European Convention of Human Rights are also engaged. She stated that although the family in this case (*i.e.* the applicants) can rely on the Constitution in relation to either family rights protected by Articles 41 and 42, or personal rights as protected by Article 40.3, she conceded that it may be in dispute, however, that the child can rely on constitutional rights. She submitted that the reliance by a family with no links to Ireland on

Articles 41 and 42 was considered in the High Court in the cases *of Northampton County Council v. ABF, Saunders v. Midwestern Health Board* [1982] I.L.R.M. 164 and most recently by the Supreme Court in *Nottinghamshire County Council v. B.* [2011] IESC 48, (Unreported, Supreme Court, O' Donnell J., 15th December, 2011). She submitted that while in *Nottinghamshire County Council v. B.*, [2011] IESC 48, (Unreported, Supreme Court, 15th December, 2011) the Supreme Court rejected the argument that Saunders established a general principle that a non-citizen could not rely on the Constitution proving the trial judge's reference in other cases such *A.O. & D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, the court reserved to another case the decision as to when and how a non-citizen can rely on constitutional rights where the resolution of disputes necessitated it, and when a far wider range of cases would be opened. O'Donnell J. reiterated that the court allowed non-citizens to rely on some of the constitutional provisions. She said that it cannot be argued that a person arriving in this country had to engage in a process of adoption registration before constitutional rights could be invoked. In the context of Convention law, she referred to the European Court of Human Rights decisions in *Wagner v. Luxembourg* (*Application No. 76240/01*, 28th June, 2007) and *Neulinger and Anor v. Switzerland* (2012) 54 E.H.R.R. 31 concerning child abduction where the court found article 8 mandates a consideration of the best interests of the child. She fundamentally asserted that the court could not construe or administer the Act of 2010 without considering how the lack of an adoption outcome would affect the welfare of the child in terms of his right to a passport, domicile consanguinity, parental rights, succession and as was clear from the third party notice without the option of returning to Mexico to have his current difficult position reversed, or to be improved upon by some further procedure. In addition, as was decided by Barron J. in *J.M. & G.M v. An Bord Uchtála* [1987] I.R. 510, the bonding between a child and would be adopters commences at six months of age and is completed by the age of twelve months, and certainly by the age of eighteen months and that any breaking of this bond is detrimental to the welfare of the child. The frequent applications to this Court relating to notice to sections under the Act of 2010 underline that the current expert thinking is that if a placement is not made with the first six months, opportunities for bonding seriously diminish.

19. In relation to the construction of the Act of 2010, counsel for the applicants submitted that the applications commenced their adoption procedure under the Adoption Act 1991 and there was no question but that the adoption would have been entitled to recognition by virtue of that legislation. The only reason for non-recognition is the refusal of the respondent to accept the article 23 certificates produced by the applicants. She accepted that s. 7 of the Act of 2010 repeals the entirety of the Adoption Act 1991, but claimed that the provisions of s. 27(1)(c) of the Interpretation Act 2005, states that a repeal does not "affect any right, privilege, obligation or of liability acquired, accrued or incurred under the enactment". It was clear that in this case the applicants had a vested right or privilege which accrued under the Act of 1991. Apart from vested rights she claimed that the applicants had an entitlement to have their adoption recognised by virtue of s. 20 and/or s. 63. She also urged that it was impossible for the respondent to argue that they could not enter the adoption order in the register, as, on their own admission they had, (on four occasions entered other adoptions) which, if not identical to, then similar in all material respects to this case. This could be considered by the court as an abuse of discretion as is exemplified in *HTV Ltd v. Price Commission* [1976] I.C.R. 170. She stated that the Hague Convention is clear and that Article 24 states that the only basis for refusal is if the adoption is manifestly contrary to its public policy, taking into account the best interest of the child and that article 24 must be decisive having regard to the fact that whereas the respondents state that only the central authority can issue such a certificate, Mexico's response to the questionnaire from the Special Commission in 2005 clearly states that a court can also issue such a certificate.

20. For the sake of convenience I shall classify this latter argument as counsel for the applicants' "estoppel argument". In this regard, she further referred to the findings of the third meeting of the Special Commission on the practical operations of the Hague Convention on the 17th to 25th June, 2010, wherein it was stated at para. 52:-

> "The permanent bureau explained that where flawed procedures leading to the issue of a certificate under 23 are noticed, the central authorities must cooperate and assist in guaranteeing that the situation will be rectified where possible. However, when the certificate is issued the refusal to recognise the adoption is only possible only if it is manifestly contrary to the public policy of the state recognising the adoption, taking into account the best interests of the child. It was stressed that the non-recognition is very rarely in the best interests of the child but may be justified in cases where human rights violations occur."

21. In interpreting s. 92 of the Act of 2010 the court must interpret it widely as social and remedial legislation and she referred to the principles of statutory interpretation set out in Bennion on *Statutory Interpretation, 5th ed. (Butterworths*, *2008)* at p. 51. She stated that comparison with s. 90 of the Act of 2010 prescribing the three circumstances in which the respondent may enter an adoption into the Register with the powers of courts sought to be exercised in this case, show that there is no appeal provision from the decision of the adoption authority under s. 90, and thus it is to be assumed that the only supervision of the adoption authority in relation to the exercise of these powers is in the context of judicial review. However, the section (repeating the provisions of s. 6 of the Adoption Act 1991, as amended by s. 15 of the Adoption Act 1988) gives a separate and distinct power to the High Court to "procure an entry into the Register". The exercise of this power is not subject to any of the statutory requirement which apply to the making of such entry by the Adoption Authority of Ireland (hereinafter "the AAI") (save as to the category of applicants), but rather it is a broad provision to be exercised by the High Court, whenever it is "satisfied" that such an entry ought to he made. If s. 90 and s. 92 criteria were the same, the question arises why would s. 92 be necessary? If the criteria were to be the same why did the legislature not simply provide an appeal from s. 90 to the High Court? She submitted that from the foregoing it was clear that the High Court can direct the AAI to register foreign adoptions which, for whatever reason, the AAI believes it does not have the power to register – otherwise s. 92 would be otiose and redundant and the remedy of judicial review would be sufficient to compel the entry. Neither is the section a mere power to correct as elsewhere in the Act s. 90(11) provides "an error in an entry in the register of inter country adoptions may be corrected and if the High Court so directs the specified correction shall be made in the register". The legislature must have meant for the provision to allow the court to do something more, otherwise s. 92 is superfluous. Further, there is no requirement that the application to the High Court relate to "inter country adoption" or to "an inter country adoption effected outside the state" as defined in the Act of 2010. Section 92 refers to an entry with respect to an adoption. The reference to the Register of Inter Country Adoptions is simply to identify the Register concerned as named in s. 90(2) of the Act of 2010. She refers to O'Halloran in a second edition on *Adoption Law and Practice* where he specifically states that s. 92 may be used to convert a simple adoption into a full adoption and, therefore, overcoming the difficulty in procuring an entry representing a simple adoption which would not achieve full recognition in Irish law.

22. She stated that the High Court is empowered to make an order provided it is "satisfied" that the entry "should be made" and that there was little guidance as to when the High Court should be satisfied save that the High Court should be satisfied that such entry would be made in "the best interests of the adopted person". She examined the factors which the court should consider in determining whether or not it is satisfied that such entry should be made as follows:-

> A. The paramountcy test – s. 19 of the Act of 2010 stating that the welfare of the child to be the first and paramount consideration in any recognition application.
>
> B. The implications of non-entry for the children concerned. Under Mexican law the child is a child of the applicants. To

refuse recognition is to leave the child stateless, unrelated to his carers and deprived of a constitutional family which he might otherwise have, and that such outcomes fail to have regard to his welfare and best interest.

C. The provisions of the European Convention on Human Rights Act 2003, and in particular article 2 thereof (as they relate to interpretation of the Adoption Act 2010) and the right to family life provided for in article 8 of the Convention.

D. Public policy issues.

E. The history and origin of the powers thus vested in the High Court.

The Respondent's Submissions

23. Mr. Shane Murphy with Mr. David Barniville S.C. and Ms. O'Neill, counsel for the respondent, having given an overview of the statutory framework and the detail of the relevant provisions of the Act of 2010, went on to deal with the application of the Act of 2010 to the applicants in particular. It was submitted that the respondent does not have any statutory power or discretion to recognise the adoption pursuant to s. 57 of the Act of 2010 or to register the adoption pursuant to s. 90(6) of the Act of 2010. The applicants have not furnished a valid certificate for the purposes of section 57. The applicants rely instead on the adoption order of the R court and it was submitted that there were several deficiencies with this adoption order.

A. The R. Court was not the competent authority designated by Mexico to issue an article 23 certificate.

B. Under The Hague Convention the legal power of the Mexican Ministry of Foreign Affairs is the sole competent authority to issue a s. 23 certificate.

C. While the order of the R court purports to confirm the adoption had been effected in accordance with the Hague Convention, the R court has no function under the Hague Convention and is not a competent authority for that purpose.

D. Likewise, the order of the R Court purports to confirm compliance with article 23 of the Hague Convention, but the R Court has no function.

24. It was submitted that the absence of a valid certificate was and remains an insurmountable bar to the recognition or registration by the AAI of the adoption order under ss. 57 and 90 of the Act of 2010. He then went on to set out further difficulties arising from the ban on children under five years of age being eligible for inter country adoption in Mexico, unless the minor in question suffered from a disability or high cost illness or was one of a group of siblings. The further difficulties set out in the third party notice were alluded to. He stated that the respondent has no power to dispense with the requirements. It is impossible for the respondent to ignore the Hague Convention and the lack of a certificate and must cooperate and report to the Mexican authorities in relation thereto and must not ignore same by proceeding to register the adoption as suggested by the applicants.

Transitional Provisions

25. Counsel for the respondent expressed some concern about the applicants alleging that they had been habitually resident in Mexico, but I consider that the applicants have not made this case to the court when pressing their submissions to the court in oral hearing. Hence, I consider that that aspect (habitual residence) does not form part of the argument on either side. Referring to the provisions of s. 63 of the Act, it was submitted that s. 63(2) simply allows the pre-existing application to continue as if "it were commenced under this Act". It relieves such applicants of the need to restart their adoption applications. It does not, however, relieve such applicants of the other requirements set forth in the Act of 2010. On the contrary, the applicants are required "to proceed under this Act". Further, the Act of 2010 specifically states that a pre-existing declaration of eligibility and suitability shall proceed as if "the date of the issue of the declaration were that day". It was submitted that as a matter of Irish law the application herein must proceed under the Act of 2010 and the Hague Convention and not otherwise. The apparent suggestion made in the applicants legal submissions that an adoption might proceed under the (now repealed) Adoption Act 1991, is not even notionally possible given the clear wording of s. 63 ("proceed under this Act as it were commenced under this Act"). This interpretation is bolstered by s. 176 of the Act of 2010 entitled "savers". It provides that:-

"176(1) An application made under the Adoption Acts to An Bord Pleanála for

(a) an adoption order, or

(b) the recognition of an adoption effected outside the State,

before the establishment day that was not determined before that day shall, on that day be deemed to be an application for an adoption or the recognition of an inter country adoption effected outside the State, as the case may be under this Act and this Act shall apply to the application accordingly."

Vested Rights

26. It was submitted that notwithstanding the clear language of s. 63 of the Act of 2010, that it would have been extraordinary and unwarranted (not to mention *ultra vires*) for the authority to apply the repealed Act of 1991 in the face of clear and unambiguous transitional provisions in the Act of 2010. The respondent noted that notwithstanding this position that the applicants had relied on the "vested rights" argument that at the commencement date of the Act of 2010, *i.e.* the 1st November, the applicants had a vested right by reason of having had declared a declaration of eligibility and suitability which permitted the applicants to do no more than seek an entry on the Register of Foreign Adoptions on their return to Ireland. It was at all times emphasised that the "Board shall exercise its discretion in respect of an entry in the Register upon receipt of the application". It was submitted that the applicants had yet to meet the substantive requirements set out at s. 156 of the Act of 1991, and these requirements could only be met after the adoption. The attention of the court was drawn to the judgment of the Supreme Court in *Minister for Justice v. Tobin* [2012] IESC 37, (Unreported, Supreme Court, 19th June, 2012) and the judgment of O'Donnell J. at para.67 wherein it is stated:-

"A right can be said to be the entitlement of a person to do something which is not itself specifically prohibited, and which the court will enforce as a matter of entitlement and not merely as a matter of discretion."

And it was further stated by the Supreme Court that it was appropriate to look at whether "at the time the right was granted there was intended that it should be permanent" in *Minister for Justice v. Bailey* [2012] IESC 16, (Unreported, Supreme Court, 1st March,

2012) per O'Donnell J. at para. 9. The submission suggested that the present case bears similarities to *J. Wood & Co Ltd v. Wicklow County Council* [1995] 1 I.L.R.M. 51 where the planning permission commenced but was not decided prior to the commencement date of the Local Government Planning and Development Act 1990. A right to compensation arose under the previous legislation, but not the Act of 1990. It was held that the making of the application itself conferred no rights and that the applicant had not acquired any rights within the meaning of the earlier planning Act as the right to compensation did not arise until planning permission was refused. It was accepted that Dodd *on Statutory Interpretation* (Dubin, 2008) is apt where it is stated at 4.53 as follows:-

> "It is clear from these examples that no vested right had accrued merely because a statutory process or application had commenced."

27. It was further submitted that the passing of the Adoption (Amendment) Act 2013, inserting s. 63(a) which extends certain declarations of eligibility for persons who applied under the Act of 1991 and had been issued with declarations of eligibility prior to the commencement date of the Act of 2010 showed that, had the authority been entitled to continue to apply the Act of 1991 to such applications, the Adoption (Amendment) Act 2013 would not have been necessary.

Power under s. 92 of the Act of 2010

28. The respondent's submissions set out the provisions of s. 92 in their entirety and they are set out herein as follows:-

> "(1) If, on application to the High Court in that behalf by a person who may make an application to the Authority under section 90 (3), the High Court is satisfied that an entry with respect to an adoption in the register of intercountry adoptions should be made, cancelled or corrected, the High Court may by order, as appropriate—
>
> (a) direct the Authority to procure the making of a specified entry in the register of intercountry adoptions,
>
> (b) subject to subsection (2), direct the Authority to procure the cancellation of the entry concerned in the register of intercountry adoptions, or
>
> (c) direct the Authority to make a specified correction in the register of intercountry adoptions.
>
> (2) Unless satisfied that it would be in the best interests of the adopted person to do so, the High Court shall not give a direction under subsection (1) (b) based solely on the fact that, under the law of the state in which an adoption was effected, the adoption has been set aside, revoked, terminated, annulled or otherwise rendered void.
>
> (3) Where the High Court gives a direction under subsection (1) (b), it may make orders in respect of the adopted person that appear to the High Court—
>
> (a) to be necessary in the circumstances, and
>
> (b) to be in the best interests of the person, including orders relating to the guardianship, custody, maintenance and citizenship of the person.
>
> (4) An order under subsection (3), notwithstanding anything in any other Act, applies and shall be carried out to the extent necessary to give effect to the order.
>
> (5) If the High Court—
>
> (a) refuses to give a direction under subsection (1)(a), or
>
> (b) gives a direction under subsection (1)(b), the intercountry adoption effected outside the State shall not be recognised under this Act.
>
> (6) The High Court—
>
> (a) may direct that notice of an application under subsection (1) shall be given by the person making the application to such other persons (including the Attorney General and the Authority) as the High Court may determine, and
>
> (b) of its own motion or on application to it by the person concerned or a party to the application proceedings, may add any person as a party to the proceedings.
>
> (7) The Attorney General—
>
> (a) of his or her own motion, or
>
> (b) if so requested by the High Court, may make submissions to the High Court in relation to the application, without being added as party to the application proceedings.
>
> (8) If the High Court so determines, proceedings under this section shall be heard in private."

29. It was submitted that if the High Court had any different or other authority to enter a registration than the AAI had, then this should have been specifically stated in the section. The omission of such a power can be contrasted with other provisions in Act of 2010, pursuant to which the High Court is given an express power to dispense with certain other requirements of the Act such as s.

18(4) dispensing with notification of a parent and s. 26 which dispenses with consents necessary for adoption. Section 92 contains no equivalent language allowing the High Court to dispense with the requirements of ss. 57 or 90(6). While acknowledging that the court in exercising such powers to make an entry shall have regard to "the welfare of the child as the first and paramount consideration"; the plain intention of the Act may be readily ascertained in relation to section 92. The court was referred to the judgment of O'Neill J. in W.S. v. An Bord Uchtála [2009] IEHC 249, [2010] 2 I.R. 530, and stated that in that judgment it is clear that the paramountcy principle as it applies to the High Court cannot be relied upon by the applicants to expand the role of the High Court under s. 92, such that the court can dispense with the requirements of the Act of 2010, (specifically s. 57(2)(b)(ii)). It was submitted that the requirement to give paramountcy to the interests of the child must be exercised within the structure of the Act only where either the authority or the High Court has been given a degree of discretion.

30. It was submitted that the decisions of the European Court of Human Rights in *Wagner v. Luxembourg (Application No. 76240/01, 28th June, 2007* and *Neulinger v. Switzerland* (2012) 54 E.H.R.R. 31 do not provide a basis for dis-applying national law by reference to the paramounty principles, or otherwise. Furthermore, the Act of 2010 is a reflection of the best practice in relation to adoption including inter country adoption, having regard to the rights of all persons potentially involved and it is intended to give effect to The Hague Convention. It would, therefore, be very surprising if the requirements of the Act could be over written and any question of non-compliance resolved by an invocation of s. 19 of the Act (relating to the paramountcy principle). Referring to the case of *M.F. v. An Bord Uchtála* [1991] I.L.R.M. 399 at 402, (MacKenzie J.), the submission stated that domicile of the parents was the basis for recognition of foreign adoptions under the common law power and that since 1991, the recognition of foreign adoption was put on a statutory footing and was then governed by a clear and exhaustive statutory rules providing for the recognition of adoptions orders made in foreign jurisdictions. In the premise, there was no subsisting jurisdiction to recognise foreign adoptions which do not meet the strict requirements of the Act of 2010, and before that the Act of 1991. The court was referred to the judgments of the High Court and Supreme Court in *B & Ors v. An Bord Uchtála* (Unreported, High Court, Flood J., 12th April, 1996) and Murphy J. [1997] 1 I.L.R.M. respectively. In that case, there was no suggestion that the Adoption Board or the court had a jurisdiction in common law to dispense with the statutory requirements set forth in the Act of 1991. In England the common law rule is preserved by statutory provisions and there is no equivalent provision in Irish legislation. It was further submitted that even assuming the court retains some inherent jurisdiction in common law to recognise foreign adoptions the following points bear emphasis:-

> A. First, as a matter of Irish law recognition at common law was strictly confined to adoptions affected by adopters domiciled in the country of origin. This rather rigorous requirement was widened considerably by the repealed Adoption Act 1991. In respect of the present case there is no evidence that the applicants were domiciled in Mexico and, on the contrary, the evidence clearly indicates that their stay in Mexico was intended to be temporary. So at common law the court has no jurisdiction to recognise the adoption.
>
> B. Secondly, it was submitted that the applicants "cannot use common law recognition to subvert the strict statutory requirement such a loophole would run contrary to the public policy reasons for having such a stringent regime citing *Cabeza & Ors, International Adoption* at 7.77". The proposition that an adoption effected in one Hague Convention area could be recognised in another Hague Convention state where the requirements of the Convention are not met as contrary to the no reservations provision set out forth in Article 40 of the Convention where it is stated that "no reservations to the Convention shall be permitted".
>
> C. Thirdly, the applicants adoption falls squarely within the provisions of s. 63 of the Act "not yet effected but still in process".
>
> D. Fourthly, there is no evidence before the court that the other criteria for common law recognition have been met. This can be contrasted with the English cases cited by the applicants, and in *D. & Ors v. An Bord Uchtála*, all of which featured expert evidence regarding compliance with and the affect of adoption laws in the state of adoption.
>
> E. Fifthly and finally, for the avoidance of doubt, it was submitted that the AAI is a creature of statute and has no powers at common law.

31. The respondents stated that the hearing of the action contained a significant concession to the applicants' case, and to demonstrate that, the said submissions of counsel for the respondent is set out as follows:-

> "**Mr. Murphy**: Judge, on behalf of the authority just to inform the court that the authority since the last date that this matter was before you has reflected very seriously on this case and on the structure and scheme of s. 92 of the Act and in terms of its assessment my instructions are that the position as outlined by Ms. Brown is ultimately one which the authority are happy to accept that, namely that you, judge, have a discretion under s. 92 and this is an exceptional and unusual case, that there is guidance for you in the statute because it is quite clear from the statute itself in s. 19 of the Act that the parmountcy principle in relation to best interests of the child are large in every aspect of the court's jurisdiction in relation to this Act.
>
> So the authority having looked at the situation, having reviewed the legal issues and having consulted with is legal team has adopted the revised position which I am now outlining to the court. It also does so in the context of this case where in addition to the special features that have been mentioned on behalf of the applicant here, I would draw the court's attention back again to third party notice. It is exhibit M in the first affidavit.
>
> Mr. Justice Abbott: Yes, I am very familiar with it.
>
> Mr. Murphy: And in particular, judge, if I can just bring your attention again to the phrase at paragraph 5 and this is what the Mexican authority said and I quote:
>
> > *"The wellbeing of the child must prevail over the multiple considerations. Under the circumstances and given the social acclimatisation and familiarity of the children, it is not advisable to remove the children and return them to Mexico but to keep them in Ireland. The children are the victims here of procedural errors which occurred. Therefore, if the granting of Irish citizenship is to occur this will be determined by the Irish authorities, experts in Irish legislation."*
>
> So confirming the context of the letter that the relevant authorities in Mexico have indicated first they do not want these children to come back to Mexico.

Mr. Justice Abbott: No way, absolutely no way, that is very clear. Whatever else is clear about that third party notice, that is certainly clear.

Mr. Murphy: And it is a striking feature but insofar as the court is here as the guardian as it were of the scheme which has been put in place by the Convention and recognised by the State, it is there to ensure that there is nothing in the form of fraud, criminality or side seeping of the obligations which exists.

Mr. Justice Abbott: Yes, or any action which runs fundamentally or even suspiciously against the matters for which the scheme was designed to eradicate, trafficking and fraud…

Mr. Murphy: Here you have a situation where three and a half years later these young children are acclimatised as the Mexicans have acknowledged and familiarised I presume as their family arrangements have developed over here in relation to each of the individuals and a very unusual circumstance confronts the court. But it is not a situation where in our submission the court is bereft of guidance from the statute and if in that context one applies s. 19 as a guiding principle, that is a factor which could affect and influence the court's discretion in that regard.

Secondly, judge, in relation to s. 92 the authority now accepts that the exercise of discretion by the court and the structure of the Act looking at s. 90 and s. 92, it is our acceptance that the intention of the Oireachtas was to create a power or discretion vested in this Court which could in circumstances exceed that of the authority's insofar as the discretion of this issue might be necessary to direct the authority to do something which it felt that it could not do or did not want to do but where the court was satisfied that there were countervailing features and in particular the paramountcy principle which directed the need for the court's discretion to be exercised in that particular way.

So on that particular issue in relation to s. 92, it is our submission that the terms of s. 92, the scheme and its structure have to be interpreted as indicating the existence of a discretion and a discretion which can be exercised if the court so directs in this particular case."

Submissions on Behalf of the Attorney General

32. Ms. Mary O'Toole S.C. and Mr. Finn, counsel for the Attorney General, submitted that no inherent jurisdiction or jurisdiction at common law for the recognition of foreign adoptions should be applied to the Act of 2010, as the Act specifically stated that under its provisions that The Hague Convention had the force of law. To posit otherwise would be to establish a contrary system whereby the only decisive factor which diverts from the procedural requirements of The Hague Convention would be based on welfare principles and would be entirely inconsistent with the national obligations under The Hague Convention and the intention of having an automatic system of recognition of inter country adoption as provided for in the Act of 2010. She submitted that the transitional provisions in s. 63 were far from clear when compared with other provisions of the Act and that; in any event, the applicants had vested rights by reason of having commenced the adoption process prior to the date of commencement of the Act on the 1st November, 2010. She referred in detail to the judgments of O'Donnell J. in *Tobin* [2012] IESC 37, (Unreported, Supreme Court, 19th June, 2012) and *Bailey* [2012] IESC 16, (Unreported, Supreme Court, 1st March, 2012), and submitted that the facts of the present application for adoption take the case far beyond the circumstances of mere passive waiting of an application to continue a process, thus entitling him to any vested rights under the *Tobin* tests. She pointed to the manner in which the authorities had evolved and the circumstances in which the facts of each case would have to be examined having regard to the complexity and dynamics of the legislation providing for the relief concerned in respect of which vested rights were claimed. She referred to the judgment of Hedigan J. in *Commission for Communication Regulation v. An Post* [2013] IEHC 149 (Unreported, High Court, Hedigan J., 8th March, 2013) and also to the judgment of Dunne J. in *Start Mortgages Ltd. & Ors. v. Gunn & Ors.* [2011] IEHC 275 as examples as to how the court should examine the question as to whether vested rights arose by reference to the actual detail and circumstances of the case.

CONCLUSIONS

Paramountcy Context

33. As was the conclusion in the progress reports in relation to the child, he is making very good progress and happily bonded with his proposed adoptive parents, the applicants, and has been removed to Ireland from an early age. There is no gainsaying that these outcomes show that he has had a very good welfare experience and that his adoption, (as is the case of any such child in such a successful placing), would have a high quantum influence on improving his welfare and furthering his best interests. Conversely to be refused adoption, (notwithstanding that he has now the benefits of being a Ward of Court in the care of his proposed adoptive parents the applicants), would have in the immediate or in the long term, on an increasing basis, harmful effects and restraints which would decrease his welfare or at least preventing its improvement with the normal maturation process. Adoption is, therefore, unquestionably in the child's best interests and the effect of what has been submitted to the court is that the imperative of s. 19 of the 2010 Act that the court in deciding this case shall regard the welfare of the child as the first and paramount consideration when considered with the provisions of the European Convention on Human Rights; and the decision of the European Court of Human Rights in *Neulinger* (2012) 54 E.H.R.R. 31 and *Wagner (Application No. 76240/01*, 28th June, 2007) would indicate that the undoubted improved prospects arising from adoption would trump the technical barriers presented by the facts of this case from this Court making an order entering the adoption in the Register of Foreign Adoptions pursuant to section 92. I do not accept this proposition for the following reasons:-

1. The Act of 2010, enacting as it did the Hague Convention into Irish law, is an Act which, in itself, promotes the welfare of this child and all children and its provisions together with provisions of the various international instruments relating to the rights of a child and other matters referred to in the preamble of the Convention, are matters which in a substantial way promote the welfare of the child and are in the best interests of the child. O'Halloran in *Adoption Law and Practice*, 2nd ed. sets out in a helpful way the numerous international instruments which set out to serve the best interests of the child and provide criteria whereby the best interests of the child may best be served. The explanatory report on the Convention drawn up by G. Parre-Aranguren where it is explained that a longer preamble for the Convention was very important having regard to the need to set out the various international instruments which set out the best interests of the child and also to set out the needs relating to asserting the best interests of the child, for instance, the avoidance of human trafficking and the promotion of the development of children within family units. The approach of the explanatory report is further exemplified in this way in para. 64 in which it is stated, for instance:-

> "Undoubtedly, the establishment of certain safeguards will bring about the protection of the best interests of the child, as a paramount consideration, and the respect of his or her fundamental rights, as recognised by international law. Those requirements have to be complied with by all the adoptions covered by the Convention. Therefore, it is not enough for the Contracting States to observe the

> principle of equal treatment between national and inter country adoptions as prescribed as a minimum by Article 21…"

I accept the submissions on behalf of the respondents that the Wagner case did not propose to alter or dispense with any requirements of national law; it merely proposed the removal of an unjustifiable restriction and discrimination against the proposed adopter as a single person. This proposition applies with less force to *Nuelinger*, as it is generally interpreted as putting forward the arguments based on the best interests of the child as immediately seen in the Swiss court as countervailing procedures under the Hague Convention on the Civil Aspects of International Child Abduction , which themselves at a later stage of the Hague abduction procedure would have brought into focus the considerations of the best interests of the child and/or welfare of the child, albeit before a different forum to which the child might have been removed by the strict operation of the Abduction Convention. *Neulinger* therefore appears to me to have trumped the technical requirements of The Hague Abduction Convention with welfare considerations based on a consideration of the overall applicability of the European Convention on Human Rights. *Neulinger* has since been distinguished on the facts and also has been forthrightly criticised, both judicially and extra- judicially. I consider that *Neulinger* may no longer be taken as an authority to break down the boundaries and dimensions of a structure which has been designed to promote the welfare of children such as The Hague Convention on Adoption, which is the result of the consideration of the best assemblies in the world supported by years of practical cooperation and achievement. I find the approach which this Court should take to the question of paramountcy to be best guided by the judgment of O'Neill J. in *W.S. v. An Bord Uchtála* [2009] IEHC 249, [2010] 2 I.R. 530 wherein he states as follows:-

> "In my judgment, a child centred approach is appropriate to the interpretation of s. 19A(3), not only for consistency with the cases decided in the European Court of Human Rights but, more immediately, to comply with s. 2 of the Act of 1974 which, in its clear terms, obliges the respondent and this court and all other courts when dealing with arrangements for or the making of an adoption, in deciding "that" question to have regard to the welfare of the child as the first and paramount consideration."

In stating the above, O'Neill J. sets out the appropriate balance which this Court should have in relation to having regard to the welfare of the child, but also to seek to implement the Act in its clear terms especially having regard to the dramatically new structure for adoption which the Act introduced moving from the private placing scheme of the Act of 1991 to the competent authority placing by way of procedure surrounding the s. 23 certificate in the sending country.

Common Law Recognition

2. While the Act of 1991 responded to the situation described by the Law Reform Commission reports in the late 1980s of the foreign adoption scene in this country being plagued by the uncertainty and expense of engaging in court litigation to achieve any degree of certainty or recognition in relation to foreign adoptions, I am not satisfied that in introducing a fairly comprehensive regime in relation to the recognition of adoptions of children located by adopters in foreign countries and brought to Ireland, that the Act of 1991 thereby and by implication repealed the then existing common law power of the High Court to make orders recognising foreign adoptions (albeit on the restrictive terms analysed by MacKenzie J.) Neither is there any express repeal of any common law power to adopt in the Act of 2010. Where there is an important common law power in existence, the accepted view is that a statute dealing with matters related to that common law power should clearly and explicitly repeal the common law power.

> Having regard to the fact that movement and settlement of persons from abroad is becoming more and more a feature of Irish life, it must be borne in mind too that while the regimes introduced by the Act of 1991 (now repealed) and the new regimes brought in by the Act of 2010, dealing with foreign adoptions, make provisions for the recognition of foreign adoptions of children brought from the sending country to the receiving country, there may well be persons who arrive in this country as adults and set up residence and business interest who may have an interest in having their foreign adoption recognised for citizenship, succession or taxation reasons. The common law power of the recognition of adoption for these people might well become an important ingredient of our jurisprudence. Notwithstanding my view that such a common law power still exists, it seems to me as regards the recognition of adoptions as foreign adoptions in another Hague country may only be effected under the provisions of the Hague Convention and the Act of 2010 by reason of the no exceptions clause in article 40 of the Convention and the provisions of the Act of 2010 that the Convention shall be part of Irish law.

3. The less defined wording of the power of the High Court to enter a name on the Register of Inter Country Adoptions while allowing flexibility is continued to the scheme of the Act and the Convention, the most essential features of which are that the adoption process had moved from the 1991 private placement, to the central authority driven public placement, effected through the interaction between the article 17 agreement and the provision of a certificate under article 23 by the competent authority. Counsel for the applicants' argument that O'Halloran's identification of the possibility of the High Court entering a name on the Register where the adoption had been a simple adoption but had been transformed by reason of the obtaining of the appropriate consents or declarations in the sending country to full adoption, is of no avail in countering this view as this procedure is one which is plainly contemplated by the Act and Convention. Indeed, the sample certificate under article 23 provided with the papers shows that the certificate may at the option of the competent authorities certify either a full or a simple adoption. From the Convention itself (which is a Convention of cooperation rather than of technical and inflexible jurisdiction rules) and from the explanatory memorandum it is clear that in relation to ensuring the broad objectives and fundamental principles of the Convention that cooperation and flexibility may be required. Technical problems may arise within the broad parameters of these activities, and I consider that the more open wording of the provision relating to the power of the High Court to enter a name on the Register is more fitting to allow of these possibilities so as to allow the High Court to be a second guarantor of the interests of the child and the proper administration of the Act in relation to inter country adoptions, which the general, standard, automatic registrations effected by the authority would not encompass.

4. Transitional Provisions

> The effect of the transitional provisions in this case is such that the applicants are prevented from proceeding under the Act of 2010 to continue the adoption as a certificate cannot be issued by the competent authority for a child of less than five years, unless the exceptions apply. A certificate could not have been issued for a child in this case as he had not reached five, and the other exceptions do not apply as is manifestly apparent from the progress reports.

34. In dealing with the provisions of s. 63 of the Act of 2010 dealing with transition, it is accepted as suggested by Counsel for the Attorney General that there should be a two legged test to examine whether under s. 27 of the Interpretation Act 2005, pre-existing rights to adoption of the applicants survived the Act of 2010. The first such leg is to determine whether, on the criteria of the case as set out in the judgment of O'Donnell J. in *Bailey*, such a right arose, and the applicants took real steps to avail of it, and bring it to further states of advancement through the process in which they were involved, by seeking to adopt under the Act of 1991. I conclude that on this leg the following rights have arisen:-

> 1. The declaration of eligibility not only of the applicants but also in relation to the process of seeking a child not older than six months.
>
> 2. The furnishing of a letter reflecting such declaration of eligibility from the authority which gave the applicants a right to travel abroad, in this case Mexico, and seek out a child. In these days of scares about abduction by strangers, human trafficking and similar outrages, the possession of a letter backed by the official and solemn authority of a State Adoption Agency is, in itself, a right and an important step towards the advancement and absolute securing of that right. It is noteworthy that this letter was never countermanded by any other form of letter or "hard copy" of any kind.
>
> 3. The consent of the birth mother to place the child with the applicants is a very real and dramatic right (albeit defeasible by withdrawal of the consent, as was possible within the Mexican procedure). This consent, although perhaps not enforceable by action, nevertheless gave rise to a number of real expectations and calls for action by way of preparation to receive the child on both sides of the consent.
>
> 4. Placing of the child in custody and guardianship as noted in the order of the Mexican court, (and in this judgment above), was a right which the applicants had which was enforceable against all the world, except for the fact that the consent could still be withdrawn, and left the right defeasible or conditional to that extent. Even the conditionality of that right would or could in many cases be altered or diluted by reason of the fact that circumstances could arise when a court might not order the child to be fully returned to the custody and guardianship of the birth mother if ensuing unfortunate circumstances indicated that the interests of the child might not dictate a full return or might only indicate a qualified return with shared parental care left to the applicants.
>
> 5. The right of the child when in the custody and guardianship of the applicants pending the full adoption hearing, to develop physically and emotionally by getting food, shelter and parental nurturing so that the beginnings of the child parent bond could emerge, and that the basis for establishing a sound sense of identity of the child could be established even if these aspects could only be realistically or significantly developed from the applicants side, in the first instance.
>
> 6. The applicants with custody of the child with a properly contained consent armed with the declaration of eligibility and letter of introduction from the Irish Adoption Authorities, had a right and duty to apply to the Mexican court, which on the basis of its satisfaction as to the probity of actions taken to date on the provision of reports indicating the positive qualities and possibilities of the proposed adoption, would grant the adoption.
>
> 7. The right of the applicants and of the child (who, by now, after the Mexican order, was in the custody and guardianship of the applicants by reason of a consent which had become absolute by the reason of the Mexican adoption order) to apply to the Adoption Board under the Act of 1991 to have the Mexican adoption recognised and the adoption registered so as to be deemed an Irish adoption. It has been argued that this right was within the discretion of the Adoption Board, but on the basis of the facts in this case as Counsel for the Attorney General states, the application would have ticked all the boxes in relation to the further matters which were required to be examined by the Adoption Board on the application for the 1991 adoption.
>
> 8. It should be noted that the enumeration of such rights are taken together, which presents an almost irreversible situation in fact, the like of which is contemplated in none of the cases referred to in the judgment of O'Donnell J. in the *Tobin* case. I agree with Counsel for the Attorney General's submission that the situations set out in these various (and, perhaps conflicting authorities) generally relate to mere commercial transactions and not the forming of relationships which ultimately are intended to be finalised as full and complex family relationships representing the Irish constitutional family. While she warned against the court using the paramountcy of the interests of the child principle to assist in distinguishing the rights as analysed above from the rights arising in the cases as set out in the authorities analysed in the judgment of O'Donnell J., it nevertheless, must, in the final analysis, be an additional factor to convince the court that it should at least seek to find these distinguishing factors bearing in mind that not only do the interests of the applicant come into play, but increasingly the interest of a third person (a child) must be considered.

35. All parties accepted her characterisation of the second leg of the test that the survival of acquired rights as found in this judgment would not occur if the Act, in clear terms, repealed and revoked these rights. The submissions of the respondent analysed s. 63 along with other provisions and stated that on the clear reading of the section, all continuing applications for adoption must continue under the Act of 2010 (and by implication under the Hague Convention). However, she countered these arguments by drawing the attention of the court to s. 90(2) which provides as follows:-

> "90(2) The Register of Foreign Adoptions maintained until the establishment day under section 6 of the Adoption Act 1991 by An Bord Uchtála shall, notwithstanding the repeal of that section by *section 7 (1),* continue in being under this Act and, on and after the establishment day, shall be—
>
> (a) known as the register of intercountry adoptions, and
>
> (b) kept and maintained under this Act by the Authority."

She submitted that the reference to continuation of procedures under the Adoption Act in subs (2) clearly ran contrary to the interpretation placed on s. 63 on behalf of the respondents or, at the very least, raised a serious ambiguity in relation thereto which was sufficient to raise a presumption that vested or acquired rights survived the Act of 2010. I agree with this view, but lest this view is not sufficient, there must remain the further consideration of how the Act proceeded to authorise the authority to act on the declarations of eligibility made under the Act of 1991 while proceeding with a 2010 Act adoption. It could well be that declarations of eligibility made before the 1st November, 2010, could, if they related to children over five years or among the exceptions arising from health or sibling qualifications, so that the interactive process of matching that declaration of eligibility with an article 23 certificate offering such a child could proceed in a seamless way and, therefore, s. 63 could on the facts of the case operate to complete the adoption under the Act of 2010. However, in a case such as the applicants where the declaration of eligibility not only related to

them but also the object of their quest for a child to be a child of under nine months clearly could not have met the criteria in Mexico (or for that matter in many Hague countries) in terms of age, the provisions in relation to the continuing use of the pre 1st November, 2010, declaration of eligibility would, in fact, be a repealing section. Insofar as declarations relating to children under nine months (or for that matter under five years), this discrimination could be regarded as an invidious discrimination insofar as it arises outside the purpose of the Act which was to change the system of adoption from a state backed private adoption system to a public backed system whereby the children for the adoptions would be sourced, not by the proposed adopters, but by the competent authority in the sending state. The court is obliged to construe the legislation in accordance with the principles of the Constitution and to allow for an interpretation of the provisions allowing the continuing use of declarations of eligibility which avoids outcomes such as invidious discrimination against persons in the applicants position. This interpretation also forces the court to consider that s. 63 was not sufficient to repeal or revoke the vested rights of the applicants in relation to this adoption.

36. In view of the provisions of s. 92(2) and the agreement of the parties relating to what course the court should take in the event of a positive finding for the applicants on this issue, I am prepared to make an order under s. 92 that the adoption in this case be entered in the Register of Inter Country Adoptions, and I await further submissions of counsel in relation to the appropriate form of order.

The Mexican Certificate

37. For the sake of completeness, I reject the submission made on behalf of the applicants that having regard to the degree of latitude allowed by The Hague Convention, the court should accept the purported certificate offered by the Court of R in Mexico in its otherwise rigorous and comprehensive order. To take such a step is to attempt to bridge a gap which is too wide between what was accepted and dealt with by the Mexican court as a privately sourced adoption and what is supposed to be a non-private adoption dealt with by the meticulously and laboriously prepared interactive procedure most exemplified by the interaction between the article 17 agreement and the article 23 certificate of the Convention.