Neutral Citation Number: [2009] IEHC 429

THE HIGH COURT

2008 487 JR

W. S.

APPLICANT

AND

THE ADOPTION BOARD

RESPONDENT

AND

N. L.,

P. L.

AND

ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of O'Neill J. delivered the 6th day of October 2009.

1. Reliefs sought

1.1 Leave for judicial review proceedings was first granted by this Court (Peart J.) on the 28th April, 2008. Leave was granted by this Court on the 4th June, 2008, and on the 29th October, 2008, to amend the statement of grounds. The reliefs now sought are as follows:-

1. An order of *certiorari* quashing the adoption order relating to S.H., otherwise S.L., made by the Adoption Board on the 26th June, 2007.

2. A declaration that the respondent acted *ultra vires* and/or in breach of natural and/or constitutional justice and/or in breach of the applicant's constitutional rights in failing to notify him in relation to the proposal to place his natural child S.H., otherwise S.L., for adoption and/or in failing to notify him of the making of the adoption order of the 26th June, 2006.

3. A declaration that the respondent acted *ultra vires* and/or in breach of natural and/or constitutional justice and/or in breach of the applicant's constitutional rights in failing to inform the applicant of the steps it had taken to consult him in relation to the proposed placement for adoption of his natural daughter S.H., otherwise S.L.

4. A declaration that the respondent acted *ultra vires* and/or in breach of natural and/or constitutional justice and/or in breach of the applicant's constitutional rights in failing to inform the applicant of the grounds upon which it did not notify him in relation to the proposal to place his natural child, S.H. otherwise S.L., for adoption or otherwise provide him with any information and/or documentation in relation to the said adoption upon his request.

5. A declaration that the respondent's actions in failing to involve the applicant in the decision-making process leading to the adoption order of the 26th June, 2007, was in breach of the applicant's rights and/or the rights of S.H. which are either protected by the Constitution and/or protected by Article 6, 8 and/or 14 of the European Convention of Human Rights.

6. An order of mandamus directing the Adoption Board to provide the applicant with copies of all information with which it has been furnished concerning the applicant and records of all or any decisions taken as regards the consultation procedure and in particular its obligation to take such steps as were reasonably practical to consult him pursuant to ss.7 and or/19A of the Adoption Act 1952 and/or ss. 4 and 6 of the Adoption Act 1998.

7. Further or in the alternative an Order declaring s.19 of the Adoption Act 1952 to be unconstitutional and/or an order pursuant to the European Convention on Human Rights Act 2003 declaring s.19 of the Adoption Act 1952 to be incompatible with European Convention and in particular Articles 6, 8 and/or 14 thereof.

1.2 During the course of the hearing, on the 13th May, 2009, the applicant was permitted to amend his statement of grounds to include a claim for breach of the respondent's statutory obligation to have notified the applicant of the adoption application.

2. The facts

2.1 The applicant, W.S. is the natural father of the child S., the subject of these proceedings. The first named notice party, N.L., is the mother of S. The second named notice party, P.L., is N. L.'s husband. An adoption order in respect of S. was made in favour of the notice parties on the 26th June, 2007, without the knowledge of W.S.

2.2 W.S. and N.L. met in September, 1999, when the W.S. was 19 years old and N.L. was 15 years old. They commenced a relationship. N.L. resided with her mother and attended school. W.S., at that time, was a member of the defence forces and resided in barracks or with his parents. N.L. became pregnant and left school. The child S. was born on the 29th January, 2001. W.S. is named as the father of S. on her birth certificate, which was issued on the 6th March, 2001, and his parents' address is given as his address on it. W.S. left the army after the birth of S.

2.3 It is the evidence of N.L. that her relationship with W.S. was fraught before and after the birth of the S. In her

affidavit sworn on the 8th January, 2009, she stated that in February 2003 W.S. attempted to strangle her in the course of an argument and that he was charged with assault on foot of this. She further averred that she took the decision to withdraw her statement on the day of the hearing of the criminal proceedings as W.S. threatened to take his own life if she ended the relationship. She stated that after this incident W.S. harassed her and would shout threats at her through her mother's letterbox, though there were periods when he was calm.

2.4 The relationship recommenced and in July 2003. W.S. and N.L. became joint tenants of a council property and began to co-habit. N.L. stated that in September 2003 a violent incident in their home prompted her to return to her mother's house with S. She recalled further threatening and abusive behaviour on the part of W.S., in her mother's home. After consulting a solicitor, N.L. obtained undertakings from W.S. that he would vacate their home, would undergo counselling and would desist from behaving in a threatening and abusive manner. W.S. complied with these undertakings and relations between him and N.L. improved until December 2003.

2.5 On the night of the 16th / 17th December, 2003, W.S. babysat S. in the home of N. L.'s mother. Upon N. L.'s return an argument ensued after N.L. accused W.S. of having taken medication from a cabinet. N.L. called the gardaí and W.S. subsequently left the house. Later that night the gardaí returned to N. L.'s mother's house seeking the keys to the house the subject of the joint tenancy from N.L. to give to W.S. She informed them about the undertakings W.S. had given in respect of their house but she ultimately handed the keys of their house over. W.S. then set that house on fire. It is his evidence that, at the time, he was under the influence of controlled drugs and that he wished to take his own life. He fled the burning house, however, and alerted the neighbours, one of whom contacted the emergency services. The house was damaged to such an extent that it was rendered uninhabitable. S. did not witness the fire.

2.6 W.S. was charged with arson contrary to s.2 of the Criminal Damage Act 1991 and was granted bail. One of the conditions of bail was that he would not contact N.L. or her mother. However, he was imprisoned for one week for breach of that condition. N.L. maintains that upon his release that he continued to breach this condition of bail. She instituted proceedings in the Circuit Court and, on consent, was granted an interlocutory injunction against W.S. on the 6th May, 2004, which restrained him from perpetrating any further assault on N.L., threatening, intimidating, harassing or otherwise putting her in fear of her wellbeing and safety. It also prohibited him from entering the family home and from attending at or near or watching or besetting the family home, with a similar prohibition in respect of N. L.'s mother's house.

2.7 Later in May 2004, after the granting of the injunction, W.S. absconded to the U.K. It is accepted that the only contact he had with S. whilst he was away was through sending birthday and Christmas cards to S.

2.8 The foregoing is essentially N.L's version of events. W.S., in his affidavits, whilst admitting that the relationship was difficult, in large measure due his ongoing depression, vehemently denies violence or other abusive behaviour towards N.L. and asserts that the relationship between them was continuous from 1999 until December 2003. Specifically, he avers that until December 2003 he was with S. on a daily basis and was very much part of her life and her upbringing during that time. He points to the fact that that in the summer of 2003, they agreed to jointly take a tenancy in a local authority house, as evidence that a strong relationship was there as of that time and continued until December 2003. He admits burning this house but seeks to correct the impression given by N.L. in her application to the respondent to the effect that the applicant or S. were in any way endangered by his arson of the house. He explains what he did as a suicide attempt prompted by a sense of hopelessness brought on by the incident that had occurred earlier that night when he had been forced to leave N.L.'s house, leading him to believe that the relationship with N.L. was finished. He averred that his leaving the jurisdiction was not to escape the prosecution but to avoid false allegations by N.L. that he was breaching the conditions of his bail. He avers that he has never threatened or imperilled the safety of N.L. or S. and apart from accidentally encountering N.L. on the street or in shops he has had no contact with them for in excess of 5 years and that there was and is no basis for N.L.'s assertion in her application to the respondent that there was an ongoing threat to her safety if he was notified of the adoption application. In this regard the applicant emphasises that since his return from the U.K. he has made no attempt to contact N.L or S. and has directed his communications through correct channels and that he only learned of the adoption order when it was raised by N.L. to defeat his application to the District Court in November 2007, for access to S.

2.9 On the 31st December, 2003, N.L. and P.L. met and began a relationship. They married on the 14th October, 2005. They made an application to the respondent by letter dated the 6th November, 2005, seeking to adopt S. A child (B.) was born to them on the 18th December, 2006. On the 26th June, 2007, the adoption order was made in respect of S. They applied for a new birth certificate, which was granted. It is dated the 31st July, 2007, and P.L. is named as her father.

2.10 In July 2006 W.S. returned to Ireland and made contact with the gardaí. He pleaded guilty at the Circuit Criminal Court on the 4th December, 2007, in the respect of the arson charge, and received a three year suspended sentence. In August 2007 he applied to the District Court for access to S. pursuant to s.11 of the Guardianship of Infants Act 1964. The matter came on for hearing on the 6th November, 2007. The application was struck out on the basis that the applicant had no *locus standi*, as N.L. had remarried and that she and her husband P.L. had adopted the child. The applicant was furnished with a copy of the child's new birth certificate.

The adoption application

2.11 Accompanying the application form to adopt S., dated the 6th November, 2005, was a letter from N.L. and P.L. which requested that they be notified if the birth father of S. was to be contacted. The letter stated, *inter alia*:-

> "*We have noted from reading the enclosed information that it may be necessary to contact S…'s birth father. If this is the case I would be extremely grateful if I could be notified of this. As this man is very violent it would be in S…'s and our own best interest to be aware of this*."

On the 27th June, 2006, N.L. and P.L. forwarded the following documents to the respondent:

- A letter dated the 24th September, 2003, from N. L.'s solicitor to W.S. requesting him to avail of counselling from M.O.V.E. (Men Overcoming Violent Emotion) and to leave the family home for six months whilst availing of this.

- A letter dated the 29th September, 2003, from W. S.'s solicitors to N. L.'s solicitor confirming that W.S. would leave the family home and stating that he had commenced counselling with M.O.V.E.

- Photographs dated the 20th December, 2003, of the burned-out dwelling.

- The interlocutory injunction of the Circuit Court dated the 6th May, 2004.

2.12 N.L. compiled a "*background report*" on W.S. dated the 20th June, 2006. She indicated therein that the whereabouts of W.S. were unknown to her, that there were bench warrants extant in respect of him concerning the charge of arson and that she had been the victim of incidents of domestic violence. She further indicated that she was of the belief that she and S. and her extended family would be placed in great danger if W.S. was to be contacted in respect of the application to adopt S. N.L. wrote a letter to the garda who had dealt with the arson investigation on the 30th June, 2006. In that letter she informed him that her husband P.L. wished to adopt her daughter. She requested him to provide information to the Adoption Board about W.S. N.L. and P.L. met with a social worker employed by the respondent and a report dated the 12th July, 2006, was furnished to the respondent. A further visit from the social worker took place, after which a final report was prepared dated the 8th March, 2007. The adoption order was made on the 26th June, 2007.

2.13 In the affidavits, there is an allegation of concealment by N.L. of her knowledge of the whereabouts of the applicant in the time preceding the making of the adoption order. As noted previously, W.S. returned to Ireland in July, 2006. His solicitor wrote to the Garda Superintendent of the relevant Garda Station on the 2nd August, 2006, seeking to regularise W.S.'s position in respect of the outstanding bench warrant. W.S. says that N.L. would have been aware of his return prior to the finalisation of the adoption order but she took no steps to inform the respondent or the social worker about this. At para. 10 of his affidavit sworn on the 18th March, 2009, he averred as follows:-

> *"10. …I say and believe that there appears to have been a deliberate and conscious effort to ensure that I would not be contacted in relation to the adoption application concerning my daughter S. Allegations were made about me and my behaviour which appear to have been accepted without any checking or verification by either the Social Worker or the Respondent herein. It appears that the intention was clearly to manufacture a position whereby I would not be notified, and the notice parties succeeded in their endeavours. I say further that by the time the notice parties were visited by M. C., Social Worker in March 2007 that I was back living in … having returned in July 2006. I say that the criminal proceedings against me in relation to the charge of arson were up and running and that at that time N.L. was most certainly aware that I was back and residing in the locality. I say that about this time we would have bumped into each other from time to time in various shops or otherwise on the street. I say that N.L. was well aware that I had returned from the U.K. prior to the finalisation of the adoption herein, but never notified the Social Worker or the Adoption Board as to my whereabouts. …"*

He addressed the same issue at para.41 of the same affidavit also:-

> "41. *…I say that following my return to Ireland in or about July 2006 I bumped into N.L. in the town of … on a number of occasions prior to the making of the Adoption Order herein and she knew that I was back residing in the country and that I was facing trial for arson. I say that I was returned for trial to the Circuit Court on the 20th March, 2007, some three months prior to the making of the Adoption Order herein … yet D.L. [otherwise P.L.] suggests that she was not aware of my whereabouts until October 2007… I say that it is evident from the fact that I sought to recommence access with S. by way of application to … District Court dated August 2007 that I was anxious to re-establish a loving relationship with her. I say at the time I was not aware of the making of the Adoption Order, nor even that there had been an application for adoption. I say that I deny absolutely that N.L. and D.L. did everything proper and appropriate in making the application to have S. adopted. Aside from the fact that it is quite clear that from the outset they sought to have me excluded completely from the adoption process and provided a history of my relationship with N.L. and S. that was factually incorrect, they further failed to notify the Adoption Board that I was back living in … from July 2006 onwards, being almost one year prior to the making of the Adoption Order*."

2.14 N.L. in her affidavit sworn on the 6th April, 2009, states at para.8:-

> ```"*8. I say that contrary to the suggestion at paragraph 10 of the Applicant's Supplemental Affidavit, I had no intention of, nor did I engage in a 'deliberate and conscious effort to ensure that W.S. would not be contacted in relation to the adoption application.' I say further that I had no intention of nor did I 'manufacture' any position in relation to the notification or non-notification of W.S. regarding the adoption herein. I say that I honestly and truthfully outlined the background of our relationship to the Respondent and gave my views as requested. I say that I had no idea of the whereabouts of the Applicant at any stage whether in the UK, … or indeed anywhere else … I say that I certainly had no knowledge of the Applicant's address after his return to this jurisdiction and following upon my contact with Garda L., the matter was totally taken out of my hands as to whether or not the Garda contact with the Respondent would have revealed a true address for W.S. and lead to him being notified accordingly of the proposed adoption. I say that it is disappointing to realise that during all of the time W.S. cites how easy it was to have found him, that he never once came forward himself enquiring as to finances regarding S.H. orse S.L. or how I was coping with her in that regard. I say that this attitude was consistent with his previous self-serving decision to flee the jurisdiction in that his only consideration at all times has been himself. I say that I reiterate my contention that W.S.'s access application was only brought in the context of his upcoming plea of mitigation pertaining to the arson charge and not otherwise. I say that if he was constantly present in the area as he alleges he was, then his failure to act a year earlier when he says that he returned to the jurisdiction confirms my contention."*

2.15 It is noteworthy that the first named notice party in her supplemental affidavit did not address whether she had bumped into the applicant or not after his return to Ireland in July 2006 but prior to the making of the adoption order. She stated only in this regard that she did not have an address for him. It may be inferred from this that the first named notice party was aware of the applicant's return at some point after July 2006 but did not inform the respondent of this.

2.16 On the 18th July, 2006, the respondent made a decision not to notify W.S. of the application of N.L. and P.L.

pursuant to s. 19A(3) of the Adoption Act 1952, as amended, subject to N.L. swearing an affidavit regarding the facts surrounding W.S. The minutes of the meeting of the respondent record that N.L. had "objections" to the notification of W.S. It is not disputed that the respondent made no efforts to locate or to contact the applicant. The affidavit, requested by the respondent, was sworn by N.L. on the 27th August, 2006. At paras.4 and 5 it stated as follows:-

> *"4. The birth father became very possessive and controlling. On one occasion he tried to strangle me and I reported him to the Gardaí I later dropped the charges as the birth father decided to attend MOVE a course for anger management.*

5. I have had no contact with the birth father for many years and have no address for him in order for the adoption Board to formally notify him."

2.17 In respect of the decision of the notice party not to inform W.S. of the adoption application, the Registrar of the Adoption Board, Mr. Kiernan Gildea, stated in a letter to W. S.'s solicitors dated the 25th April, 2008:-

> *"Mr. S. was not consulted pursuant to Section 19(A) (2) of the Adoption Act, 1952 as amended and having regard to section 19(A) (3) as the information available to the Board at the time of the proposed adoption:*
>
> *(a) did not disclose where Mr. S. was residing other than he was possibly in England*
>
> *(b) indicated that Mr. S had behaved in such a way towards the natural mother during their relationship that it would be inappropriate for the Board to consult with him in regard to such adoption."*

In para. 10 of his affidavit sworn on the 13th January, 2009, Mr. Gildea again addressed the respondent's reason for its decision not to notify W.S. in respect of the making of the adoption application:-

> *"10. I say and believe and have been advised by the Respondent that it is of the view that in not notifying the natural father in this case, the Respondent, based on the evidence before it, was validly, properly and reasonably exercising the statutory discretion bestowed upon it in this regard. I say that the said decision was also taken having regard to the provisions of section 2 of the Adoption Act, 1974 and the available reports in relation to the welfare of the child. …"*

2.18 W.S. instituted these proceedings against the respondent on the 28th April, 2008. N.L. and P.L. were joined to these proceedings by order of this Court (MacMenamin J.) on the 29th October, 2008. The hearing of this case was conducted in camera pursuant to s.45 of the Courts (Supplemental Provisions) Act 1961.

2.19 W.S. now resides with his partner with whom he has another daughter who was born in October 2007.

3. The statutory provisions

The entitlement to be heard

3.1 Section 16(1) of the Adoption Act 1952 ("the Act of 1952") set forth an exhaustive list of persons who are entitled to be heard by the Board on an application for an adoption order. It states as follows:-

> *"16.—(1) The following persons and no other persons shall be entitled to be heard on an application for an adoption order—*
>
> *(a) the applicants,*
>
> *(b) the mother of the child,*
>
> *(c) the guardian of the child,*
>
> *(d) a person having charge of or control over the child,*
>
> *(e) a relative of the child,*
>
> *(f) a representative of a registered adoption society which is or has been at any time concerned with the child,*
>
> *(g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,*
>
> *(h) an officer of the Board,*
>
> *(i) any other person whom the Board, in its discretion, decides to hear."*

3.2 In the definition section of the Act of 1952 (s.3) "*relative"* is defined as "*grandparent*, *brother, sister, uncle or aunt, whether of the whole blood, of the half-blood or by affinity*, *relationship to an illegitimate child being traced through the mother only*". Therefore, s.16 (1) of the Act of 1952, in its original form, did not provide for a natural father to be heard in respect of the adoption of his child.

3.3 Section 5 of the Adoption Act 1998 ("the Act of 1998"), substitutes the following for s. 16(1) of the Act of 1952:-

> *"(1) The following persons are entitled to be heard on an application for an adoption order-*
>
> *(a) the applicant,*
>
> *(b) the child,*
>
> *(c) the mother of the child,*
>
> *(d) the father of the child or the person who believes himself to be the father,*
>
> *(e) the guardian of the child,*
>
> *(f) the person who immediately before the placing of the child for adoption had charge of or control over the child,*
>
> *(g) a relative of the child,*
>
> *(h) a representative of any registered adoption society or health board which is or has been at any time concerned with the child,*
>
> *(i) an officer of the Board,*
>
> *(j) any other person whom the Board, in its discretion, decides to hear*."

By virtue of the new s.16 (1)(d), the natural father is now one of the persons with an entitlement to be heard in an application for an adoption order. The definition of relative was also substituted by s.2 of the Act of 1998 to include specified relatives that could be traced through the mother or the father.

Notification of the natural father

3.4 Section 4 of the Act of 1998 inserted a new Part IA into the Act of 1952. Section 7D(1) provides for the father notifying the Adoption Board of his wish to be consulted in respect of the placement of his child for adoption or the application of the mother or relative of the child for an adoption order. It states as follows:-

> *"7D. – (1) The father of a child may, by notice to the Board, advise the Board of his wish to be consulted in relation to-*
>
> *(a) a proposal by an adoption agency to place the child for adoption, or*
>
> *(b) an application by the mother or a relative of the child for an adoption order relating to the child.*
>
> *(2) A notice under subsection (1) shall be in writing, be in such form and contain such information as is prescribed and may be given to the Board before the birth of the child concerned."*

3.5 Section 6 of the Act of 1998 inserts s.19A into the Act of 1952. It provides for the Adoption Board taking such steps as are reasonably practicable to consult with the father of a child in respect the adoption of the child, in circumstances of "*private"* adoption (i.e. not arranged by an adoption agency). Subsection 3 gives power to the Adoption Board to make an adoption order without consulting the father upon being satisfied of certain matters. Section 19A of the Act of 1952 reads as follows:-

> *"Post-placement consultation*
>
> *19A. – (1) This section*
>
> *(a) applies in respect of the adoption of a child by a person who is not the father or the person who believes himself to be the father of the child (in this section referred to as the 'father'), and*
>
> *(b) does not apply in respect of the adoption of a child where the placement of the child for adoption was arranged by an adoption agency.*
>
> *(2) Subject to this section, on the receipt of an application for an adoption order, the Board shall take such steps as are reasonably practicable to consult the father of the child in relation to the matter of the adoption.*
>
> *(3) Where the Board is satisfied that, having regard to the nature of the relationship between the father and the mother or the circumstances of the conception of the child, it would be inappropriate for the Board to consult the father in respect of the adoption of the child, the Board may make the adoption order without consulting the father.*
>
> *… ."*

3.6 As to the pre-placement consultation procedure with the father, in circumstances where a child is placed for adoption with an agency s.7E, as inserted by s.4 of the Act of 1998, provides as follows:-

> *"…*

(2) Subject to this section and section 7F, where an adoption agency proposes to place a child for adoption and the identity of the father is known to the agency, the agency shall, before placing the child for adoption, take such steps as are reasonably practicable to consult the father for the purpose of –

(a) informing him of the proposed placement,

(b) explaining to him the legal implications of, and the procedures related to, adoption, and

(c) ascertaining whether or not he objects to the proposed placement."

3.7 Section 7F of the Act of 1952, as inserted by s.4 of the Act of 1998, deals with situations where a father need not be contacted in respect of the placing of his child for adoption by an adoption agency:-

"…

(2) Where on application by an adoption agency that proposes to place a child for adoption, the Board is satisfied that, having regard to the nature of the relationship between the father and the mother or the circumstances of the conception of the child, it would be inappropriate for the agency to contact the father in respect of the placement of the child, the Board may authorise the agency to, and the agency at any time thereafter may, place the child for adoption."

3.8 Section 2 of the Adoption Act 1974 ("the Act of 1974") imports the paramount welfare of children principle into the adoption legislation. It provides:-

"2.—In any matter, application or proceedings before the Board or any court relating to the arrangements for or the making of an adoption order, the Board or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

3.9 Section 5 of the Adoption Act 1976 ("the Act of 1976") prohibits an adoption order being declared invalid upon the establishing of certain matters to the satisfaction of a court. It provides as follows:-

"5.-(1) An adoption order shall not be declared invalid by a court if the court, after hearing any persons who, in the opinion of the court, ought to be heard, is satisfied-

(a) that it would not be in the best interests of the child concerned to make such a declaration, and

(b) that it would be proper, having regard to those interests and to the rights under the Constitution of all persons concerned, not to make such a declaration.

(2) An adoption order shall be deemed for all purposes to be and at all times since its making to have been a valid adoption order unless it is declared invalid by a court."

Effects of an adoption order

3.10 Section 24 of the Act of 1952 sets forth the effects of an adoption order:-

"24.- Upon an adoption order being made –

(a) the child shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock;

(b) the mother or guardian shall lose all parental rights and be freed from all parental duties with respect to the child."

Section 7 of Adoption Act 1988 ("the Act of 1988") provides that references to the mother of a child in, *inter alia,* s.24 of the Act of 1952, shall be construed as including references to the father of a child. Therefore, it is clear that parental ties with the natural father will be severed on the making of an adoption order.

The European Convention on Human Rights Act 2003

3.11 Section 2 of the European Convention on Human Rights Act ("the Act of 2003") deals with the interpretation of laws in accordance with the European Convention on Human Rights. It states as follows:-

"2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

…"

Section 3 of the Act of 2003 provides for the performance of certain functions by public bodies in a manner compatible

with the Convention provisions. It states:-

> *"3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*
>
> *..."*

4. The Issues

4.1 The meaning of ss. 16(1) and 19A(3) of the Act of 1952, as amended, fall to be interpreted in these proceedings. The scope of a natural father's right to be heard and to be notified in respect of the adoption of his child must be explored, as must the meaning and extent of the respondent's discretion to decide not to notify him of this. The interpretation and application of s.2 of the Act of 1974 and s.5 of the Act of 1976 must also be considered and determined.

5. Irish Law

5.1 The meaning of s.16 (1) of the Act of 1952 was considered in the case of *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, where the Supreme Court interpreted that provision in its original format. That case involved the placing of a child for adoption without the natural father's knowledge or consent. The Supreme Court found that a natural father was not, as such, entitled to be heard prior to the making of an adoption order and that any provision to that effect under the Act of 1952 was not repugnant to the Constitution.

5.2 At p.641 Walsh J., considered whether the natural father came within the terms of the subsection and concluded as follows:-

> *"Under the provisions of these sections of the Act [ss.14(1) and 16(1) of the Act of 1952] certain persons are given rights and all other persons are excluded. Whether or not the natural father is excluded depends upon the circumstance whether or not he comes within the description of a person who is given a right, and he may or may not come within some such description. If he is in fact excluded it is because in common with other blood relations and strangers he happens not to come within any such description. There is no discrimination against the natural father as such. The question remains whether there is any unfair discrimination in giving the rights in question to the persons described and denying them to others."*

5.3 He proceeded to examine the status of persons listed in s.16(1) and formed the view that there could be a difference in moral capacity or social function between the persons expressly listed and a natural father and because of this s.16(1) was not unconstitutional:-

> *"In the opinion of the Court each of the persons described as having rights under s. 14, sub-s. 1, and s. 16, sub-s. 1, can be regarded as having, or capable of having, in relation to the adoption of a child a moral capacity or social function which differentiates him from persons who are not given such rights. When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question. In presenting their argument under this head counsel for the appellant have undertaken the onus of showing that in denying to the natural father certain rights conferred upon others s. 14, sub-s. 1, and s. 16, sub-s. 1, of the Act are invalid having regard to Article 40 of the Constitution. In the opinion of the Court they have failed to discharge that onus."*

5.4 Walsh's J's. evaluation of the precise extent of the right afforded to persons listed under s. 16(1) was as follows at pp.638-269:-

> *"It is clear that the persons specified in sub-paras. (a) to (h) of the sub-section inclusive have a right to be heard on an application for an adoption order in the sense that, if one of them applies to the Board to be heard, he cannot properly be refused. It does not, however, follow that before it can make a valid adoption order the Board must seek out all such persons and inquire of each whether he wishes to be heard. There could also be several persons not coming within any of the categories covered by sub-paras. (a) to (h) whose views as to the adoption of a particular child might be of assistance to the Board; and sub-para. (i) enables the Board to hear them. However, no such person can be said to have a right to be heard unless and until the Board has decided to hear him. In this respect the drafting of the sub-section and sub-paragraph may be somewhat peculiar, but the purpose is plain enough. It would be a strange result if by failing to hear some person who could have been of assistance, and who did not ask to be heard, the Board could deprive itself of all jurisdiction to make a valid order. It might well be thought that in the particular circumstances of this case it was impolitic of the Board not to have afforded the appellant the opportunity to be heard but it had a discretion after proper consideration not to do so. The proper exercise of that discretion not to allow the appellant such opportunity left him without any right to be heard. The position would of course be different if the refusal was based on a general policy not to hear the fathers of illegitimate children in such cases and in such an event certiorari would go. There is, however, no evidence that such was the position in this case."*

5.5 The nature of the right enjoyed by persons listed under s.16(1) of the Act of 1952, as it is described above per Walsh J., is a right to be heard should the respondent decide to hear that person and it does not impose an obligation on the respondent to seek out the listed persons in order to ask them if they would like to be heard. Since this decision there has been an express statutory amendment to bring the natural father within the terms of s. 16(1), in that s. 16(1) (d) was inserted by s.5 of the Act of 1998 to include "*the father of the child or the person who believes himself to be the father*" as one of the persons that are entitled to be heard on an application for an adoption order. In addition, an

obligation, albeit a qualified one, on the part of the respondent to consult with a natural father upon receipt of an adoption application order was introduced under s.19A(2), as inserted by s.6 of the Act of 1998. The enactment of the Act of 2003 and the amendments to the Act of 1952 set out above raise the question as to whether the interpretation of s.16 of the Act of 1952 must be considered anew and whether the dicta of Walsh J. are to be distinguished on that basis.

5.6 Other domestic cases involving adoption proceedings that were cited to this Court included *G. v. An Bord Uchtála* [1980] I.R. 32 where a mother withdrew her consent to place her child for adoption and sought to have her child restored to her custody from that of the prospective adopters, Also relevant is In the matter of *S.W., an infant, J.K. v. V.W.* [1990] 2 I.R. 437 which concerned the proceedings that gave rise to the *Keegan v. Ireland* case, (1994) 18 E.H.R.R. 342 and *W.O.R. v. E.H.* [1996] 2 I.R. 248 which also involved the application of a mother and her new husband to adopt the children from her previous relationship. These cases were of assistance in clarifying the position of a natural father in Irish law and the role of the respondent when they were decided, but, they do not provide guidance on the interpretation of ss. 16(1), 19A(2) and 19A(3) of the Act of 1952, as amended.

5.7 In *G. v. An Bord Uchtála* [1980] I.R. 32 the role of the respondent was described in the following terms by Walsh J. at p.72:-

> *"The Board has no function to settle disputes as to the custody of a child. Neither does it have a jurisdiction to adjudicate upon anything that could be said to be in controversy or dispute between parties, either in cases where anonymity is maintained or in the cases where the parties are known to each other. The Board is simply concerned with what I am satisfied is the administrative function of seeing that the steps being taken are not contrary to the adoption legislation, are not inimical to the welfare of the child, and that everybody concerned has had a full opportunity of considering the matter carefully. It is quite clear that the Board was not invested with any power to settle or decide any question as to the existence of a right or obligation or duty. This appears to me clearly to have been the policy and the effect of the Act of 1952."*

5.8 In the matter of *S.W., an infant, J.K. v. V.W.* [1990] 2 I.R. 437 the Supreme Court considered the legal position of the natural father under Irish law. It confirmed that a natural father does not have a constitutional right to guardianship of a child born outside marriage. Finlay C.J. considered that the extent of a natural father's rights could change according to the particular circumstances at p.447:-

> *"The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary greatly indeed, depending on the circumstances of each individual case.*
>
> *The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."*

5.9 In *W.O.'R. v. E.H.* [1996] 2 I.R. 248, which was decided after the *Keegan v. Ireland* (1994) 18 E.H.R.R. 342 case but before the Act of 1998 was enacted, Hamilton C.J. said the following in confirmation of the decision in *Nicolaou* concerning the rights of a natural father at p.265:-

> *"In view of the decision of this Court in J.K. v. V.W. [1990] 2 I.R. 437 I do not consider it necessary for the purpose of answering the questions posed in the case stated, which is the function of this Court, to refer to or purport to deal in any way with the decision of this Court in the case of The State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567 other than to state that the view of the Court that it had not been established that the father of an illegitimate child has any natural right, as distinct from legal rights to either the custody of that child would appear to be reinforced by the statement made by Finlay C.J. in the course of his judgment in J.K. v. V.W. where he stated that 'no constitutional right to guardianship in the father exists'."*

6. Counsels' submissions

6.1 Ms. Browne S.C., for the applicant, submitted that her client was given an entitlement under statute to be heard by virtue of the substitution of a new s.16(1) into the Act of 1952 and that since her client's name was on the child's birth certificate and as there was family life within the meaning of Article 8 of the Convention, that this was a mandatory obligation. The inclusion of the father at s.16(1)(d) of the Act of 1952, as amended, would be otiose if this was not the case, in her submission. She claimed that the respondent breached its statutory obligation to have notified her client. It was also submitted that the previous practice of the Board in respect of the notification of natural fathers from the 6th April, 1992, until the enactment of the Act of 1998 supported the view that the respondent was under a duty to notify the applicant.

6.2 She argued that s. 19A(3) of the Act of 1952, as amended, only applied to fathers who were not registered on the birth certificate or who were not in a continuous relationship with the mother. In the alternative, she argued that if the Court found that the respondent had a discretion to exclude a father who was on the birth certificate or who was in a continuous relationship with the mother that the nature of the evidence to justify excluding the natural father would have to be very compelling. In respect of the manner in which the respondent had exercised its discretion under s.19 A(3) of the Act of 1952, as amended, not to notify the applicant, she argued that it was ultra vires that Act and that questions of safety were excluded from the respondent's remit under s.19 A(3), the only relevant considerations being confined to two matters, namely, the circumstances of the conception of the child and the nature of the relationship between the father and mother. She submitted that ss. 16(1) and 19A(3) of the Act of 1952, as amended must be interpreted in the light of the Constitution and the Convention.

6.3 Mr. Durcan S.C., for the respondent and the third named notice party, urged this Court to follow the dictum of Walsh

J. in *Nicolaou* which, in his submission, was still good law. He submitted that s.16(1), as it was interpreted by Walsh J., provided that the listed persons had a right to be heard if they asked to be heard but that they did not have a right to be notified.

6.4 He submitted that the applicant's submission that if there was family life that there must be notification of the natural father was far too broad and that such a test could not accommodate the complexities of the relationships the Adoption Board would have to deal with in the cases before it. For example, he submitted that if there was a risk that the life of another could be put in danger by informing the natural father that such a test would be inadequate. He stated that when dealing with natural fathers the spectrum was a wide one which could vary enormously and that the interpretation of the legislation in issue would have to cater for that variety of situations.

6.5 He argued that natural fathers have a right to be consulted on the making of an adoption application insofar as the legislature gives this right. He stated that it was not an absolute right. He submitted that the Board, in exercising its discretion, must act proportionately and would have to have regard to all relevant circumstances and rights of all the parties, which included the safety and security of others and the welfare of the child as its first and paramount consideration. He identified the following six matters to which, he submitted, the respondent should have regard when exercising its discretion: the extent of the interference with the natural father's right; the nature and possible infringement of the other parent's rights if the father is notified; the consequences of notification; the effect on the child and, in particular, what its welfare requires; the quality of the family life that was there and the cumulative weight of all of the preceding relevant factors. He stated that the approach of the courts in the U.K. and in the European Court of Human Rights supported this view. In this particular case he noted that the Board had evidence before it that that the natural father had set fire to the family home, that he had attempted to strangle the mother, that the natural father had moved out of the house because of his violent behaviour and that there was a bench warrant in existence in respect of him. In his submission this evidence established that it was reasonable to believe that he could be a threat to the mother and that this was relevant to the welfare of the child.

6.6 He argued that if s. 16(1) of the Act of 1952, as amended, were interpreted as a mandatory obligation to inform all natural fathers as to adoption proceedings this would be wholly inconsistent with the various circumstances provided for in s.7F(1), s.7F(3) and (4) and s.19A(4) wherein, the identity of the father is not known and cannot be ascertained, but nonetheless the respondent may proceed to make a placement order or, as the case may be, an adoption order.

6.7 Counsel for the first named notice party, Ms. Flynn S.C. and counsel for the second named notice party, Ms. O'Hanlon S.C. adopted Mr. Durcan's submissions in respect of the interpretation of ss.16 and 19A(3) of the Act of 1952, as amended.

7. Decision

7.1 I am satisfied that the inclusion of the natural father amongst the parties with a right to be heard in s. 16(1)(d) of the Act of 1952, as amended by the 1998 Act and the enactment of the of the Act of 2003 warrants, particularly in the light of s.2 of the Act of 2003, a reconsideration of the interpretation of s.16(1) taken in conjunction with ss.19A(2) and 19A(3). For this reason it is instructive to examine the approach of the European Court of Human Rights and the courts in the U.K., which have considered the application of the Convention, to the notification of natural fathers of applications for and proceedings concerning adoption.

8. The approach of the European Court of Human Rights

8.1 The relevant Convention articles are Articles 6(1) and 8. Article 6 guarantees, inter alia, the right to a fair hearing before an independent tribunal in the determination of civil rights and obligations, which encompasses adoption proceedings. It reads as follows:-

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

Article 8 provides for the right to respect for private and family life. It states:-

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

8.2 The European Court of Human Rights ("*the Court*") considered the position of a natural father who had not been consulted in respect of the placement of his daughter for adoption by reference to the adoption legislation in Ireland prior to the introduction of the Act of 1998 in *Keegan v. Ireland* (1994) 18 E.H.R.R. 342. The Court found breaches of the applicant's rights under Articles 8 and 6 of the Convention. In that case the applicant's daughter was placed for adoption shortly after her birth without his knowledge or consent. The applicant had been in a relationship with the mother of the child for approximately two years prior to the birth of the child. The Court noted that Article 8 rights not only applied to relationships based on marriage but included other de facto family ties where the parties lived together outside of marriage. A child born in such a relationship was part of such a family unit. Having regard to all the circumstances, it was held that the natural father enjoyed family life under Article 8 with his daughter:-

> *"45. In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and*

they had also planned to get married. Their relationship at this time had thus the hallmark of family life for the purposes of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

8.3 The Court identified the essential problem in Irish law, as it then stood, as being that such a placement in the absence of the father's knowledge and consent was actually permitted and it examined whether this was necessary in a democratic society and concluded as follows:-

"55. … As has been observed in a similar context, where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care. Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

The Government has advanced no reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties. That being so, the Court cannot consider that the interference which it has found with the applicant's right to respect for family life, encompassing the full scope of the State's obligations, was necessary in a democratic society. There has thus been a violation of Article 8."

8.4 As to Article 6, the Court held that as the applicant did not have a right under Irish law to challenge the decision to place the child for adoption and as he had no standing generally in the adoption procedure that there had been a breach of Article 6.

8.5 The Court, at para. 30 of its judgment referred to the practice which the respondent followed with regard to the notification of natural fathers after the proceedings were instituted:-

"…

By a letter of 6 April 1992 the Adoption Board has informed the relevant adoption societies and social workers of a review of its policy in relation to natural fathers of children placed for adoption and the necessity of following new procedures. The letter indicates that whenever a natural father is

(a) named as father on the child's birth certificate

(b) in a continuous relationship with the mother,

he should be notified, if not already aware, of the application to adopt his child and offered a hearing by the Board on the application."

8.6 Some four years after the decision in Keegan, the Oireachtas enacted the Act of 1998 which, inter alia, conferred an entitlement to be heard on a natural father in adoption proceedings and which set out a right of a natural father to be consulted before the placement, in the case of an adoption arranged by an adoption agency and post-placement in the case of a "*private"* adoption.

8.7 A more recent judgment of the Court in *Eski v. Austria* [2007] 1 F.L.R. 1650 concerned a challenge by a natural father to the decision of the Austrian courts to grant permission to his former partner's husband to adopt his daughter without his consent. The natural father was, however, aware of the application to adopt his child and had been invited to partake in those proceedings. By a majority of five to two it was held by the Court that there had been no breach of the applicant's Article 8 rights. The Court found that although there had been an interference with those rights, that it was proportionate in the circumstances. The relevant circumstances, as identified by the domestic court were that the father did not have a close relationship with the child and that de facto family ties existed as between the child and the mother's husband. The Court also noted that the domestic court had heard from the child, the mother and the mother's husband before reaching a decision and that although the father was given the opportunity to be heard in court, he had failed to attend any of the hearings.

8.8 The Court highlighted the primacy of the best interests of the child in the balancing of rights at pp.1657-1658:-

"[35] … While the court has recognised that the authorities enjoy a wide margin of appreciation in particular when deciding on custody, a stricter scrutiny is called for as regards any further limitations and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Article 8 of the Convention requires that the domestic authorities strike a fair balance between the interests involved and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents (see, mutatis mutandis, Sahin v. Germany; Sommerfeld v. Germany [2003] 2 FLR 671)"

8.9 The Court summarised its position pertaining to cases of adoption in which a natural father was excluded. It indicated that a breach of Article 8 was not automatic in such circumstances at p.1658:-

"[36] The court reiterates that legislation permitting the placing for adoption of a child by a mother shortly after the child's birth without the natural father's knowledge or consent may be in breach of Art 8 of the Convention (see Keegan v. Ireland (1994) 18 EHRR 342). In another case, concerning the deprivation of a mother's parental rights and access in the context of compulsory and permanent placement of her daughter in a foster home with a

view to adoption by foster parents, the court stressed that such a particularly far-reaching measure should only be applied in exceptional circumstances and be motivated by an overriding requirement pertaining to the child's best interests (see Johansen v. Norway (1996) 23 EHRR 33). In two more recent cases (Soderback v. Sweden (2000) 29 EHRR 95, [1999] 1 FLR 250 and Kuijper v. The Netherlands, cited above), the court, in finding no violation of the Convention, noted in particular that the natural parent concerned had not had custody of the child and that contacts with the child were very limited. The adoptions had served to consolidate and formalise de facto family ties and the natural parent opposing adoption had been given an opportunity to state his or her case. In the Kuijper case the court had regard also to the fact that the request for adoption was fully supported by the child, who had almost come of age."

8.10 Family life within the meaning of Article 8 extends beyond families based on marriage, as noted in Keegan to include other de facto families, as when parties live together. A child born within such a relationship would enjoy a relationship amounting to family life with its parents. The existence or non-existence of family life under Article 8 is a question of fact which depends upon the existence of the requisite personal ties. Evidence of personal ties, in the context of a child born into a non-marital relationship, could include the following matters as identified by the Court in Lebbink v. The Netherlands (2004) 2 F.L.R. 463:-

"[36] … Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth … ."

8.11 In *Boughanemi v. France* (1996) 22 E.H.R.R. 228 the Court held that family life existed in circumstances where the applicant father had separated from the mother several months before the child's birth and was subsequently deported. The Court, at para.35, indicated that family life, once established, could only be broken thereafter in exceptional circumstances:-

"35. … The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances. In the present case neither the belated character of the formal recognition nor the applicant's alleged conduct in regard to the child constitutes such a circumstance."

8.12 The Court in *Ciliz v. The Netherland*s (Judgment of the European Court of Human Rights, 11th July, 2000) dealt with the circumstances in which family ties can be severed. In that case the parents of the child had been married and later separated. During the period immediately following the separation the applicant father made no attempt to see his son and when he did express a desire to meet him, he did not keep his appointments. After some time the applicant began to meet with his son with some frequency and he made a number of applications to court in respect of access. Ultimately the Court found that "exceptional circumstances capable of breaking the ties of 'family life'" were not demonstrated.

8.13 In *Gul v. Switzerland* (Judgment of the European Court of Human Rights dated the 22nd January, 1996) the Court found that the separation of a natural father from his son for seven years since the birth of his child was not sufficient to terminate family life between them, though in that case the applicant father was married to the mother.

8.14 In establishing whether family life exists as between a natural father and his child it is apparent that the Court will adopt a pragmatic approach in identifying the necessary personal ties. If this relationship exists, a very high threshold must be reached to demonstrate that those ties have been extinguished by subsequent events. If a natural father who enjoys family life with his child is deprived of any participation in adoption proceedings this may or may not result in a finding of a breach of Article 8. It will have to be established, in the context of the specific case, whether such a decision to exclude him was "*in accordance with the law*", pursued a "*legitimate aim*" and whether it was "*necessary in a democratic society*", in the sense of being a proportionate measure in the circumstances. It is clear that a child's interests may override that of a natural parent.

9. The notification to fathers in U.K. of adoption proceedings

9.1 In U.K. law, Regulation 14 of the Adoption Agency Regulations 2005 (S.I. No. 389 of 2005) requires the adoption agency to, insofar as is reasonably practicable, to ascertain the wishes and feelings of a father of a child who does not have parental responsibility in respect of the placement for adoption and the adoption itself. The old corresponding provision was r. 4(4) of the Adoption Rules 1984 which required the agency to ascertain the wishes and feelings of a natural father about a proposed placement of a child if to do so would have been practicable.

9.2 In addition, a court has power under r.23 (3) of the Family Procedure Adoption Rules 2005 ("*the rules of 2005*") to join a natural father to adoption proceedings. The precursor to this was rule 15(3) of the Adoption Rules 1984, which provided for the joining of a father who did not have parental responsibility to subsequent adoption proceedings in appropriate circumstances. Rule 108 of the rules of 2005 permits an adoption agency or local authority to ask the High Court for directions on the need to give a father without parental responsibility notice of the intention to place a child for adoption. The Adoption and Children Act 2002 does permit the placement of a child for adoption and the making of an adoption order without the consent of and without notice to a father who does not have parental responsibility.

9.3 The cases to date have mostly considered the older provisions, as referred to above. In general, the courts have taken the view that if family life, as that term is understood in the context of Article 8 of the Convention, is established on the particular facts then a father should be notified of the proposed adoption application, unless there are strong reasons not to do so, although the legislation also permits a court to dispense with notice to a father who does not have parental responsibility. In the recent case of *Re L* [2008] 1 F.L.R. 1079 Munby J. usefully summarised the current state of the law as follows:-

"[25] … The court has an unfettered discretion [to join a natural father to adoption proceedings], to be exercised having regard to all the circumstances and in a manner compliant with the requirements of the Convention. That said, and where there exists family life within the meaning of Art 8 of the Convention as between the mother and the father, one generally requires 'strong countervailing factors' (Re H and G (Adoption: Consultation of Unmarried

Fathers) [2001] 1 FLR 646 at [48]), 'very compelling reasons indeed' (Re C (Adoption: Disclosure to Father) [2005] 1 EWHC 3385 (Fam), [2006] 2 FLR 589, at [17]) or 'cogent and compelling grounds' (Birmingham City Council v S, R amd A [2006] EWHC 3065 (Fam), [2007] 1 FLR 1223, at [73]) to justify the exclusion from the adoption process of an unmarried father without parental responsibility."

9.4 In *Re H; Re G* (Adoption: Consultation of Unmarried Fathers) [2001] 1 F.L.R. 646 Butler Sloss P. expressed the view that she would expect judges or district judges giving directions in adoption or freeing for adoption applications to inform natural fathers of the proceedings unless, for good reasons, the Court decided that it is not appropriate to do so. In the first case it was held that family life was established by the natural father in circumstances where the parents had a relationship for several years during which they had co-habited and where the father had enjoyed ongoing contact with the elder child they had together. It was further held that there would be a breach of that father's Article 8 rights under the Convention if the child was placed for adoption without notice to him and that he should be given notice and an opportunity to be heard. In the second case family life was not found to exist as the parents had never cohabited and their relationship was not sufficiently constant to have established de facto family ties.

9.5 In Re R (Adoption: Father's Involvement) [2001] 1 F.L.R. 302 a father without parental responsibility was, in all the circumstances of the case, held by the Court of Appeal to be entitled to be given the opportunity to be heard in adoption proceedings. A balancing exercise of all relevant considerations including the father's rights under the Convention was undertaken. Thorpe L.J. found as follows at p.305:-

"(20) The terms of the Adoption Rules 1984 seem to me to be continuingly apt in conferring on the court an unfettered discretion. There will undoubtedly be cases in which the court will exercise that discretion against joining a natural father. An extreme and obvious instance would be the mother whose conception was as a consequence of a violent rape. But in a case such as this, where there is a history of relationship between the parents and where the father has intermittently but transiently sought to play a part in the child's life, it seems to me that a judge acts wisely in ensuring that at least the father has notice of the proceedings.

(21) The climate has undoubtedly shifted since the mid-1980s, and the shift is towards according greater involvement of natural fathers, even though there has been no marriage and even though there has been no formal order of parental responsibility. The arrival of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 probably does not greatly impact on this discretionary balance. But it is a factor that the judge was not only entitled to take account of, but wise to take account of. In the end it has to be recognised that despite the father's failings, despite his poor track record, he was either in prison or on the verge of imprisonment when this application was issued. If the adoption order had been made in this summer past without any notice to him, he most obviously might subsequently raise complaint of unfairness which would rebound to the harm of the child.

(22) I cannot, for my part, see that this discretionary judgment is open to substantial or, indeed, any criticism. The judge decided the matter as he did and, for my part, I would say that he decided the issue wisely. I would not myself interfere and I would dismiss this appeal."

Butler-Sloss P. agreed that there would be instances where it would not be proper to join a natural father to proceedings. She stated as follows:-

"(25) As my Lord has said, there will be extreme cases such as rape where it would be wholly inappropriate for such a father to be joined. There is a spectrum and the question is: at what point does each father without parental responsibility stand on that spectrum? The judge decided that this father – although as my Lord has said his track record was not encouraging – ought to be given the opportunity to be heard, because the judge took the view he was entitled to be heard and also the judge took the very pragmatic view that not to allow him to do so might store up trouble in the future. He quite rightly did not underestimate the trouble that might be stored up, even after the child had been adopted. Far better to have it out in the open and heard and dealt with before the adoption order was made, if it is right so to make such an order."

9.6 In *Re M (Adoption: Rights of Natural Father)* [2001] F.L.R. 745 a local authority's application for a direction, supported by the mother, that the natural father not be contacted in respect of the proposed adoption of the child, the mother gave evidence that the father was a dangerous and violent man and that he had no knowledge of the birth of the child. On the facts it was held that there had never been family life between the father, the mother and the child as they had never lived together, that the child had been conceived unintentionally, that the parents were not living with each other at the time of conception and that there had been no meaningful relationship between the father and mother at any time relevant to the child's birth. Bodey J. balanced the various Convention rights of the mother, the father and the child and another child not the subject of the proceedings and concluded that the decision taken by the local authority not to inform the father as to the existence of the child or of the freezing proceedings was correct.

9.7 Therefore, it appears that in the U.K. a high threshold must be met before the participation of a natural father is ruled out. The first step is to determine whether family life under Article 8 of the Convention exists as between the father and the child. A balancing exercise is then undertaken weighing the rights of the mother, father and the child or children of that relationship. It is clear that there may be instances where it would be inappropriate to notify him or to join him to the proceedings. However, these instances appear to be extreme cases.

10.1 I am satisfied that there was family life within the meaning of Article 8 between the applicant and S. This is evidenced by the fact that he and the first named notice party were in a relationship before and after the birth of the child, during part of which they cohabited. In addition, he enjoyed contact with the child for almost three years following her birth. The severing of contact between the applicant and S. resulted from the tempestuous fracturing in the relationship between the applicant and N.L., which had the consequence of an injunction being put in place, albeit by consent, which effectively precluded the applicant from contact with S. The conditions attached to the applicant's bail no doubt also inhibited contact between the applicant and S. Also arising out of the events at the end of 2003, the applicant absconded the jurisdiction. During his three year absence he did attempt to maintain some contact with S. by sending Christmas and birthday cards. I am satisfied that the applicant was never consciously indifferent to his relationship with

S. and the separation from her was the result of force of circumstances, which were undoubtedly of his own making. Nonetheless, when he did return to this jurisdiction he did set about gaining access to her. It could be said, as indeed it was in the affidavit of N.L., that he waited for some time after his return to initiate the District Court application for access and in the time before that while back in Ireland he did not intimate any interest in S., as for example enquiring of her welfare and offering to contribute to her support. Against this it is to be observed that the injunction was still in force and until the determination of the criminal proceedings in respect of the arson charge, the conditions attached to his bail applied and he may have had reasonable apprehensions of breaching these.

10.2 The existence of an Article 8 relationship between the applicant and S. was, in my opinion, under the jurisprudence of the European Court of Human Rights, sufficient to trigger the obligation to notify the applicant unless the circumstances of the conception or the nature of the relationship between the applicant and N.L. were of such extreme or exceptional kind as to have either severed the Article 8 family tie or to have been a proportionate response in the light of the circumstances, bearing in mind the paramount welfare of *S.*

10.3 As the applicant's Article 8 rights were engaged, it necessarily follows that pursuant to s.2 of the Act of 2003, ss. 16(1) and 19A(2) and 19A(3) of the Act of 1952, as amended, must be interpreted, insofar as it is possible and subject to the existing appropriate rules of interpretation under Irish law, in a manner consistent with the State's obligations under the Convention. Apart from the requirements of the Act of 2003, the new provisions inserted into the Act of 1952 in relation to natural fathers, necessarily, in my view, call for a new consideration of the existing interpretation of the obligation on the respondent to notify a natural father, as contained in the dicta of Walsh J. in the *Nicolaou* case, as set out above.

10.4 I cannot accept the submission of Ms Browne to the effect that under the new s.16(1) notification of the natural father is mandatory, where the natural father is recorded on the child's birth certificate or where there is a relationship between the natural father and mother which attracts family rights under Article 8 of the Convention. Also, I cannot accept Mr Durcan's submission to the effect that the dictum of Walsh J on the obligation to notify under the original s.16(1) remains good law.

10.5 Section 19A(3) gives to the respondent a discretion to withhold notification in certain circumstances. If Ms. Browne's submission were correct, that discretion would be impermissibly curtailed, insofar as the mere recording of the natural father on the birth certificate and/or the mere accrual of Article 8 rights would, without more, oust any discretion and disable the respondent from considering circumstances amounting to the severing of Article 8 family ties or which were of such an extreme kind as to warrant withholding notice.

10.6 The inclusion of the natural father as a person entitled to be heard under the new s.16(1)(d) together with the new s.19A(2) undoubtedly imposes on the respondent a mandatory obligation to notify the natural father where that is reasonably practicable, unless the respondent can exercise its discretion under s.19A(3) to withhold notification. Thus, in my view, the dictum of Walsh J. in the *Nicolaou* case in relation to the obligation to notify under the former s.16(1) can no longer have any application in the context of the new statutory provisions as contained in the new s.16(1)(d) and ss.19A(2) and 19A(3), as inserted by the Act of 1998.

10.7 The issue which is at the core of this case is the correct interpretation of s.19A(3) and its application to the facts in this case and ancillary to that, the correct interpretation and application of s.2 of the Act of 1974 and s.5 of the Act of 1976. If s.19A(3) could not or should not have been availed of, then there was a mandatory obligation to notify unless that was not reasonably practicable. In this case it is common case that the respondent made no attempt whatever to notify and the only impediment to notification which might have made notification not reasonably practicable was the information given to the respondent to the effect that the whereabouts of the applicant were unknown but that he was believed to be in the U.K.

10.8 Interpreting s.19A(3) in a manner compliant with the Convention requires, in my view, that its effect be ring-fenced, so as to ensure that its application is confined to the kind of extreme or exceptional cases discussed in the jurisprudence of the European Court of Human Rights. In my judgement, the literal terms of s.19A(3) lend themselves easily to such an approach. There are only two circumstances mentioned in the subsection which can be considered as a basis for not notifying the natural father. These are the circumstances of conception and the nature of the relationship between the natural father and the mother. Whilst the section makes it clear that these two matters can be considered separately, in a great many cases it is likely there would be a considerable overlap. When considering the circumstances of conception, clearly what the Oireachteas had in mind was a distinction between conception as a result of rape, or an isolated casual encounter or some other incident of sexual contact which right-thinking people would readily recognise as failing to confer on the natural father any of the normal rights of paternity. In clear contradistinction, is the conception of a child out of a normal relationship between the father and the mother.

10.9 A wider variety of consideration arises when dealing with the nature of the relationship between the natural father and the mother. At first it must be observed that a literal interpretation of the language used does not include the relationship between the father and the child. It need hardly be said that such an exclusion could hardly have been contemplated by the Oireachtas as it would lead to patently absurd results. It could not seriously be suggested that an abusive relationship between the natural father and the child would have to be ignored where the relationship between the father and mother did not justify withholding notification. Conversely, where the relationship between the father and the child was good, it could not be the case that abusive nature of the relationship between the father and the mother would, alone, be decisive on the question of notification.

10.10 I am quite satisfied that a purposive approach is required in the interpretation of this part of s.19A(3). In my judgement, 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 *G. v. An Bord Uchtála* [1980] I.R. 32 an issue arose as to whether the "*best interests of the child"* test, set out in s.3 of the Act of 1974, or the welfare test, as set out in s.2 of that Act, should apply on an application under s.3 to dispense with the consent of the natural mother. In the event the majority of the Court favoured the test as laid down in s.3 as the appropriate one for an application under s.3. In the course of his judgment Walsh J. said the following, albeit *obiter,* apropos s.2 generally at p.77:-

> *"I am quite satisfied that the President of the High Court did not err in adopting the test laid down in s. 3 of the Act of 1974 instead of the test laid down in s. 2, which latter test appears to be the one which binds the Board when it comes to consider whether or not it should approve of the arrangements to make an adoption order. The references to the 'court' in s. 2 are not very illuminating. Save for the purpose of reference in deciding questions of law, the court, apart from s. 3, has no function whatever in the matter of adoption as such. Section 2 specifically refers to 'the arrangements for or the making of an adoption order' and seems to imply that a court has some function in these matters."*

Henchy J. in his judgment in the same case said the following concerning s.2 at p.90 :-

> *"Whether a distinction is to be drawn (and, if so, to what extent) between the 'welfare of the child' and the 'best interests of the child' is something I find unnecessary to consider for, in my opinion s. 2 and s. 3 of the Act of 1974 are directed to mutually exclusive situations. Section 2 is confined to one or other of two types of questions. The first is a question relating to the arrangements for an adoption. By reason of the statutory scope given by s. 4 of the Act of 1952 to 'the making of arrangements for the adoption of a child,' this type of question is limited to the sphere of the initiation of a placement; so it does not arise here. The second type of question envisaged by s. 2 of the Act of 1974 is one related to the making of an adoption order. While the question of whether or not the mother's consent to the making of an adoption order should be dispensed with might, broadly speaking, be said to be related to the making of an adoption order, it is so related only in a preliminary or indirect way. The juxtaposition of ss. 2 and 3 of the Act of 1974, with their differently worded specifications for the exercise of the court's discretion, must be held to indicate differing subject matters. In my view, s. 2 must be held to refer to questions relating to 'arrangements,' i.e. ,the making of placements, or to the actual making of an adoption order. The question whether the mother's consent will be judicially dispensed with is a separate and distinct matter which arises only under s. 3 and is required by s. 3, sub-s. 2, to be decided in accordance with what is adjudged to be in the best interests of the child. That is the only test which the court may apply in a case such as this."*

10.11 These dicta on the general scope of s.2 appear to me to extend beyond the matter immediately in issue in that case namely, whether the welfare test in s.3 or s.2 applied to an application under s.3, and may properly be regarded as obiter. Section 2 is cast is very broad terms indeed and expressly includes the courts. It would appear to me that the functions of the court affected by the operation of s.2 are not defined or limited and thus, in my judgement, s.2 must be construed as applying to any function which a court has which involves a question concerning the arrangements for or the making of an adoption order. The issue or question, before the court, if it relates to arrangements for or the making of an adoption order then becomes "*that*" question for the purposes of the application of s.2. The task this Court is engaged in seems to me to be essentially that envisaged by Walsh. J., namely that of a reference on a question of law for a determination on the correct interpretation of and application of s.19A(3). That is a function that can only be determined at first instance by this Court and is clearly a function this Court has which is potentially affected by s.2, provided that the question before the Court is concerned with arrangements for adoption or the making of an adoption order.

10.12 The specific question at issue in this context is whether the giving of notice to a natural father under s.19A(2) or the withholding of it are matters which should properly be regarded as so intimately connected with or essential to the making of an adoption order as to be properly treated as an integral part of the making of an adoption order. There is no doubt but that the operation of ss.19A(2) and 19A(3) are essential features of the making of an adoption order. They are not dispensable preliminaries. The steps set out in ss.19A(2) and 19A(3) must be taken in every application for an adoption order where there is no placement i.e. in every private adoption application. That being so, it necessarily follows, in my judgement, that the operation of ss.19A(2) and 19A(3) must be considered an integral part of the making of an adoption order and, therefore, subject to the application of s.2 of the Act of 1974, whether or not the function is one carried out directly by the respondent or is the subject matter of an issue before a court.

10.13 I am satisfied that s.2 must impact on and inform the interpretation of s.19A(3). With this in mind and also the obligation under s. 2 of the Act of 2003, where possible to construe in compliance with the State's obligations under the Convention, I have come to the conclusion that the "*nature of the relationship between the father and the mother*" must be construed as including the relationship between the father and the child.

10.14 In identifying the relevant factors that may be taken into account by the respondent in exercising its discretion under 19A(3), it must first be borne in mind that the decision involved is simply to notify the natural father or not and is not the decision on whether or not to make the adoption order itself. Different considerations would apply on the decision to make the adoption order. Thus, the welfare of the child must be viewed in that context. Therefore, there must be a distinction drawn between factors which are relevant to the decision to notify and factors that are relevant to the eventual decision to make or not make the adoption order. Consideration of factors properly relating to the final decision may be premature and impermissible in making the decision to notify or not. Into this latter category would fall those considerations relating to the effect of the adoption order sought, as against its refusal, on the ultimate welfare of the child. Insofar as the welfare of the child is concerned, the range of consideration on a decision to notify the natural father or not should be confined to the effect on the child's welfare of consulting the father in the adoption application and no more.

10.15 Under the umbrella of the "*nature of the relationship*" a critically important factor in deciding to notify or not would be the duration of any relationship between the father and the child and hence the degree of the any engagement between the father and the child or the depth (or lack of it) of any commitment by the father to the child. If the duration of the relationship was so short as to be negligible, in the sense of demonstrating that no paternal/filial bond could have been realistically formed between father and child, this would clearly be a factor which would sway the respondent towards a refusal of notification.

10.16 If the relationship was one of some longevity such that the normal parental bond was formed between father and child, unless there was present in that relationship an abusive element of some sort such as to lead to a conclusion that the relationship should be terminated in the interest of the welfare of the child, then the respondent should be swayed towards notification.

10.17 I mention these factors first, because in a child centred approach to discerning the meaning of s.19A(3) the factors relating specifically to the relationship between the father and the child should be paramount.

10.18 This brings me to the actual relationship between the father and the mother. Obviously, in applications for adoptions of this kind, the relationship between the mother and the natural father will either have been of short duration or if not will have broken down due to the myriad of factors that cause the collapse of intimate relationships between adults. If the shortness of the relationship between the mother and the father mirrors the relationship between the father and the child, then clearly that would be good grounds for a withholding by the respondent of notification to the natural father. Where a relationship of significant duration between the mother and the father comes to an end, in my judgement, the respondent must be careful not to be drawn into a punishment of the father for what may have been ill treatment by him of the mother. This may arise in the context of allegations by the mother of violence and other forms of abuse perpetrated by the father. Of particular concern in this regard, is where it is alleged that there is a continuing threat of violence or harm from the father either directed at the mother or perhaps members of her family. Whilst this may be alarming to the respondent, it must be realised that the safety or security of the applicant for an adoption order, or other persons connected to the applicant is not primarily the concern of the respondent. Where there is a material threat of violence or other harm or indeed an apprehension in that regard, this is a matter which is the responsibility of An Garda Síochána, who are in a position to deal with such matters and for that reason recourse should be to them in such situations. As far as the respondent is concerned, while it is natural that there would be alarm when matters of this kind are raised, as they were in this case, great care must be taken to ensure that the respondent is not impelled by the threat or apprehension of violence, into a decision driven solely by that concern. Indeed the futility of a decision prompted in this way is apparent when one considers that the eventual adoption order will inevitably become known to the natural father and indeed the making of an adoption order without consulting a natural father would, in all probability, be more likely to exacerbate a potentially violent situation (if it existed) rather than easing it or avoiding it, in circumstances where the identity of all the parties are known to the natural father and vice-versa.

10.19 Because of the limited nature of the decision under s.19A(3), as said earlier, the range of relevant consideration is much more limited than the range of material that is relevant to the final decision to make or not make the adoption order sought. Whilst it not possible to be prescriptive because of the variety of circumstances that may arise, the foregoing nonetheless indicates the range and type of material which s.19A(3), correctly understood, permits consideration of by the respondent.

10.20 The operation or practical application of s.19A(3) raises an issue of great importance, because where a decision is made under s.19A(3), both the making of that decision and the subsequent making or indeed refusal of the adoption order sought are done on an *ex-parte* basis.

10.21 The consequences of the non-notification of a natural father is that a central party to the adoption proceedings is excluded. This creates a real risk, that the process may be flawed or kiltered by the sole reliance on one-sided information that may turn out to be inaccurate or otherwise unreliable. There is a grave risk of a very serious breach of the natural father's constitutional right to fair procedures and natural justice and his rights under Article 6 of the Convention, resulting in a very serious injustice being done to the natural father and, by extension, the child, if the natural father is excluded from the process on the basis of reliance solely on information supplied by the mother. This risk, in my judgement, places on the respondent a very heavy onus of ensuring that the procedures it adopts in order to reach a determination on whether to withhold notification in reliance on s.19A(3) must be adequate to ensure that the injustice mentioned is avoided. In my judgement, it is not sufficient at all to simply accept the uncorroborated or unsupported word of the applicant for the adoption order. Their version of events must, insofar as the core allegations against the natural father are concerned, be corroborated or supported by reliable independent evidence, so that the respondent can be satisfied that the natural father can be excluded from the process without doing any injustice to him and maybe also the child.

10.22 The passage quoted at para. 10.10 above from the judgment of Walsh J. in *G. v. An Bord Uchtála* [1980] I.R. 32 at p.77 suggests that the respondent has no jurisdiction to adjudicate on anything that could be in dispute between the parties and that the respondent has merely administrative functions. It would seem that the dictum of the learned judge in this regard was obiter, no submission or argument having been made in that case on that issue. Parke J. at the end of his dissenting judgment refers to this in the following terms at p.101:-

> *"There is one other matter to which I wish to advert. In the course of his judgment, Mr. Justice Walsh has carried out a detailed analysis of the duties and obligations of the Adoption Board and of the manner in which it discharges its functions … None of these matters were the subject of any submissions or arguments presented to this Court in the course of the appeal, nor do they appear to me to be germane to the matters which this Court is now called upon to decide. Therefore, I wish to say in the most explicit terms that I do not express any views upon such matters."*

O'Higgins C.J., at the end of his judgment (at p.60) makes a similar comment. Walsh J. at p72 of the report goes on to add the following which appears to qualify the first part of the dictum on the same page:-

> *"The Act of 1952 provides that certain persons, who are designated by reference to their occupation or relationship to the child, are entitled to be heard on an application for adoption as well as any other person whom the Board, in its discretion, decides to hear. It is obvious that there are instances where the Board, like many other administrative tribunals or designated persons exercising administrative functions, is bound to act judicially. As has already been pointed out by this Court in McDonald v. Bord na gCon , the obligation to act judicially does not mean that the body or the person or persons so bound are thereby deemed to be exercising a judicial function or powers of a judicial nature …"*

10.23 It seems clear that there in no impediment to the respondent acting in a judicial manner in the discharge of its function under s.19A(3). Indeed, as remarked by Walsh J. in the immediately above quoted passage, it would be bound to act judicially when hearing persons entitled to be heard under s.16(1). Whilst the respondent would not hear the natural father in making its decision under s.19A(3), the respondent would, nonetheless, in my judgement, be bound to act judicially, to ensure, as set out above, that the matters it was entitled to have regard to were established by the appropriate evidence to a forensically acceptable standard of proof.

10.24 In order to interpret and apply s.19A(3), as required by s.2 of the Act of 2003, in compliance with the State's obligations under the Convention, it is necessary, as said earlier, to ensure that only in the most exceptional and extreme

cases is the s.19A(3) jurisdiction used to exclude a natural father from the adoption process. The restricted range of material to which regard may legitimately be had, as discussed above, coupled, with the necessity for independent reliable evidence to verify the allegations of the mother are necessary, in my judgement, to achieve a compliant interpretation and application of s.19A(3).

10.25 This brings me to a consideration of the facts of this case in the light of the foregoing. As is apparent from the evidence in this case, the material that was relied on by the respondent in reaching its decision to allow the application to proceed without consulting the applicant came, exclusively, from the notice parties. This material took the form of information imparted in the first interview with the social worker, the information given in the application form, the initial letter of the 23rd October, 2005 from the notice parties to the respondent making the application for adoption, a background report furnished by the notice parties to the respondent and the documents and photographs furnished by the notice parties to the respondent on the 27th June 2006. What this material from the notice parties strives to establish is that the applicant is, because of his history of violent abuse of N.L., a danger to the notice parties and the mother of N.L, that the amount of time spent together out of the 4 year relationship was very brief, that the applicant could not cope with a small child, that the applicant was out of the family home in the period leading up to December 16th 2003 and that on the 16th December, 2003, the applicant was permitted, on an isolated basis, to babysit S. and on that occasion breached trust when he "*was caught taking medication from a cabinet—the f/a's [female applicant's] mother is a nurse and when confronted about this began to rant and shout to such an extent that the Gardai had to be called at which stage the n/f [natural father] left*"(from the first report by the social worker Mr. C.) In addition, it is suggested that S. suffers psychological damage "*sourced from that period*" (from the first report by the social worker Mr. C.) namely, the period when the applicant and N.L. co-habited in the local authority house. Although this psychological damage is referred to in the report of the social worker of the 12th July, 2006, S. had not yet seen a psychiatrist, as mentioned in that report. S. was initially assessed by Dr. T., a psychiatrist on the 25th October, 2006. His report was not prepared until the 12th December, 2008, for these proceedings. It is clear that Dr. T. was left with the impression that S. had witnessed the fire, which it is now accepted was not the case. He was told also that the separation occurred when S was 1½ years old, a mistake which also appears in the information given by the notice parties to the respondent, a mistake which conveys an impression of a much shorter involvement with the applicant than just short of the 3 years from the birth of S. until the separation on the 16th December, 2003.A curious feature of Dr T.'s report is that in spite of the history of violence on the part of the applicant given to him, in the Summary and Opinion section he says the following:-

> *"S is a 7 year old girl born to young parents who separated during the course of her second year of life. She was reportedly witness to violence perpetrated by her father on her mother and also reportedly witnessed the burning of her family home with the information that her father had set the fire. The developmental history provided by S's mother suggests that despite the reported violence in the family home, she was not unduly anxious or insecure during the first year and a half of her life. Her mother's account is that she became significantly less secure following the separation of the parents and the fire in the family home. Much of this insecurity could be accounted for by her witnessing the fire but was also undoubtedly mediated by conflictual circumstances of her parents' relationship and the subsequent turmoil and changes in her life as a result of the separation and fire. …"*

10.26 The affidavits which have been filed in these proceedings yield a much fuller and more nuanced picture of the events and circumstances described to the respondent in the information given for the adoption application and specifically to persuade the respondent not to notify the applicant. Clearly, there is a great deal of dispute between *N.L* and the applicant concerning the nature of their relationship and the breakdown of it. It is neither necessary nor indeed possible for me to resolve those conflicts in these proceedings. Without entering the sphere of conflict on the affidavits I can discern a much fuller picture than that given to the respondent, which is not in conflict.

10.27 As is apparent both were very young when they met, *N.L* 15 and the applicant 19. The applicant was then in the army and *N.L* was still in school. An intimate relationship developed between them and in due course N.L became pregnant. Both seem to have been relatively content with this situation. S was born in January 2001. By this time *N.L*. was no longer going to school and around this time the applicant left the army. There is nothing in the affidavits to suggest that either of them became engaged in any vocational activity from the birth of S. until the 16th December, 2003. As both were content with the arrival of S. and were continuing in an intimate relationship, and neither had anything else to do, I infer that it is highly probable that they spent a good deal of time with each other and with S. It may very well be the case that the relationship was fractious, but it was not until February 2003 that *N.L* alleges an act of violence on the part of the applicant.

10.28 In spite of this, however, they jointly applied to the local authority for housing and they were successful in this application being granted, a tenancy in a local authority house which they took up in July 2003. At this stage the relationship between them had been ongoing for the best part of 4 years. I am satisfied on the evidence that by this time the applicant was a major figure in *S.'s* life and very frequently with her. There is a dispute as to where each of them lived during this time. The applicant avers that they lived together most of the time in *N.L,'s* mother's house. N.L. vehemently denies this saying her mother would not have tolerated the applicant in her house. She does, however, concede that the applicant may have stayed there occasionally.

10.29 I think it very likely that the applicant and *N.L* and *S.* were together a lot of the time in *N.L's* mother's house. *N.L's* mother worked as nurse and must have absent from the house a lot. *N. L.* is an only child. It would be very surprising indeed if they did not avail of the facility of that house which was *N.L's* home to pursue their relationship and to look after S.

10.30 It is quite clear that when they moved out on their own into the local authority house in July 2003, things did not go well for them. At this stage they had to fend for themselves without much of the support which, undoubtedly, *N.L's* mother provided while N.L. was living at home. NL's allegations that the applicant could not tolerate the childish behaviour of S. appear to relate to this period. The applicant denies this. In September 2003 there clearly was a very serious rupture in the relationship in which N.L. alleges violence on the part of the applicant, which he denies. At all events N.L consulted a solicitor and as a result of a letter sent by this solicitor the applicant, by response through his solicitor, agreed to vacate the family home and attend an anger management course. It appears that notwithstanding the agreement by the applicant to move out, a somewhat different arrangement emerged in which *N.L.* moved back into her mother's house with S. and the applicant continued to live in the local authority house with the agreement of N.L. The applicant attended the anger management course and, on occasion, was accompanied there by N.L. She describes this period as "calm". The applicant avers that during this period the relationship with N.L. was good and that *N.L*. came to

the local authority house where the applicant continued to live everyday with *S. N.L.* disputes the frequency of these visits as alleged by the applicant but does not deny the pattern of contact as averred by the applicant. It was into this relatively propitious scene that the events of the night of the 16th December, 2003, exploded. On the occasion in question the applicant was babysitting S. while N.L. and her mother were out at separate social events. N.L. appears in her information given to the respondent to convey the impression that allowing the applicant to babysit was an isolated contact with the applicant and a reward for good behaviour. In my view, that appears a strained or unlikely characterisation of the event. I would be inclined to hold that, on the balance of probabilities, the applicant at this time was seeing S. and N.L. on a very regular basis during the day. In the information given to the respondent N.L. describes the incident, as the applicant being caught taking medicine from a cabinet, in breach of trust, and which led the applicant to become verbally aggressive and abusive, so that the guards were called with the result that the applicant left. Her statement made to the gardaí at the time paints a somewhat different picture. In it she states that when she came home at 12.10am the applicant and S. were both asleep on the couch. About one o'clock she took S. and put her into be beside her mother. Later on in the night she was looking for a diary which she knew the applicant had in his pocket. She searched his jacket for it but did not find it. She did, however, find nicorette gum in his pocket, which she says she knew he had taken from her mother. It would appear that this gum is the "medication" referred to in her information given to the respondent. N.L. then woke up the applicant and questioned him about the gum. He denied taking it and a verbal row ensued in which she alleges he "got in my [her] face" and started pushing her. He denies this. The applicant then got his anti depressant medication and after taking it became drowsy and fell asleep. N.L. then called her mother and told her about the nicorette. She checked and found that it was missing. N.L.'s mother decided that she did not want the applicant in the house and she woke him up and told him to leave. He was still dopey, but shot up grabbed his jacket and with threats to N.L., which the applicant denies, he left but shouted treats to N.L and her mother to the effect that he would burn them out. Again, the applicant denies making these threats. The gardaí were called and when they arrived they moved the applicant away. A short while later the applicant returned with the gardaí seeking the keys of the local authority house which the applicant avers he forgot when he left the house. *N.L.,* reluctantly gave the keys. Her stated reason for her reluctance was the undertaking by the applicant to vacate that house. However on the 16th December, 2003, she was well aware that the applicant was living in this house with her consent, a fact averred by the applicant and not denied by *N.L.*

10.31 When the matter went to the respondent for a decision on notification on the 18th July, 2006, the only material before the Board, apart from the 4 documents referred to, was, in effect, the notice parties' version of events, conveyed through their application form, the background report on the applicants and the interview with the social worker as set out in his report dated the 12th July, 2006. It is quite clear now that the information given to the respondent which moved or persuaded it to withhold notification was not only wholly inadequate, when compared to the fuller picture which has emerged in these proceedings, but also unjustly damnified the applicant. When one takes the undisputed facts, as revealed in the affidavits in these proceedings, it is quite clear, in my judgement, that the applicant is a person who should have been consulted by the respondent under s.19A(2). His relationship with S. was a relatively normal paternal relationship which was of considerable duration i.e. for the first 3 years of *S.'s* life. The applicant's relationship with *N.L.* was also one of lengthy duration *i.e*. 4 years. Without doubt, because of the youth and immaturity of both and the depressive illness of the applicant, it may have been a fractious inadequate relationship that was always doomed to eventual failure. If there was violent and abusive behaviour on the part of the applicant, as alleged by N.L., then that would have made the relationship that much worse. In spite of all that the relationship did last a long time and it would appear that, notwithstanding its difficulties, it must have been viewed by N.L. in a positive light as late as the middle of 2003 when she jointly applied with the applicant to the local authority for a house. The relationship between the applicant and N.L. cannot, in my view, be seen as very unusual because it is not or as having a particular content or nature which would warrant it, or either of the participants in it being catagorised as reprehensible.

10.32 Then there is the question of the safety and security of N.L., P.L. and N.L's mother, a factor which seems to have weighed heavily on the respondent. On the 27th August, 2006, at the request of the respondent, N.L swore an affidavit which was to verify the information already given. One can only be struck by the brevity of this affidavit and the paucity of its content. It does, however, say at para. 5:-

> *"I have had no contact with the birth father for many years and have no address for him in order for the adoption Board to formally notify him."*

Placed with the other information available to the respondent, it would have been apparent that this meant there had been no contact for well in excess of two years when the respondent made its decision on the 18th July, 2006. It is difficult to see, in light of this, why the alleged threat from the applicant was not treated as in the remote category.

10.33 I am quite satisfied that the applicant was a natural father who, on the true state of the facts, was, under Article 8 of the Convention, entitled to be consulted. The failure in this case of the respondent to consult him calls in question the procedures adopted by the respondent to implement s.19A(3) which, in itself is, I am satisfied, entirely compliant with Article 8, if interpreted and applied in the manner set out above. In my judgement, the failure that occurred in this case was a failure by the respondent to act judicially when confronted with an *ex-parte* application. As said earlier, the respondent was bound to act judicially when making this decision. What was needed was independent reliable evidence to support the version of events of the notice parties.

10.34 In his affidavit sworn in these proceedings on the 13th January, 2009, the Registrar of the Adoption Board refers at para. 8 to "*external evidence*" provided by the notice parties. I take this to refer to the 4 documents listed at para.5 of his affidavit. Of these documents, the two solicitors' letters and the consent Court Order could not be judicially viewed as evidence which reliably corroborates or supports the notice parties' case. Clearly, these documents called for explanation. On the face of them they indicate the existence of relationship problems and could be construed as an admission of responsibility, but they also suggest a willingness on the part of the applicant to comply with demands made by *N.L.*, which could be construed as satisfactorily addressing the alleged safety or security threat. The photos of the burned house are alarming but, again, could not be assumed to support an allegation of ongoing threat, given the singular nature of the event and the long lapse of time since its occurrence. In my view, these documents could not be considered to be the kind of independent reliable evidence which would be acceptable judicially to support the notice parties' case to have notification to the applicant withheld.

10.35 It was submitted that because there was a facility under s.7D(1) of the Act of 1998, which enables a natural father to notify the respondent that he wishes to be consulted in the event of there being an application to adopt his child, that

this in some way relieves the respondent of a duty to notify. In my view s.7D(1) is entirely irrelevant to the matters in issue in this case. The fact that a natural father may notify the respondent of his wish to be consulted does not and could not relieve the respondent of the express statutory obligation set out in s.19A(2) to take such steps as are reasonably practicable to consult the father, unless under s.19A(3) it is inappropriate to do so. In any event, even if a natural father did serve a notice under s.7D(1), that does not oblige the respondent to consult him. The respondent must still observe and apply the provisions of s.19A(2) and s.19A(3), where appropriate.

10.36 I have come to the conclusion that the decision of the respondent made on the 18th July, 2006, to allow the adoption to proceed without consulting the applicant, breached the applicant's constitutional right to fair procedures and natural justice and breached his rights under Article 8 and Article 6 of the Convention.

10.37 Although the letter of the 25th April, 2008, from the Registrar of the Adoption Board to the applicant's solicitors, which purports to explain the reasons for the decision of the 18th July, 2006, cites two reasons for the decision namely, the lack of knowledge of the whereabouts of the applicant and, secondly, reliance on s.19A(3), it is clear from the minute of the meeting of the respondent, at which the decision was made, that the primary and indeed overwhelming factors leading to the decision are all concerned with the case made under s.19A(3).There is a very brief reference to the lack of information concerning the address or residence of the applicant.

10.38 I have already concluded that the conclusion reached in respect of the s.19A(3) issue by the respondent breached the applicant's constitutional and convention rights. That being so, it is unnecessary for me to express an opinion on the issue relating to the lack of knowledge of the location of the applicant. However, for the sake of completeness and as a significant part of the case was devoted to this matter, I feel I should give my judgement on that aspect of the case as well.

10.39 Section 19A(2) obliges the respondent to take such steps as are reasonably practicable to consult the natural father. In my view, where the information given by the applicant for adoption does not reveal the address of the father, there rests on the respondent a mandatory duty to take such steps as are reasonably practicable to ascertain the address of the natural father. In this case the respondent took no steps at all to ascertain an address for the applicant, presumably because they had decided that it was appropriate that notification should be withheld under s.19A(3). If s.19A(3) was not to be invoked, I would have had no hesitation in saying that the respondent had failed in the duty imposed on it under s.19A(2). Manifestly, it was open to the respondent to have made enquiries of the Garda Síochána in relation to this and whilst these enquiries, if made before the 2nd August, 2006, might have not have been fruitful in the sense that the Gardaí would probably not have known the applicant's whereabouts before then, it is certain that thereafter they would. Before the 2nd August, 2006, the gardaí would, undoubtedly, have been in a position to supply the address of the applicants' parents which could have solved the problem of finding an address through which the applicant could have been contacted.

10.40 The conduct of the notice parties with regard to the location of the applicant merits consideration. It is not denied that N.L. encountered the applicant on the street or in other public places after his return to this jurisdiction in July 2006. *N.L*. wrote to Garda L. by letter dated the 30th June, 2006, seeking his assistance in making out her case to the respondent not to consult the applicant. It seems clear that Garda L. did not write to the respondent in this regard, perhaps understandably, as the letter to him seems implicitly to invite a reply to *N.L,* who does not in her affidavit say whether she got a reply from Garda L. or not. Following the letter of the 2nd August, 2006, from the applicant's solicitor telling the gardaí that the applicant had returned to the jurisdiction and was making himself amenable to the criminal justice process in respect of the arson and other charges, and bearing in mind *N.L's* letter to Garda L., it is remarkable that the notice parties were not promptly informed of the applicant's return. In that context the averment of N.L. in her affidavit sworn on the 27th August, 2006, to the effect that she had no contact for several years is a matter for some concern. There is not the slightest doubt that when the notice parties met the social worker in March 2007, they must have been well aware that the applicant was back in the jurisdiction and that his address could be easily ascertained. They, however, opted to remain silent on that matter in their interview with the social worker.

10.41 Their silence in these circumstances coupled with the inaction of the respondent amounted to potential breaches of the applicant's constitutional right to fair procedures and his rights under Articles 8 and 6 of the Convention and if this was a case where s.19A(3) was not to be invoked it would lead this Court to conclude that insofar as the respondent was concerned it had failed in its duty under s.19A(2) and had breached the applicant's constitutional and convention rights as mentioned and insofar as the notice parties are concerned, that they had breached the same constitutional and convention rights of the applicant.

11. Whether the adoption order should be set aside

11.1 Ms. Browne argued that as s.5 of the Act of 1976 was phrased in the negative the correct test to apply was whether it would not be in the best interests of the child to make a declaration of invalidity. She submitted that the burden of proof in respect of this test lay with the respondent and the notice parties. The notice parties relied on their rights under Articles 40 and 41 as a Constitutional family, which status only accrued to the S. and the notice parties on the making of the adoption order.

11.2 Again, it must be stressed that the decision impugned in these proceedings is the decision to allow the adoption to proceed without consulting the applicant. It, of course, necessarily follows that, if this decision is invalid, the final adoption order is consequentially tainted by illegality. In my judgement, what would happen, leaving aside s. 5 of the Act of 1976, is that there would be declarations to the effect that the decision of the 18th July, 2006, breached the applicant's constitutional and convention rights, orders of certiorari quashing the decision of the 18th July, 2006, and the final adoption order. The application by the notice parties for the adoption should be remitted to the respondent who should deal with the matter on the basis of consulting the applicant pursuant to s.19A(2). Thus, it is unnecessary for the purpose of applying s.5 of the Act of 1976 to consider the various factors relevant to the welfare of S. which would arise in the context of a decision to grant or refuse the final adoption order, such as the merits of her current parenting, any instability or insecurity or administrative inconveniences that would result from a refusal of the adoption, or on the other hand the long term disadvantage that might ensue from the legal disconnection from her biological father and his family.

11.3 In my view, the only relevant consideration in the application of s.5 of the Act of 1976 in this case is the effect which consulting the applicant in this adoption application will have on the welfare of S. All the other factors can be left aside because they can be considered by the respondent when it comes to make a final decision on the application,

having consulted the applicant and no doubt having heard him under the provision of s.16(1).

11.4 As to the onus of proof in the application of s.5 of the Act of 1976, in my opinion, as the application of s.5 necessarily arises in every case where a court is persuaded to declare invalid an adoption order, the burden of proof remains with the moving party, i.e. the applicant in this case, because establishing to the satisfaction of the court that the setting aside of the adoption order will not adversely affect the welfare of the child, is necessary proof which must be addressed by any party seeking the setting aside of the adoption order. Similarly, it is the applicant who must address the balancing exercise between the interests of the child and the constitutional rights of all persons affected so as to demonstrate to the court that it would not be proper to make the declaration of invalidity or conversely as the section expresses it, not to make the declaration.

11.5 The evidence adduced in this case by the applicant and not denied by the notice parties establishes to my satisfaction that S. is now 8 years of age and is aware that the applicant is her birth father. In addition, S. is aware that the applicant is back in this jurisdiction and it would appear that she remembers the applicant having apparently addressed him as "*B*" when the met. There is no evidence as to whether S. is aware of the adoption application and its progress or whether she is aware of these proceedings. Having regard to all the evidence concerning the very careful and responsible parenting of S. by the notice parties, I would readily infer that S. has not been exposed to these proceedings in a way that could give rise to apprehensions on her part concerning her future stability and security. In that context I cannot see any adverse risk to *S.'s* welfare in permitting the applicant to be heard in the adoption application. On the contrary, in the long term, regardless of the outcome of the adoption application, in my opinion, the knowledge that her natural father was heard in the adoption application is more likely to advance her wellbeing rather that knowing that he sought and was refused that opportunity. Thus, for the purpose of s.5(1)(a) of the Act of 1976, I hold that declaring this adoption order invalid will not conflict with or at all imperil the best interests of *S*.

11.6 A balancing exercise must be undertaken between the rights of the various parties. I am satisfied that S. cannot claim the protections afforded to the constitutional family under Articles 41 or 42 by virtue of the existence of the adoption order that is impugned in these proceedings. The rights of the natural mother are not in issue in these proceedings and are not being interfered with. As to the adoptive father, for the reasons given, he cannot claim to enjoy family rights under the Constitution. The constitutional rights of the natural father that are involved are his right to fair procedures and to natural and constitutional justice. If the applicant is not heard, in my view, he will have suffered a very serious breach of his constitutional rights and a very grave injustice. In addition, there is a risk that in refusing to consult the applicant, that *S.'s* right under Article 40.3 of the Constitution to have her welfare protected on the same basis as a marital child, will be infringed. As there is little or no adverse risk to *S.'s* welfare in allowing the applicant to be heard in the adoption application, I have come to the conclusion that I must conclude for the purpose of s.5 (1)(b) of the Act of 1976 that it is proper to declare invalid the adoption order in question.

12. Conclusion

12.1 For the reasons set above, I have come to the conclusion that I must grant orders of certiorari quashing the decision of the respondent of the 18th July, 2006, to allow the adoption application in relation S. to proceed without consulting the applicant and also quashing the final adoption order made on the 26th June, 2007. There will, in addition, be declarations to the effect that the decision to allow the adoption to proceed without consulting the applicant breached the applicant's constitutional right to fair procedures and natural justice and his rights under Article 6 and 8 of the Convention. I will also order that the matter be remitted back to the respondent to hear and determine the application for adoption on the basis that the respondent is obliged to consult the applicant under s.19A(2) of the Act of 1998 and the applicant is entitled to be heard under s.16(1) of the Act of 1952, as amended.