

**THE HIGH COURT**

**[2007 No. 1396 J.R.]**

**BETWEEN**

**E.L. AND T. O'L.  
V.  
AN BORD UCHTÁLA**

**Judgment of Mr. Justice Sheehan delivered the 5th day of November, 2007.**

1. The applicants E.L. and T. O'L. to whom I shall refer as the parents seek an order of certiorari by way of judicial review of the decision of An Bord Uchtála (The Adoption Board) made on or about the 10th of October 2007 which prevents them, being persons holding a declaration of suitability and eligibility and intending to adopt in the Federal Democratic Republic of Ethiopia, from proceeding with such adoption.

2. The parents also seek the following declarations:

1. A declaration that they are entitled to adopt in the Federal Democratic Republic of Ethiopia
2. A declaration that the notice published by the Adoption Board entitled adoptions for the Republic of Rwanda and the Federal Democratic Republic of Ethiopia and dated the 10th of October, 2007 is null and void and of no legal affect.
3. A declaration that the said purported decision of the Adoption Board in or about the 10th of October, 2007 was taken *ultra vires* the provisions of the Adoption Act 1952 – 1998.
4. A declaration that the purported decision of the Adoption Board taken on or about the 10th of October, 2007 was in breach of the requirements of natural and constitutional justice.
5. A declaration that the applicants were entitled to rely on their legitimate expectations that they were entitled to proceed with the adoption of the child referred to them having complied with the law or
6. In the alternative a declaration that there is no impediment in law that would prohibit the applicants from proceeding with the adoption of the child referred to them.
7. Such further mandatory declaratory relief of other relief as to this honourable court may seem fit.
8. Damages
9. And if necessary an order directing the respondents to advise the Irish Department of Foreign Affairs officials responsible for the Federal Democratic Republic of Ethiopia that the said decision is no longer in force and requesting such officials to facilitate an adoption by the applicants.

3. There are thirteen grounds set out in the statement filed by the parents to ground their applications for these reliefs the first six of which set out the legal grounds. These assert that:

1. The Adoption Board wrongfully failed to give any or alternatively sufficient and adequate reasons for its decision.
2. The Adoption Board failed to give any opportunity to the parents to be heard in relation to the issues involved prior to the decision being taken or to make a response to their solicitor's letter of the 19th of October, 2007.
3. That the Adoption Board exercised its powers in an arbitrary and unjust manner.
4. The Adoption Board failed to exercise its powers in accordance with the principles of natural justice and constitutional justice.
5. The Adoption Board had sufficient information before taking its decision to permit the parents to adopt from Ethiopia.
6. The parents had a legitimate expectation that the Adoption Board would not hinder the adoption of another child by the applicants in Ethiopia. The Adoption Boards decision in or about the 10th of October, 2007 and consequential acts blocking adoption in Ethiopia were in breach of that legitimate expectation.

**Background**

4. The parents were married in 1996 and reside in Sligo. They have two children P. who is now five years old and L. who is almost four. L. was adopted from Ethiopia on the 5th of June, 2006.

5. The parents decided that they wished to extend their family by adopting another child from Ethiopia and having successfully completed a number of procedural matters made arrangements with the children's home from where they had adopted Liam to adopt a baby girl of about six months. The parents have been told by the children's home that the referral of this baby girl to them will lapse unless they now travel to Ethiopia and commence the adoption process within ten days from the 24th of October, 2007.

6. The following steps were taken by the parents in relation to their proposed adoption of a baby girl:

- (1) They submitted themselves to an assessment of their suitability to adopt a further child from outside the State and received a declaration from the Adoption Board which states "An Bord Uchtála (The Adoption Board) having received an application from E.L. and T. O'L. (his wife) for a declaration of their eligibility and suitability to affect the adoption of one child only outside the State and having regard to a report from the Health Service Executive, North Western Area, a copy

of which is attached hereby declares pursuant to s. 5 (1) (iii) (11) of the Adoption Act 1991 that it is satisfied (i) that they are eligible to adopt one child only by virtue of s. 10 of the Adoption Act 1991 and (ii) that they are suitable to adopt one child only by virtue of s. 13 of the Adoption Act 1952".

This declaration shall only apply in relation to an adoption effected during a period of twelve months from the date hereof and the declaration is dated the 14th day of August, 2007.

(2) The parents then made arrangements to travel to Ethiopia. As both parents work outside the home one part-time and the other full-time it is not difficult to imagine the various personal and work arrangements that had to be put in place.

(3) On the 28th of September, 2007 the parents wrote to the Adoption Board as follows:

"To whom It May Concern.

We are intending to travel to Ethiopia in the next couple of weeks for our second adoption. We recently wrote to your office requesting a letter clarifying/confirming the documentation required by the Adoption Board in order to make an entry into the register of foreign adoptions. Could you please forward this in writing at your earliest convenience.

Thanking you in advance."

(4) In response to this request the parents received a reply from the Adoption Board which stated:

"In response to your email regarding adoption from Ethiopia I attach for your attention a circular recently issued by the Adoption Board on the subject. I also attach a general advisory aimed at all those who are adopting abroad. I hope these are of benefit".

(5) On the 28th of August, 2007 the parents received an immigration clearance certificate from the Department of Justice Equality and Law Reform permitting them to re-enter the State with one child legally adopted under Ethiopian law.

(6) On the 30th August, 2007 the parents received a document from the Adoption Board. This document which seems to be provided for the authorities in Ethiopia commences with a short statement about the establishment of the Adoption Board, its function and powers, confirms the eligibility and suitability of the parents and goes on to state as follows;

"I also wish to confirm that the Adoption Board has considered the adoption law of Ethiopia and has decided that the adoptions effected in Ethiopia complied with s. 1 of the Adoption Act 1991 ('definition of a foreign adoption'). Subject to the appropriate sections the adoption may also qualify for entry in the Boards register of foreign adoptions. The last two paragraphs explain the implications of the recognition by the Adoption Board of a foreign adoption order."

(7) The following receipt of the documents just referred to the parents were in further contact with the children's' home in Ethiopia and forwarded to them the required documents.

(8) The parents made specific travel arrangements on the 1st of October, 2007 to travel to Ethiopia on the 23rd of October, 2007 with intended return flights on the 16th of November, 2007.

(9) The parents then arranged to have various papers notarised.

(10) Following the notarisation the parents then arranged for the said documents to be authenticated on the 10th of October, 2007 by the Department of Foreign Affairs. On the 12th of October, 2007 the parents learnt that the Adoption Board was advising them not to travel to Ethiopia.

(11) There is some disagreement between the parties as to what took place over the following days. The parents say that not only were they advised not to travel but that representatives of the Adoption Board told them if the Adoption Board was contacted by the Irish Embassy in Addis Ababa the Adoption Board would say that the parents had been advised not to travel.

(12) The parents further say that during a discussion with an official of the Adoption Board on the 15th of October, 2007 and receipt on an electronic mail the following day no grounds or reasons were given to them for the decision to advise them not to travel.

(13) The parents say that until their own solicitor so advised them they were unaware of a circular posted on the website of the Adoption Board on the 11th of October, 2007. This notice stated as follows:

"The Adoption Board is examining the adoption laws of Rwanda and Ethiopia to determine if they meet the requirements for recognition in Ireland. As part of this examination the Board has recently received information regarding the adoption laws of these countries. Arising from this examination a number of important legal issues require further investigation before a final determination can be made.

In the circumstances and in order to protect the adoption process the Board has decided as a precautionary measure to suspend the granting of declarations of eligibility and suitability in respect of these two countries until the above investigations are complete. The Board is dealing with this issue as a priority. Applicants intending to adopt from these countries may continue to be assessed for inter country adoption should they wish. Applicants holding a declaration of suitability and eligibility who intend to adopt abroad in these countries should not proceed with their adoption until further notice. The Board will continue to accept applications for an entry in the register of foreign adoptions but a final decision cannot be taken until the Boards work is complete. This situation arises from

the Boards review of the current adoption laws of various countries being undertaken as part of the Boards preparation for the ratification of the Hague convention on inter country adoption."

(14) On the 12th of October, 2007 one of the parents emailed an official of the Irish Embassy in Ethiopia requesting an appointment on the 24th of October, 2007 for a letter of introduction from the Embassy and she received the following reply by email on the 15th of October, 2007 signed by Mr Ronan Corvin which stated:

"I attach a copy of a statement issued last week by the Irish Adoption Board saying that adoptions in Ethiopia and Rwanda should not be proceeded with till further notice.

You may wish to make contact with the Adoption Board in the matter and in the meanwhile I advise against your travelling to Ethiopia for the purposes of adoption.

I wish to express my personal regret for the disappointment that this must inevitably cause you."

(15) Finally the parent's solicitors Beatty & Healy wrote to the registrar of the Adoption Board by fax at 5.10pm on Friday the 19th of October, 2007 in which they set out a brief history of their client's position and concluded by stating:

"In the circumstances of all the facts we now call on you to state clearly by return the reasons that are now offered to suggest a difficulty with the compatibility between Ethiopian and Irish law which we believe should have been given to our clients before this notice was posted on the 10th of October and failing hearing from you by return we will have no option but to apply to the High Court to review your recent decision."

7. The replying affidavit was sworn by the registrar of the Adoption Board Mr Kiernan Gilday. In his affidavit he states that during the course of the 11th and 12th of October, 2007 the Boards social workers contacted the holders of declarations who had not yet effected an adoption in Ethiopia informing them of the Boards advice. He says that on the 13th of October, 2007 at the International Adoption Association annual conference the Boards Chairman and Chief Executive Officer and Social Workers met with applicants intending to adopt from Ethiopia. It is not clear from this affidavit if Mr Gilday is suggesting he spoke to the parents in this case at that conference. However, he does say, that he and Mr Collins the Chief Executive Officer spoke to the parents on the 12th and 17th of October and explained the problems regarding the possible non compatibility of Ethiopian adoption law. He says the parents were informed of the reasons why the respondents had acted in the manner which it did.

8. He further states that the applicant's mother telephoned him on the 15th of October, 2007 and asked for her case to be discussed by the Board and that she was subsequently informed that she might consider taking independent legal advice. He further states that the Board was not in a position to respond to the letter from the parents solicitors as they were notified of these proceedings on the 24th of October, 2007. Mr Gilday goes on to aver that the Board has no authority or power to direct officials of Irish Embassies to issue or not to issue letters of introduction as suggested in the parents affidavit and further states that the Board has not done so and would have no function to do so.

9. In the early part of this affidavit Mr Gilday identifies four issues in Ethiopian law on which the Board requires clarification. These are:

- a. What are the effects of the making of an adoption order, or the approval of an adoption by the court on the rights of the natural parents of the child.
- b. Do such parents continue to enjoy rights in respect of the child post adoption and does the child continue to have rights in respect of them again post adoption?
- c. Do the adoptive parents obtain rights in regard to the child following the making of an adoption order, or the approval of an adoption by the court.
- d. Does the child obtain rights in respect of the adoptive parents after the adoption.

10. Finally in the last paragraph of his affidavit Mr Gilday states that the respondent board is anxious to resolve the position in regard to Ethiopian adoptions and it will do everything it can to bring about such resolution as soon as possible.

11. Finally to conclude this section the Adoption Board in its statement of opposition denies that the parents are entitled to any of the reliefs sought.

12. Before I go on to consider the submissions of the parties in this case it is important to note the following:

13. On the first day of the hearing when Mr Finlay was making his submissions an exchange took place between himself and Mr Durcan during the course of which Mr Durcan told the court that a couple had adopted a child in Ethiopia on the 19th of October, 2007 and returned to Ireland with the child. He stated that it was the understanding of the Board from that that there is nothing that will stop somebody adopting in Ethiopia at present.

14. I asked counsel about this matter at the beginning of the second day and was informed that this matter was raised by way of reply to the parent's assertions that as things now stand it is impossible for them to proceed with the adoption. In the event that it may be of any assistance to the parents I propose here to repeat what An Bord Uchtála has said in the course of the hearing namely:

- (i) That it does not oppose and will do nothing to oppose the parents proceeding with the adoption in Ethiopia.
- (ii) That if the parents decide to proceed with the adoption they will consider an application for registration in due course.
- (iii) That it has no function in the decision of the Department of Foreign Affairs with regard to a letter of introduction and the issuing of one is entirely a matter for that department.

15. Counsel for the parents did tell the court that his clients believe that the couple referred to by Mr Durcan had travelled to

Ethiopia in late September 2007 and had probably completed all their paperwork prior to the 10th of October, 2007, when the Board expressed its reservations about the position with regard to adoptions from Ethiopia and gave its advice.

16. I now come to the submissions of Mr Finlay on behalf of the parents.

17. He submits that the parents were led to believe until the last moment that subject to meeting the statutory requirements of the Adoption Board in its circulars and notices (in particular s. 15 and s. 42 of the 1954 Adoption Act as amended) it would not put any impediment in their way to adopt in Ethiopia and have such adoption registered in Ireland. In reliance on such representations a girl of six months was referred to them, they made their travel arrangements, arranged for the required documents and took care that they would be meeting the statutory requirements highlighted by the Adoption Board. He further says that the Adoption Board adopted the position amounting to a promise or representation that it was addressed to the parents and it created an expectation reasonably entertained by them such as it would now be unjust to permit the Adoption Board to resile from it.

18. In submitting that the doctrine of legitimate expectation lies in support of the parents case Mr Finlay referred the court to the decision of the Supreme Court in *Glencarr Exploration plc v. Mayo County Council No. 2* [2002] IR page 84 and to the recent decision of Clarke J. in *Glenkerrin Homes v. Dunlaoghaire Rathdown County Council* [2007] IEHC 298. He also referred the Court to the judgment of McCracken J. in *Abrahamson v. The Incorporated Law Society of Ireland*. He submitted that *Wiley v. The Revenue Commissioners* [1993] ILRM does not answer the question of whether a legitimate expectation arises in this case and outlines reasons why that case may be distinguished. In particular he referred the Court to the third edition of Hogan and Morgan on Administration Law at pages 869 – 904 and urges it to compare the *Wiley* case with the authors conclusions. He also points out that the *Wiley* case was a revenue case.

19. Mr Finlay also submitted that in this case the Adoption Board has taken a decision to intervene by way of circular in the lawful activities of the parents without having taken any final decision on the validity of Ethiopian adoptions. He says the court is simply told that counsel's opinion has indicated there may be problems and that this advice appears to be given without any reliance on properly authenticated Ethiopian law. He also submitted that the parents should have been told the full reasons now outlined in the affidavit of Mr Gilday for the Boards decision once it had decided to issue the circular of October the 10th and further that the parents should have had a proper opportunity to make submissions to the Board before it issued the circular.

20. On behalf of An Bord Uchtála, Mr Durcan submitted that the doctrine of legitimate expectation does not apply in the circumstances of this case. He relied on the decision of the Supreme Court in *Wiley v. The Revenue Commissioners* and in particular relied on extracts from the judgments of Finlay C.J. and O'Flaherty J. He also relied on the *Glencarr* exploration case and the *Glenkerrin Homes* cases already referred to as well as the judgment of McCracken J. in *Abrahamson v. The Incorporated Law Society of Ireland* [1996] IR page 403 which I have already referred to.

21. With regard to the obligation to give reasons Mr Durcan submits that the fundamental error in this argument is that it presupposes that a decision has been made by the respondent. He says that no such decision has been made.

## Decision

22. The Adoption Board has a duty pursuant to s. 6 of the 1991 Adoption Act to provide for the entry of the register of foreign adoptions and adoptions effected elsewhere than in Ireland if the statutory criteria for so doing are fulfilled.

23. Some of these criteria are specific to the particular adoption (consent, welfare, and non-payment criteria) but there are also elements which involve an assessment of the law of the foreign country. It is these latter matters that lead to the decision of the Board to issue a circular on October the 10th which in turn led to these proceedings. On the evidence before this Court the circular of the 10th of October 2007 triggered a refusal by the Irish Embassy in Addis Ababa to give the parents a letter of introduction without which the Ethiopian authorities will not allow the adoption to proceed.

24. In considering whether the doctrine of legitimate expectation can be applied to the advantage of the parents in this case I note Mr Finlay's submission that three elements of the doctrine of legitimate expectation are satisfied namely:

1. That a representation be made.
2. That it be addressed to a particular individual or group.
3. That the individual or group acted to their detriment.

25. At the same time I note the undisputed evidence that the Adoption Board in late 2006 determined to create a general template of issues to be addressed which could be used in endeavouring to obtain legal opinion as to adoption laws in any particular country. The Board also determined at that time that the legal opinions held by the Board would be reassessed in the context of this template. And the Board sought a comprehensive counsel's opinion. The overall assessment of the criteria to be addressed was completed in September 2007 and concerns arose in relation to Ethiopian law which have already been referred to. The Board took the view that it was obliged to act when these concerns emerged and the issuing of the circular on October the 10th in respect of the Ethiopian adoptions was the action it took and as we have seen certain consequences flowed from that action.

26. I have considered the cases open to me and the submissions made to me in relation to legitimate expectation.

27. I note Mr Finlay's specific submission that not for a moment is he asking the court to consider an unlawful course of action as well as his reservations regarding the applicability of the Supreme Court decision in *Wiley v. The Revenue Commissioners* [1994] 2 IR 16. This Courts attention has been drawn to the judgment of O'Flaherty J. in that case which specifically deals with the ability of statutory bodies to change the manner in which they exercise their lawful powers:

"the applicant submits that he should continue to have conferred on him a substantive benefit by way of exemption in the circumstances that he was not informed in advance of the more stringent requirements that the Revenue Commissioners had put in place to satisfy themselves so that they could properly discharge their duty in accordance with the scheme that they had set up under the relevant legislation.

28. It will be clear immediately that acceptance of this submission would involve a radical extension of the scope of legitimate expectation. It would involve the court saying to the administration that it was not entitled to set more stringent standards so that it might discharge its statutory obligations without giving notice to anyone who might have benefited in the past from a more relaxed set of rules. Stated thus it would involve the courts in an unwarranted interference with the actions of administrators. Our

constitutional system is based on the separation of powers and just as the judicial organ of State requires the respect of the legislative and executive branches of government so must the courts exercise proper judicial restraint."

29. These matters were considered two years later by McCracken J. in *Abrahamson v. The Incorporated Law Society of Ireland* [1996] 1 IR page 403 who stated: "Where a minister or a public body is given by statute or statutory instrument a discretion or a power to make regulations for the good of the public or of a specific section of the public the court will not interfere with the exercise of such discretion or power as to do so would be tantamount to the court usurping that discretion or power to itself and would be an undue interference by the court in the affairs of the persons or bodies to whom and to which such discretionary power was given by the legislature." I hold that the judgment of the Supreme Court in *Wiley v. The Revenue Commissioners* and the remarks of McCracken J. in *Abrahamson v. The Incorporated Law Society of Ireland* are applicable to this case. I hold that the Adoption Board in issuing and publishing the circular of the 10th of October, 2007 concerning adoptions from Ethiopia and Rwanda was exercising a statutory power in accordance with the provisions of the Adoption Acts and in the public interest. This also means that I cannot hold with Mr Finlay when he seeks to have the decision to publish the 10th of October circular impugned because the parents were not given an opportunity to make submissions to An Bord Uchtála prior to its issue. In view of the above conclusions I am unable to grant the reliefs sought by the parents at ().

30. As the Adoption Board specifically stated in court that the parents may proceed to adopt in the Federal Democratic Republic of Ethiopia no declaration in that regard as sought by the parents is required. The same consideration applies to the declaration sought by the parents to the effect that there is no impediment in law that would prohibit the parents from proceeding with the adoption of the child referred to them. The height of the Adoption Boards case is that it advises the parents not to proceed at present.

31. But should this be the end of the matter?

32. It is not necessary to reiterate the considerable time, energy and expense that the parents have gone to in this case to ensure that everything was in order for their proposed adoption of a second Ethiopian child. Instead of accepting the Boards intervention on October the 10th as the end of the matter the parents sought a full explanation which they did not receive. They sought a meeting with the Board which they did not get and their solicitor sought an urgent reply in writing which the Board was unable to deliver.

33. The court has been told that the Board commenced its present review which led to the 10th of October document in late 2006. The 10th of October document states the Board is dealing with this issue as a matter of priority. The court was told on the 31st of October, 2007 by Mr Gilday that the Board is anxious to resolve the position in regard to Ethiopian adoptions and it will do everything it can to bring about such resolution as soon as possible. No indication apart from these bald assertions has been given to the court as to what steps if any the Board has already taken to progress the matter and no indication at all as to when that matter might be concluded. The declaration of eligibility and suitability of the parents was made on the 14th of August, 2007 and is only valid for twelve months. The parents may well wonder what the Board means when it uses such terms as "priority" and as "soon as possible" and "late 2006" to describe the time when it sought relevant advice. In all the circumstances of this case I hold the following.

1. Once the board had decided to issue the circular on the 10th of October, 2007 it had a duty to simultaneously inform the parents of this in writing and to further inform them in writing of the information the Board was now seeking regarding Ethiopian Law.

34. At very least this would have given the parents an opportunity of getting their own legal advice regarding Ethiopian law at the earliest opportunity and might have enabled them to make appropriate legal submissions to the Adoption Board. Although it will be little consolation to them I hold that the parents are entitled to damages, however, it is too early to assess these in any meaningful way. As the Adoption Board has stated that the parents can proceed with the adoption it is not clear to this Court if:

- a. The adoption of the baby girl can remain open for a period longer than the ten days notified to the parents.
- b. Whether there are circumstances in which the Ethiopian authorities may be able to dispense with the letter of introduction and
- c. Whether in the light of the Adoption Boards stated position to this Court the Department of Foreign Affairs may find itself in a position to issue a letter of introduction.

35. Accordingly I propose to adjourn the question of damages for a period of three months and also to adjourn the question of costs to that date.