

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister for Welfare and Population Development v Fitzpatrick and others

Case CCT 08/00

Decided on 31 May 2000

Media Summary

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Section 18(4)(f) of the Child Care Act, 1983 prohibits the adoption of a South African born child by non-South Africans. That prohibition was held to be unconstitutional by the Cape High Court which, however, suspended the order of invalidity for a period of two years to enable Parliament to correct the defect in the legislation. The Minister for Welfare and Population Development supported the order of the High Court and sought confirmation by the Constitutional Court of that order, including the two-year suspension. The Court appointed the Centre for Applied Legal Studies at the University of the Witwatersrand to act as an amicus curiae (friend of the court).

Justice Goldstone, in whose judgment the whole Court concurred, held that the prohibition was inconsistent with the provisions of section 28(2) of the Constitution which requires that the best interests of a child are to be given paramountcy in every matter concerning the child. The Court recognised that in some cases it might be in the best interests of a South African born child to be adopted by non-South Africans. The order of invalidity was accordingly confirmed.

Both the Minister and the amicus curiae argued in favour of the suspension of the order of invalidity. They submitted that striking down the provisions of section 18(4)(f) in the absence of any amending legislation would expose children to the threat of child-trafficking. Moreover adequate background investigations of the prospective parents could not be undertaken and South African adoptive parents would not be given priority in suitable cases.

The Court reasoned that the remaining provisions of the Child Care Act were sufficient to enable the children's courts to accommodate the concerns of the Minister and the amicus. Any suspension of the order could not, therefore, be justified and would prejudice the best interests of orphaned and abandoned children by prohibiting their adoption by non-South Africans during the period of suspension. The order of suspension was therefore set aside.