THE SUPREME COURT

Record No: S:AP:IE:2022:000106

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)

AND IN THE MATTER OF B, A MINOR BORN ON THE [redacted]

Between:

CHILD AND FAMILY AGENCY AND A

Appellants

AND

ADOPTION AUTHORITY OF IRELAND AND C AND D

Respondents

LEGAL SUBMISSIONS OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Contents

Introduction

1. This appeal concerns an application pursuant to section 54 of the Adoption Act 2010 (as amended) ('the 2010 Act'), which allows the High Court to direct that a child may be adopted without the consent of the birth parents. The current section 54 came into force on October 2017[1] and gives statutory effect to Article 42A.2.2° of the Constitution which allows for involuntary adoption.

2. The Special Summons seeking a section 54 order issued on 1 April 2022. Ms B, the subject of the order, [redacted]. The application was heard in the High Court on 16 June 2022, [redacted] Ms B was a child in care pursuant to the Child Care Act 1991 ('the 1991 Act') since early in her infancy.

3. It is common case that Ms B has a diagnosis of global developmental delay and a moderate learning disability, although there was no expert evidence of same before the High Court. The Trial Judge held a brief interview with Ms B on 16 June 2022 of which a transcript is available.

4. The Irish Human Rights and Equality Commission ('the Commission') was joined to the appellate proceedings as *amicus curiae* on 11 January 2023. The Commission has identified the following issues human and constitutional rights issues:

   I. The constitutional test for involuntary adoption;
   II. Parental failure and the State's obligation to facilitate reunification;
   III. The constitutional obligation to ascertain the views of the child; and
   IV. The best interests test as it relates to involuntary adoption.

I. The constitutional test for involuntary adoption

5. Article 42A differs significantly from its predecessor, Article 42.5. Firstly, it contains a general children's rights clause in Article 42A.1. Secondly, the remainder (Articles 42A.2-4) do not appear to be self-executing and require provision to be made by law

[1] Section 54(2A) inserted by section 24 of the Adoption (Amendment) Act 2017, commenced on 19 October 2017 by the Adoption (Amendment) Act 2017 (Commencement) Order 2017 (SI 443 of 2017).

(although obviously any such law must be read in light of those Articles).[2] Thirdly the non-self-executing sections are divided into five parts which present a specific structure to the rights of the child.

6. The reasoning and effect of replacement of Article 42.5 with Article 42A was discussed by O'Donnell J. (as he then was) in *Re JB and KB (Minors)* [2019] IR 270 where he observed (para. 5) that the change:

> *...occurred perhaps most clearly in the field of the possible adoption of children born to married parents, or parents who were subsequently married. Article 42A can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children, and indeed explicitly permitting the adoption of children whatever the marital status of their parents.*

The structure of Articles 42A.2 and 42A.3

7. Article 42A.2 and 42A.3 provide as follows:

> *2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
>
> *2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*
>
> *3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.* (emphasis added)

[2] It is of note that in *SMcG v. Child and Family Agency* [2017] 1 IR 1, Charleton J. commented in relation to Article 42A that that the '*Constitution executes itself*' (para.73).

8. The structure of the Article itself therefore clearly provides for three distinct situations:
    a) intervention in the life of a child where the State supplies the place of the parents;
    b) involuntary adoption;
    c) voluntary adoption.

9. Unlike the old Article 42.5, which encompassed these situations indirectly (albeit with the possible exception of involuntary adoption of children of married parents), Article 42A deals with each distinctly and in turn. This is significant as it indicates that it is not constitutionally permissible to collapse the tests for all three of these situations into one.

Intervention – Article 42A.2.1°

10. The majority decision in the Court of Appeal relied heavily on the judgment of the Supreme Court in *Re JJ* [2022] IESC 1. *Re JJ* concerned a dispute between a hospital and a family in respect of medical treatment for a child with catastrophic injuries. *Re JJ* was quintessentially a case that concerned intervention and supplying the place of the parents. It was an Article 42A.2.1° case. It did not concern involuntary adoption.

11. In *Re JJ* the majority of the Court (O'Donnell, Dunne, O'Malley & Baker JJ.) held that Article 42A.2.1° had to be read in light of Article 42A.1, which affirms the natural and imprescriptible rights of the child and '*therefore, a corresponding duty on parents to uphold and vindicate those rights.*' (para.131).

12. In examining the concept of failure of parental duty within the meaning of Article 42A.2.1° in *Re JJ* the Supreme Court noted that it is inextricably linked to the factor of prejudicial effect on the safety or welfare of the child.[3] It held (para.135):

> *It is also clear that the failure under Article 42A.1.2°* [sic] *can be a failure in one single respect and need not amount to a persistent failure tantamount to an abandonment of the parental role. This follows from the limited case law decided in relation to Article 42.5 already considered but is, if anything, clearer*

[3] There have been differing views of the changes brought about between Article 42A and Article 42.5 on foot of the *JJ* case. See generally: Conor O'Mahony 'The Same, but Different? Article 42A and the Threshold for State Intervention in Family Life: *In Re JJ*' (2022) 4 *Irish Supreme Court Review* 141 and Finn Keyes 'Children's Rights and End of Life Decision-Making: *In the Matter of JJ* (2021) 5(1) *Irish Judicial Studies Journal* 58.

under Article 42A.2.1°. The touchstone for State intervention is prejudicial effect on the safety or welfare of a child. This can occur in a single instance and as a result of a step taken or avoided by otherwise conscientious and attentive parents. It is also consistent with the requirement that any State intervention be achieved by proportionate means, since any State intervention may, therefore, be limited to supplying the place of parents in respect of a single decision rather than more generally. It is also noteworthy that the failure of duty sufficient to permit adoption must persist for a period of time to be prescribed by law, whereas no such requirement is contained in Article 41A.1.2° [sic] *in respect of any failure having a prejudicial effect on safety or welfare.* (emphasis added)

13. In *Re JJ*, the majority judgment observed *obiter* (para. 127) that:

> *Article 42A.2.2° made provision for the adoption of any child where parents have failed for such a period of time as may be prescribed by law in their duty towards the child. This provision appears directed towards making it somewhat easier to permit the adoption of children of a marital family. The same test is now to be applied to adoption of such a child, regardless of the marital status of the parents. However, an adoption is not permissible merely where it can be said that the best interests of the child so require, albeit that neither the formulae of Article 42.5 ("for physical or moral reasons") or of the preceding 42A.2.1° "to such an extent that the safety or welfare of any of the children is likely to be prejudicially affected" is used.* (emphasis added)

14. This presents a *significant* point of distinction as between Articles 42A.2.1° and 42A.2.2°. The former, which deals with intervention, is framed around effects on a child's safety and welfare. The approach of the majority in *Re JJ* appears to assess the extent of parental failure by reference to the extent of the prejudicial effects on the child's safety and welfare. However, Article 42A.2.2° contains no reference to such prejudicial effects. This textual distinction must be assumed to be deliberate and, for reasons set out below, the Article 42A.2.2° is only ever going to arise after the child has ceased to be in the care of the birth parents.

15. This presents a difficulty in over-reliance on *Re JJ* because, at its core, that judgment is about Article 42A.2.1°, which turned on prejudicial effects as they relate to a failure of parental duty. Article 42A.2.2° contains a stand-alone test of parental failure with the only reference point being the duration of that failure. If the court is to avoid collapsing Article 42A.2.1° and Article 42A.2.2° into each other, it cannot rely exclusively on the approach in *Re JJ*. A stand-alone assessment of Article 42A.2.2° is required.

Involuntary adoption – Article 42A.2.2°

16. The three sub-elements of Article 42A.2.2° are: failure of parental duty; prescribed time; and best interests. The prescribed time is set out in section 54(2A)(a) of the 2010 Act, namely 36 months. That section came into force on 19 October 2017, at which time Ms B was approximately thirteen years and one month old.

17. The wording of section 54(2A) is somewhat unusual having regard to the structure of Article 42A.2. Subsections 54(2A) (a), (b), (d) and (f) all include references to the language of Article 42A.2.1°: '*extent that the safety or welfare of the child is likely to be prejudicially affected', 'supply the place of the parents', 'proportionate means'*. To some extent, the statutory provision seems to be seeking to ensure that both sub-sections of Article 42A.2 are met before an adoption order can be made.

18. There is no reason to object to a statutory provision seeking to ensure compliance with *both* Article 42A.2.1° *and* Article 42A.2.2°. However, it remains the case that they are separate tests. It is also *necessarily* the case that they will arise at different points in time. The initial intervention removing the child from the birth parent's(s') care will *always* be separate in time from the adoption order. Again, this is included in the structure of the Constitutional test: the parental failure of duty towards the child is required to continue for the prescribed period before it will be possible for an involuntary adoption to proceed.

19. Theoretically it is possible to envisage a circumstance where the child's removal from the birth parents takes place at the *end* of a defined period of parental failure, but this is extremely unlikely in practice. First, if the State was aware of a parental failure sufficient to justify involuntary adoption for three years and took no action to intervene,

there would be a clear violation of the child's rights. Secondly, even if this did arise, it is to be expected that the child would have to spend a significant period living with the proposed adopters before any involuntary adoption could proceed.

20. In light of the statutory prescription of 36 months, the time between an Article 42A.2.1° intervention and an Article 42A.2.2° involuntary adoption will be, at a minimum, three years separate in time (or one sixth of a childhood). It is entirely feasible that the circumstances of the child at the time the child was taken into care under the 1991 Act will be different from the child's circumstances at the time an application under section 54 is made.

21. As was highlighted above Article 42A makes *explicit* provision for both involuntary and voluntary adoption. Article 42A.2.2° is the constitutional provision that deals with involuntary adoption: it only applies where a birth parent is objecting to adoption – it will therefore always involve a conflict.

22. It is not in dispute that Article 42A.2.1° is relevant to the proceedings. However, to some extent, the initial, and most intrusive, State intervention in the family predates the proceedings, at the point of Ms B coming into State care, which occurred in her very early childhood and was dealt with under the Child Care Act 1991, not the 2010 Act. The reason this is so important to the interpretation of Article 42A.2.2° is that *in every case* where Article 42A.2.2° is being applied, the immediate threat to the child's welfare will have been removed some time previously. It is, in any event, inappropriate to measure parental failure under Article 42A.2.2° by reference to prejudicial effect on safety and welfare. That would involve reading words into a constitutional provision from which they are conspicuously absent. Of even more practical significance is the fact that prejudicial effects on safety and welfare will probably have been removed long before an involuntary adoption is even constitutionally possible.

23. Article 42A.2.2° is not directly concerned with whether or not a child should be returned to the birth parents; it is concerned with whether all legal links to the birth parents should be severed in favour of the adopters. This places a significant limitation on the usefulness of the approach in *Re JJ* for the purposes of Article 42A.2.2°. Whereas in *Re JJ* the prejudicial effect on safety and welfare was the lens through which parental failure was measured, that is not the approach under Article 42A.2.2°. Where a child is

settled in a foster placement to such an extent that an adoption order is being contemplated, it is meaningless to suggest that there is any risk to their safety and welfare if an adoption order is *not* made. And that is the extent of what is involved: whether or not to make an adoption order involuntarily (voluntary adoption is separately provided for in Article 42A.3). This means that a distinct understanding of parental failure is required.

Aspects of statutory test not in dispute

24. As is set out in the majority Court of Appeal judgment, section 54(2A)(a), (c) and (e) were accepted by the High Court as being met. Section 54(2A)(a) and (c) provide:

> *(a) for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53(1) relates, have failed in their duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected,*
>
> ...
>
> *(c) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child,*

25. The Commission is sensitive to the Court's finding in *Dowdall and Hutch v DPP* [2022] IESC 36 (paras.46-49 *per* O'Donnell CJ) that it should only involve itself in matters that are actually in dispute between the parties. It does appear that neither section 54(2A)(a) or (c) are being challenged in this appeal, although the dissenting judgment of Power J. in the Court of Appeal did query whether this was appropriate (para.25). However, the Commission respectfully observes that the test in section 54(2A)(a) is a replication of the test of parental failure in Article *42A.2.1°* not Article 42A.2.2°. It is framed by a reference to prejudicial effects on safety and welfare and so over-reliance on it risks collapsing the two tests together. Similarly, section 54(2A)(c) references the abandonment of parental rights, which is distinct from duty. While the Commission acknowledges that the concessions on the statutory test are relevant to the within appeal, the decision in dispute remains one that is to be dealt with under Article 42A.2.2° and

so the Commission hopes that its observations on the operation of that test have been of assistance with the task before the court.

Obligations on parent and State

26. In addition to the issues arising from the text of Article 42A.2.2° and the necessary temporal issue, the particular matrix of facts in this case raises significant questions regarding parental failure and when and how it is to be measured in the context of Article 42A.2.2°. At the time Ms B came into care it appeared to be common case that Ms C was not in a position to care for her. However, long before the adoption order application was being made, Ms C had put her addiction behind her and had successfully raised two other children. This indicates, at least *prima facie* an ability to safely parent *a child.* Whether that translates as parental capacity to parent *Ms B specifically* is contingent on the breadth of the analysis. If parenting capacity is the sole criterion, then there does not appear, on the agreed facts, to be a significant impediment to Ms C caring for Ms B. If the particular circumstances of the child involved is the standard applied, then clearly it would be incredibly disruptive and distressing to Ms B for Ms C to take over her care shortly before her majority when she has never had full-time care of her before. This in turn is affected by the question of whether or not the Child and Family Agency ('CFA') met the State's obligation to work towards reunification of a child in state care (discussed further below).

27. However, as has been set out above, the parental failure of duty test in Article 42A.2.2° cannot be the same test as Article 42A.2.1°. If the failure of duty in Article 42A.2.2° is not based on prejudicial effects on safety and welfare (and it is respectfully submitted that it *cannot* be for the reasons set out above), then the issue becomes 'failure to do what?'. In interpreting Article 42A.2.2° it becomes necessary to assess what the duty is on a parent whose child no longer lives with them and is now living with someone who may wish to adopt the child. It cannot be a duty of day-to-day care since the parent and child now live separately. It could, obviously, entail some element of a negative duty not to cause harm to the child: for example, attending access while intoxicated; aggressive outbursts; unreliability regarding contact around birthdays, Christmas etc. – all of these are unfortunately common features of cases where children are in long term care. A parent who does not refrain from such conduct is obviously failing in their duty.

28. Conversely, positive obligations on the parent are more complex. In the first instance, the obvious duty in terms of Article 42A.2.2° would be for the parent to address the underlying issues that led to the child being taken into care; that would appear, in the first instance, to be positive action to meet the parent's duty to the child. While that may not be the typical situation, it is unambiguously the position with Ms C who not only addressed her addiction and left an abusive relationship, but did in fact subsequently successfully parent two children who were returned to her care. It is not clear what more Ms C could have done to address her own circumstances. This therefore raises the issue of who bore the duty to work towards reunification – Ms C or the State. For reasons considered below, it seems to the Commission that there are positive obligations on Ms C *and* the State.

29. It also raises the question of whether, if Ms C *was* obliged to work towards reunification, is that a separate issue from the question of adoption (as opposed to whether Ms B should return to live with her). It may be that addressing the underlying issues that led to a child being taken into care have been dealt with, but steps were not taken towards reunification. Where the child is safe day-to-day with the foster carer there is no threat to the child; if the birth parent supports that placement and works with the foster carer then it is difficult to characterise that as a failure of duty.

II. Parental failure and the State's obligation to facilitate reunification

30. The High Court took the view that that there had been significant failings on the part of the CFA in respect of the supports needed to promote the relationship between Ms B and Ms C and to pursue reunification.

31. The European Court of Human Rights ('ECtHR') jurisprudence on Article 8 of the European Convention on Human Rights ('ECHR') is consistent in finding that there is an obligation on State bodies to actively pursue reunification of children taken into care (*K and T v Finland* (GC) Application no. 25702/94, judgment of 12 July 2001; *Strand Lobben v Norway* (GC) Application no.37283/13, judgment of 10 September 2019).

32. In *Strand Lobben,* the ECtHR held (para.208):

> *Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and*

that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (see, for instance, Olsson v. Sweden (no. 1)*, 24 March 1988, § 81, Series A no. 130). The above-mentioned positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child (see, for example,* K. and T. v. Finland*, cited above, § 178). In this type of case the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live (see, inter alia,* S.H. v. Italy*, no. 52557/14, § 42, 13 October 2015). Thus, where the authorities are responsible for a situation of family breakdown because they have failed in their above-mentioned obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child (see* Pontes v. Portugal*, no. 19554/09, §§ 92 and 99, 10 April 2012).* (emphasis added)

33. The thrust of the High Court judgment is to the effect that the CFA failed in its positive duty to take measures to facilitate family reunification. Barrett J. summarises what he sees as the failings of the CFA (pp.15-18, 21-23). The approach taken by the majority of the Court of Appeal appears to focus on the failures of Ms C to seek reunification (paras.150 and 190). With respect this approach appears to deviate from the nature of the obligations arising in the Article 8 jurisprudence. As is set out above, Article 8 places *positive* obligations on State bodies to pursue reunification of families where children are taken into State care.

34. One of the most recent summaries of the principles on this point by the Grand Chamber of the ECtHR is the case of *Abdi Ibrahim v. Norway* (GC) Application no. 15379/16, judgment of 10 December 2021.The ECtHR found that there had been insufficient weight attached to the mother and child's mutual interest in maintaining family ties and personal relations through contact. The Court held (paras.149-150):

149. The Court reiterates that an adoption will as a rule entail the severance of family ties to a degree that, according to its case-law, is permissible only in very

exceptional circumstances and could only be justified if motivated by an overriding requirement pertaining to the child's best interests .... That is so since it is in the very nature of adoption that no real prospects of rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family .... Given the nature of the issues and the seriousness of the interests at stake, a stricter scrutiny is necessarily called for in respect of such decisions ...

150. Against this background, it should be emphasised that, regardless of the applicant's acceptance during the adoption proceedings that X's foster care could continue, and irrespective of whether the domestic authorities were justified in considering long-term foster care for X were he not to be adopted, she and her son retained a right to respect for family life under Article 8 of the Convention. The fact that the applicant did not apply for family reunification did not dispense the authorities from their general obligation to consider the best interests of X in maintaining family ties with the applicant, to preserve their personal relations and, by implication, to provide for a possibility for them to have contact with one another in so far as reasonably feasible and compatible with X's best interests ... The foregoing is a central consideration in the Court's examination of whether the domestic authorities provided relevant and sufficient reasons to show that the circumstances of the case were so exceptional as to justify a complete and definite severance of the ties between X and the applicant and were motivated by an overriding requirement pertaining to the child's best interests and also whether, in so deciding, they struck a fair balance between the competing interests at stake. (emphasis added)

35. In *Strand Lobben* the ECtHR expressly structured its analysis around proportionality (para.203). The justification for taking a child into care is centred in Article 8(2). This is remarkably similar in structure to Article 42A.2.1° of the Constitution which expressly refers to 'proportionate means'. These similarities were noted by Noonan J. in *SOTA v. Child and Family Agency* [2018] IEHC 714 (paras.69-70):

The Strasbourg jurisprudence makes clear that it is incumbent on State authorities in this situation to consider all possible alternatives to the removal

of the child from its family. The action taken has to be proportionate. The Constitution demands no less. Article 42A.2.1 provides:

> *'In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.' (My emphasis)*

Even prior to the insertion of Article 42A in the Constitution, the principle of proportionality in the context of litigation involving the family was well established in our law.

36. The parallels between the proportionality requirements in Article 42A.2.1° and Article 8 ECHR are significant as regards reunification. The *positive obligation* to work towards reunification is grounded in the proportionality requirement. To some extent this is axiomatic: a shorter period of separation of parent and child with the active support of the State to work towards reunification will be less intrusive on the fundamental rights involved than a longer order with no such support. A less rights-intrusive order is a more proportionate order.

37. Since Article 42A.2.1° requires State intervention to be proportionate in a similar manner to Article 8 of the ECHR, it is useful to consider Article 8 when interpreting Article 42A.2.1° (see generally *DPP v. Gormley and White* [2014] 2 I.R. 591 para.37 *per* Clarke J.). If a similar approach is taken, then the proportionality requirement in Article 42A.2.1° would also place a *positive obligation* on the State to work towards reunification.

38. It is of note that Article 42A came into force on 28 April 2015 at which time Ms B was approximately ten years and eight months old. It was clear from relatively early in Ms B's childhood that Ms C had made significant positive changes in her life. Her two other children were returned to her, and she raised them successfully. This certainly suggests that there was a positive obligation on the State to do considerably more than was done to support reunification of Ms B and Ms C during Ms B's childhood. In light

of Ms C's significant efforts, the least that the State's positive obligations would seem to require is that she be met halfway – if she can make improvements in her circumstances, the State can make improvements in her level of contact and support with her child.

39. This obligation on the State must form part of the analysis of parental failure of duty within the meaning of Article 42A.2.2°. If there is an obligation on the State to work towards reunification and if the State failed in that obligation (which was found as a fact by the High Court, see pp.21-23 of the High Court judgment) then that failure must be relevant to any analysis of whether Ms C failed in her duty.

40. If Ms C had never addressed her alcoholism, then the obligation on the State to reunify would necessarily have been lessened, since the prejudicial effect of the addiction on the child's safety and welfare would clearly have remained. But since she did, the obligation on reunification would appear to have increased.

III. The obligation to ascertain the views of the child

41. Although Ms B is no longer a child, the proceedings concern her being adopted by her long-time foster carer. Article 42A.4.2° of the Constitution requires that provision be made by law for her views to be ascertained and given due weight having regard to her age and maturity. This is implemented by section 19(3) of the 2010 Act which again references an obligation ('shall') to ascertain, and references 'age and maturity'. The Minister for Health is empowered to make regulations in this regard under section 19(4) but no such regulations have been made to date.

42. It has been accepted as fact by both the High Court and the Court of Appeal that Ms B has a global developmental delay and moderate learning disability[4] (with some references to the school having a view that it is mild in the majority Court of Appeal judgment). The dissenting judgment in the Court of Appeal was highly critical of the lack of expert evidence regarding Ms B's capacity. Power J. held:

[4] [2022] IEHC 389 at para.10; [2022] IECA 196 (*per* Whelan J.) at paras.4, 122, 203.

Evidence as to the minor's disability is also critical in circumstances where it is relevant to her capacity to form a view on adoption—a view to which due weight must be given having regard to her age and maturity. Appropriate expert evidence would have been helpful in determining the girl's ability to make decisions concerning her own life, including, decisions on future surgical interventions. In the absence of such evidence, the judge was entitled, indeed obliged, having met the girl, to form a view as to her understanding of what adoption entails. The lack of appropriate expert evidence makes this case a particularly difficult one to decide.[5]

43. In some instances it may be quite straightforward for a child's views to be ascertained; a competent sixteen year old who knew their own mind could, presumably, in many cases sit with the Judge for 30 minutes and discuss their life in some detail and make very clear what it is they wish for themselves with regard to adoption.

44. However, it must be borne in mind that those views are being sought in the context of conflict – in most cases between the child's birth parent(s) and proposed adopter(s). Placing primary responsibility for determining such issues on a child may not always be in a child's best interests.

45. A useful parallel arises with the Hague Convention on the Civil Aspects of Child Abduction 1980 ('the Hague Convention'). Where a Hague Convention case runs to hearing it will, like a section 54 application, always be a conflict as between two parties who love and care for the child about what should happen to the child. As with section 54, Hague Convention cases require some caution about placing too much responsibility for the decision on the child.

46. Article 13 of the Hague Convention allows a defence to a return order where the child objects to being returned. Where a Hague Convention application is made as between two EU Member States, the Brussels II Regulation applies. This is now in its third version (Brussels II *bis recast* Regulation 1111/2019/EU with effect from August 2022). The previous version (Brussels II *bis* Regulation 2201/2003/EC) provided in section 11(2) that:

[5] IECA 196 (*per* Power J.) at para.14.

When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

47. This provision was considered by Finlay Geoghegan J in *MR v. RN* [2009] 1 IR 388. She summarised the approach of the court as follows (para.12):

> *Neither the Act of* [Child Abduction and Enforcement of Custody Orders Act 1991] *nor the Rules of the Superior Courts 1986 make any express provision as to how the court is to assess any alleged objections to return made by a child, or how it should determine whether the child has attained a degree of maturity where it is appropriate to take account of its views. Pursuant to its inherent jurisdiction, the court has, for some time, in applications under the Act of 1991, made orders for the interview and assessment of a child by an appropriately qualified person, such as a child psychologist, where it was alleged that the child objected to being returned to his or her country of habitual residence. This was done as a matter of discretion and not pursuant to any absolute obligation on the court.*

48. If there is an inherent jurisdiction to have a qualified independent expert assess a child's views in High Court cases under the Hague Convention then, particularly having regard to Article 42A.4.2°, there must be such a jurisdiction in section 54 cases under the 2010 Act. This applies *a fortiori* where the child in question has an intellectual disability. The obligation on the Court (and the AAI) to *ascertain her views* was stronger because there was good reason to think that she may require additional support in expressing those views. And it is an obligation to 'ascertain' her views, not just hear her. 'To ascertain' is defined in the Cambridge English Dictionary as 'to discover something', or 'to make certain of something'.[6]

[6] https://dictionary.cambridge.org/dictionary/english/ascertain

49. The approach of the courts of England and Wales to Hague Cases may be instructive, including in their approach to hearing a child's views. In *Re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554; [2014] 1 WLR 4326 Moore-Bick L.J. summarised the position (paras. 53-54):

> *... it is possible to draw together a number of themes which are common to each of the authorities to which we have made reference:*
>
> *a) There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate ...;*
>
> *b) In this context, 'hearing' the child involves listening to the child's point of view and hearing what they have to say ...;*
>
> *c) The means of conveying a child's views to the court must be independent of the abducting parent ...;*
>
> *d) There are three possible channels through which a child may be heard ...:*
>
> *i) Report by a CAFCASS officer or other professional;*
>
> *ii) Face to face interview with the judge;*
>
> *iii) Child being afforded full party status with legal representation;*
>
> *e) In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary (Re D , para 60);*
>
> *f) Where a meeting takes place it is an opportunity ...:*
>
> *i) for the judge to hear what the child may wish to say; and*
>
> *ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;*
>
> *g) a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process ...*

None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge. As Lord Wilson SCJ describes in Re LC at para 55, where a child's evidence might prove determinative of an issue, it may be adduced by an appropriate process into the full proceedings by witness statement, report from a CAFCASS officer or, where the child is a party, by her advocate's cross-examination of the adult parties and closing submissions. Going further, where oral evidence is required, Lord Wilson indicated that an age appropriate process should be deployed

50. This highlights the significance of formal rules of evidence as well as the various approaches that may be necessary.

51. *MN v. RN* makes clear that there is a mechanism available for the High Court to obtain assessment of views (including by professionals) under the inherent jurisdiction. Section 54(4) of the 2010 Act allows for the appointment of any person and the payment of their costs. Order 15 Rule 16 of the Rules of the Superior Courts allows for the appointment of a Guardian *ad Litem*. As such, it is clear that there are procedural mechanisms in place to help give effect to Article 42A.4.2° in any section 54 application up to and including full legal representation with a Guardian *ad Litem*.

52. This increasing scale of options is useful in that there will be many situations where the ascertaining of the child's views is straightforward, but also in more difficult cases, for example in the case of intellectual disability as in this case, where more may be required to achieve the constitutional imperative of ascertaining the child's views.

Maturity and intellectual disability

53. The constitutional and statutory standard applicable requires *both* that the child's views be ascertained *and* that regard be had to the child's maturity. Although 'age' is a straightforward standard for any court to apply, 'maturity' is considerably more complex. This is especially so for a person with an acknowledged intellectual disability.

54. A person's level of maturity can be taken to encompass a range of factors and in the specific context of the expression of views about a person's own circumstances and welfare, those factors will, in the main, concern their cognitive and emotional maturity.

55. It is of note that in the High Court when oral evidence was given, Helen McMahon, social worker, was asked whether she thought wardship might be an appropriate route. Ms McMahon's answer was:

> *I suppose, Judge,* [Ms B] *is obviously under a full care order and in 2010 section 43(a) with enhanced rights was granted in effect of* [Ms B] *to* [Ms A]. *I suppose* [Ms B] *is a child who has a lot of needs, high needs in terms of her medical needs through the year's educational needs. And I suppose* [Ms A] *has made lots of appropriate decisions in order to meet those needs. And I think going forward, even when* [Ms B] *is 18, she has a moderate learning disability, she would continue to need that care from* [Ms A] *and have those decisions made in her best interests. I feel wardship, I suppose, wouldn't encourage that and would seriously, I suppose, diminish the relationship between* [Ms A] *and* [Ms B] *going forward and certainly would not be in* [Ms B]*'s best interests to have that, a person, who she I suppose has lived with for the last 17 years not be able to make those decisions or help her along her journey.*[7]

56. This evidence indicates that the allocated social worker anticipated that Ms B would not be in a position to make her own decisions in adult life and would require Ms A to make them for her.

57. It is at least arguable that a young person with an intellectual disability will have less maturity than a person of the same chronological age without such a disability. It does not axiomatically follow that a disability is required to establish a level of maturity lower than that of the chronological age; children develop differently. However, whether a child has an intellectual disability is *at a minimum* a relevant factor for the

[7] Transcript of High Court hearing, 16 June 2022, p.22 line 32-p.23 line 8. The terms used for the parties in the High Court judgment have been inserted in the above quotation.

question of maturity. The Court's duty to 'have regard' to the level of maturity can be expected to entail an acknowledgement of the effects of any intellectual disability.

Obligation to 'ascertain'

58. The wording of both Article 42A.4.2° and section 19(3) of the 2010 Act place an obligation on the AAI and the Court to *ascertain* Ms. B's views. This wording is significant. As already submitted, it is not an obligation to simply let her speak; if it were, it would be worded differently. It is an obligation to actually find out what she thinks.

59. With a typical 17 year-old, it seems likely that in most situations this constitutional and statutory obligation will be met by simply letting them address the Judge/AAI. However, where there is an acknowledged intellectual disability, significantly greater care will be required.

60. It is open to the Court when interpreting constitutional rights to have regard to relevant international treaties to which Ireland is a party.[8] Article 12 of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD') is entitled '*Equal recognition before the law*' and provides *inter alia*:

> *2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
> *3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

61. Article 13(1) UNCRPD is entitled '*Access to justice*' and provides:

> *States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their*

[8] See generally *N.H.V. v. Minister for Justice* [2017] IESC 35; [2018] 1 IR 246, paras 16-18 *per* O'Donnell J.; and *M.X v. H.S.E.* [2012] 3 I.R. 254, paras. 52 to 61.

effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

62. Taking these provisions of the UNCRPD as an interpretive aid to Article 42A.2.4° supports the position taken by Power J. in the minority in the Court of Appeal that, at the outset, expert evidence was required. This also suggests that the Court's *constitutional obligation* to ascertain Ms. B's views also requires that some care and attention be paid to what scaffolding and supports she would require to accurately express those views.

Separate representation/Guardian ad Litem

63. The ascertaining of the child's views and 'having regard to them' is a distinct issue from legal representation for the child. However, there is some jurisprudence which suggests that legal representation will be required in some cases.

64. In *Re AC (A Minor Ward)* [2019] IEHC 691 Kelly P. directed that solicitor and counsel be provided to a child who had a rare and severe form of cancer and who had been brought into wardship in circumstances where his parents disagreed on whether or not curative or palliative only treatment should be pursued by the treating doctors. The case was finely balanced and the likelihood of successful treatment was low. The doctors had indicated that if the parents were agreed on palliative only treatment, they would proceed on that basis. (see para.27). Kelly P. explained the appointment of a legal team to the child in terms of Article 42A. He held (paras.47-48):

Article 42A(iv)2 provides:

"Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child"

It was because of the provisions of Article 42A(iv)2 that I specifically directed the views of the child be obtained and legal representation afforded to him.

65. The UN Convention on the Rights of Child Committee has indicated strong support for separate legal representation of children in proceedings concerning their best interests. In its General Comment No. 14, it stated:

> *The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.* [9]

66. On the facts of this case the question of separate legal representation is inextricably tied up with the intellectual disability and capacity issues, and the contest between the natural mother and foster mother concerning their individual rights, the rights of Ms. B and what is in the child's best interests. The Trial Judge was not satisfied that the young person understood the application before the court. That finding of the Trial Judge indicates that the young person's views *were not ascertained*. Significantly more needed to be done to achieve this, starting with an assessment of her capacity. It remains open to this Honourable Court to take such steps as are necessary to ascertain her views and to defer a final ruling on the application until that has been done. If her views were ascertained and she understood and was unambiguously in favour of adoption then that would be a very significant factor. Furthermore, because there is a conflict between the parties involving the balancing of competing rights and the determination of the best interests of Ms. B, it seems appropriate that Ms. B would have legal representation.

IV. Best interests

67. Article 42A.4.1° provides:

> *1° Provision shall be made by law that in the resolution of all proceedings—*

[9] UNCRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14) para.96.

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration

68. Section 19 of the 2010 Act provides *inter alia* that the best interests of the child shall be the paramount consideration and that the views of the child shall be ascertained. Section 19 was inserted by section 9 of the Adoption (Amendment) Act 2017. To that extent, it is the means by which provision has been made by law to bring adoption legislation into compliance with the provisions of Art.42A

69. Best interests cannot be the *only* consideration; if it were, the other two parts of Article 42A.2.2° (parental failure of duty and prescribed period) would be rendered meaningless. As MacMenamin J. observed in *Re JB and KB (Minors)* [2019] 1 IR 270 (para.271):

> *The best-interests guarantee contained in Article 42A is not to be seen as some form of interpretative Trojan horse which can undermine the intent of the 2010 Act.*

70. In *YC v. United Kingdom,* Application no. 4547/10, judgment of 13 March 2012, the ECtHR summarised the factors affecting best interests in an adoption case as follows (para.135):

> *The identification of the child's best interests and the assessment of the overall proportionality of any given measure will require courts to weigh a number of factors in the balance. The Court has not previously set out an exhaustive list of such factors, which may vary depending on the circumstances of the case in question. However, it observes that the considerations listed in section 1 of the 2002 Act (see paragraph 103 above) broadly reflect the various elements inherent in assessing the necessity under Article 8 of a measure placing a child for adoption. In particular, it considers that in seeking to identify the best*

interests of a child and in assessing the necessity of any proposed measure in the context of placement proceedings, the domestic court must demonstrate that it has had regard to, inter alia, the age, maturity and ascertained wishes of the child, the likely effect on the child of ceasing to be a member of his original family and the relationship the child has with relatives. (emphasis added)

71. The domestic statutory provision that the ECtHR referred, as set out at para. 103 of its judgment, provided that courts and agencies have regard to:

> *"(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),*
> *(b) the child's particular needs,*
> *(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,*
> *(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,*
> *(e) any harm (within the meaning of the Children Act 1989 ...) which the child has suffered or is at risk of suffering,*
> *(f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including–*
>
> > *(i) the likelihood of any such relationship continuing and the value to the child of its doing so,*
> > *(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,*
> > *(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child."*

72. This is similar in nature and scope to section 19(2) of the 2010 Act, which lists factors to be considered when determining best interests, as follows:

> *In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to*

all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including—

(a) the child's age and maturity,

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

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

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

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

(f) the child's upbringing and care,

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

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

73. The United Nations Convention on the Rights of the Child ('UNCRC') provides for best interests to be the paramount consideration in Article 3. The UNCRC Committee has described best interests as being a 'threefold concept: (a) a substantive right; (b) a fundamental, interpretive legal principle, and (c) a rule of procedure.[10]

74. Insofar as best interests present an issue in this case, it is one of interpretation and of balancing. The High Court considered the need to maintain the legal relationship between Ms B and Ms C; this was structured, at least in part, in terms of best interests (see para.18 of the judgment). Conversely, the majority of the Court of Appeal focused significantly on the effects of an adoption order on the *adult* relationship between Ms B and Ms A. The two courts did not disagree on the importance of best interests – they disagreed on what was in fact in Ms B's best interests.

75. This highlights the importance of having clarity as to the constitutional approach. A best interests analysis requires a structured analysis if it is to avoid being an almost infinitely malleable legal standard (which is no legal standard at all). The Law Reform Commission, in looking at medical treatment decisions, endorsed an objective approach which considered all of the child's rights:

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[10] UNCRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14) para.6.

> *The best interests test has sometimes been criticised as amounting to no more than a simple paternalistic test of "parents know best" or, in the context of this Report, "doctor knows best". When the best interests test is seen, however, in the light of a rights-based approach, it is clear that it is not paternalistic in nature but has an objective aspect that ensures an appropriate level of protection against outcomes that would be inconsistent with the rights of children. ... It is notable that the best interests test has also been incorporated into international rights-based instruments on children, including the 1989 UN Convention on the Rights of the Child. This objective best interests test ensures, therefore, that the health care outcome in an individual case is not to be equated with the particular preferences of the person under 18, his or her parents or guardians (subject to the presumption that their views should be given priority under Article 41), still less of any person acting in the place of parents or guardians (such as the Health Service Executive exercising powers under the Child Care Act 1991).*[11]

76. It is of note that Part V of the Guardianship of Infants Act 1964 (as amended by the Children and Family Relationships Act 2015) provides a list of specific criteria to be looked at when determining best interests. Seen through this objective test lens, best interests is not a concept that is in conflict with other concepts; it is a concept within which conflicting principles and issues must be resolved.

77. The Canadian Supreme Court has expressly found that it is open to a court to analyse the circumstances brought about by a child protection authority when considering what is in the child's best interests. In *BJT v. JD* [2022] SCC 24 Martin J. (giving the judgment of the Court) held (para.73):

> *In the same vein the* [Director of Child Protection for the Province of Prince Edward Island]*'s decisions structured the status quo as it existed at the time of the disposition hearing and the hearing judge was well within her authority to understand how that status quo came about. In many cases the status quo is an*

[11] Law Reform Commission *Report on Children and the Law: Medical Treatment* (LRC 103-2011) p.23.

important consideration when assessing the best interests of children .... However, courts have also recognized that in certain circumstances, it is inappropriate to give effect to an existing state of affairs. For example, return and retention orders restore the status quo that existed before a wrongful removal or retention .... While the father pressed the status quo of W.D. living in Alberta before this Court, a status quo created from compounded actions or errors on the part of a child protection agency or others may require scrutiny. A court is entitled to look behind the veil of an existing status quo to understand how it came about and to assess whether that status quo is itself in the child's best interests.

78. A further issue which presents itself is the relevance of the child's *adult* status to the best interests test. The nature of the 'eleventh hour' adoption application is such that inevitably, the focus is on the status of the child upon their majority when, as in this case, there are only a small number of weeks left in the person's childhood. The existing jurisprudence leaves entirely unanswered the question of whether Article 42A is primarily concerned with a child's best interests *for the duration of their childhood only* or whether this extends to a consideration of their adult life. On the facts of this case this is complicated somewhat by the fact that Ms B is acknowledged to have an intellectual disability.

79. Insofar as a rights-based approach to best interests is required, this would align with the use of the proportionality test in respect of the assessment of the rights of Ms B. Since the Article 42A.2.2° test is one of best interests (plus parental failure for the prescribed period), it is not appropriate for proportionality to be treated as determinative as a constitutional test. Certainly, the intervention that occurred under Article 42A.2.1° must be proportionate (including as regards positive obligations to work towards reunification), but proportionality is not an express part of the involuntary adoption test in Article 42A.2.2°. Insofar as it is relevant to involuntary adoption at the level of the Constitution, it is relevant to the rights of Ms B. Under Article 42A, Ms B has clear constitutional rights to the care and company of Ms C (*Chigaru v. Minister for Justice and Equality* [2015] IECA 167) as well as other imprescriptible rights (*Gorry v. Minister for Justice* [2020] IESC 55) and a right to identity (*Habte v. Minister for Justice* [2020] IECA 22). She has a right to develop relationships (*CI v. Minister for*

Justice [2015] 3 IR 385), which would include her relationship with Ms A; recent UK jurisprudence on the ECHR indicates that Article 8 will protect those rights after her majority (*Uddin v. Secretary of State for the Home Department* [2020] EWCA Civ 338; [2020] 1 WLR 1562). A proportionate interference with these rights may be justified by some of the other rights involved. It has long been recognised that the rights of a single individual may need to be balanced against one another and this can be done using a *Heaney* style proportionality test (*DG v. Eastern Health Board* [1997] 3 IR 511 and *Health Service Executive v. VF* [2014] IEHC 628; [2014] 3 IR 305). If, ultimately, the adoption order is a disproportionate balancing, then the order ought not to be made. This appears to be the finding of Power J. in the Court of Appeal (see paras.78-80 of her dissenting judgment).

80. In summary, the best interests analysis is required to be rights-based and to take account of all relevant factors specific to Ms B.

Conclusion

81. Article 42A.2.2° entails a distinct three-part test for involuntary adoption that requires: parental failure of duty; for the prescribed period; and best interests. The parental failure of duty cannot be defined by reference to prejudice to safety and welfare as the child will have to be safe and well in the foster placement before Article 42A.2.2° even enters into the frame. Insofar as there is a parental failure of duty test, it appears to be linked to the positive obligation on the State under Article 8 ECHR (and, by extension under the proportionality standard in Article 42A.2.1°) to work towards reunification. The significant failures on that front in this case are directly relevant to any finding of parental failure by reference to the constitutional test; and if there is no such parental failure, then there can be no involuntary adoption.

82. Separately, the obligation to ascertain the views of the child does not appear to have been met. It remains open to this Honourable Court to rectify any deficiencies in ascertaining the views of this child, even at this late stage.

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