**THE COURT OF APPEAL**
**CIVIL (ORDINARY APPEAL)**

**UNAPPROVED**

**Court of Appeal Record Number: 2018/63**
**Neutral Citation Number [2022] IECA 171**

**Murray J**
**Ni Raifeartaigh J**
**Power J.**

**BETWEEN/**

**J.M.**

**APPELLANT**

**- AND–**

**ADOPTION AUTHORITY OF IRELAND**

**RESPONDENT**

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 29th day of July 2022**

# Introduction

**1.** This case arises from the adoption by the appellant and his wife of a child **("A")** in the Philippines. They wish to have the adoption entered upon the Irish Register of

Intercountry Adoptions. Their application to have the adoption registered was declined by the respondent ("**the Authority**").

**2.** Intercountry adoptions are regulated by the Adoption Act 2010 ("**the 2010 Act**"). The 2010 Act commenced on the 1 November 2010 and gave effect in Irish law to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("**the Convention**"). The key issue in the case is whether the adoption falls within section 57(2)(a) of the 2010 Act on the basis that it was "effected" in the country of origin *before* the commencement date of the Act.

**3.** This issue arises because (as is now accepted by the appellant) the adoption was not compliant with the Convention or the 2010 Act. An adoption which was not compliant with the Convention or the 2010 Act may nonetheless be entered upon the Register if it was effected in the country of origin before the commencement date of the Act.

**4.** The matter was brought before the High Court by means of an application pursuant to section 92 of the 2010 Act which empowers the court to direct that an entry be made in the Register. The High Court (Reynolds J.) [2017] IEHC 320 refused to make the order sought and the appellant brought the appeal on the basis of the single point identified above. As a fall-back position, he relies on the "bests interests of the child" principle.

## The background facts

**5.** In February 2013, the appellant and his wife applied to the Authority to have an adoption entered into the Register of Intercountry Adoptions. The application was

accompanied by a number of documents and was premised on the appellant's view that the adoption had taken place on the 9 November 2009.

**6.** After an exchange of correspondence, the Authority declined to make the requested entry into the Register for reasons set out in their letter dated the 15 May 2013. Essentially this was on the basis that the adoption did not satisfy the requirements of section 57(2) of the 2010 Act because it was not "effected" before the 1 November 2010. The letter stated that the appellant and his wife could make an application to the High Court under section 92 of the Adoption Act 2010 if they were not satisfied with the decision of the Authority, which is what the appellant duly did.

**7.** The appellant's affidavit sets out the background facts. Ms. A was born in April 1995 and was 22 years of age at the date of the High Court judgment. She is the niece of the adoptive mother, the latter being a sister of the birth mother. A and her adoptive mother formed a very close and loving relationship during A's young years, and in later years, after the appellant and his wife had married, they took steps to adopt her lawfully in the Philippines in the period 2010/11. The appellants have at all times accepted that they were not habitually resident in the Philippines at the time of the adoption. A remains a Filipino citizen and is habitually resident in the Philippines. The appellant and his wife now live in Northern Ireland and are therefore habitually resident in the United Kingdom.

**8.** The appellant described on affidavit the unsuccessful efforts to have A adopted in Northern Ireland around 2012. He says that the Northern Ireland authorities based their refusal upon the fact that the child would reach the age of 18 before the process would be

completed. He and his wife then sought to have the adoption registered in this jurisdiction but were unsuccessful, as described above.

**9.** A replying affidavit was sworn on behalf of the Authority by Kiernan Gildea, Director of Operations and Corporate Services of the Authority. He exhibited the documents submitted by the appellant and his wife to the Authority and explained why the Authority had taken the decision it did. The decision was taken on the basis that the date of the adoption in the Philippines was determined by the Authority to be the 28 March 2011, finalised on the 1 July 2011. The Authority had regard to the fact that the child continued to reside with the birth mother until the 1 July 2011 and that the adoption was non-Hague compliant.

**10.** It is important to observe that no affidavit of laws was put forward on behalf of the appellant. The appellant filed a further affidavit in which he argued that the date of the adoption was the 9 November 2009. He also referred to the "best interests of the child" test under section 19 of the 2010 Act. He said that Philippine law included a similar principle within the Domestic Adoption Act 1998. In the course of this affidavit, he further averred that "… *at any time up to finality the birth mother (or others) could revoke (sic) the adoption and she wanted [A] to remain until this time to look after siblings. Once Finality was issued, we took [A] away. Finality is effectively a safeguard and confirmation, not an adoption decree*" … There may be a significant typographical error in his affidavit as the substance of his submission was that the birth mother could *not* revoke her consent. He made other points in his affidavit in support of the argument that the adoption was effectively, if not formally, Hague-compliant but these are no longer relevant as the issue on appeal is the net issue described earlier.

**11.** The appellant submitted some further documents on appeal to which reference will be made later in this judgment.

## The Key Dates, and the Documents before the High Court

**12.** The first key date is the **9 November 2009**. This is the date upon which the appellant and his wife brought a petition for adoption in the Philippines. The appellant's position is that the adoption which was later finalised was retroactively backdated to this date. Proof of that fact, and its implications under both Philippine law and the law of this State, are critical to the issues in this appeal.

**13.** A key document in the case is a three-page document from the Regional Trial Court of the Philippines entitled "Decision". It is signed by a judge and dated the **28 March 2011**. It may be noted that there is no reference to the Hague Convention anywhere in this document. It records that an order of the 11 November 2009 had been furnished to the Office of the Solicitor General and other parties and that notice of the hearing was publicised in various locations. It records that the matter was called for "initial hearing" on the 14 January 2010 but that nobody appeared apart from the parties and the Government and that the appellants were allowed to present their evidence in support of the petition. It then records some personal information relating to the appellant and the circumstances of the minor and records that the biological parents of the minor, as well as the minor herself, had given consent to the adoption. It refers to a report prepared by a social welfare officer confirming that the appellants were fit in every way to adopt the child and favourably recommended the adoption. It then says:

> "Wherefore, finding the present petition for adoption to be sufficient in form and substance to the full satisfaction of this Court, the same is hereby GRANTED.

> Accordingly, the minor [A] shall henceforth by virtue hereof be freed from all legal obligations of obedience and maintenance with respect to her natural parents and to all legal intents and purposes be the legitimate child of herein petitioners, acquiring reciprocal rights and obligations arising from the relationship of parents and child/daughter and that her name shall now be [A].
>
> Likewise she shall become the legal heir of herein petitioners and shall remain the legal heir of her natural parents and other blood relatives.
>
> Furnish a copy of this Decision, which for the purpose of this petition, shall already be a DECREE OF ADOPTION, *effective as of the date of the filing of this petition on November 9, 2009*, to the City Civil Registrar of [L] city for recording in the City Civil Registry and annotation in the records of birth, entitling said minor [A] to the issuance of an amended certificate of live birth in accordance with this decision.
>
> SO ORDERED." (Emphasis added)

**14.** The third key date is the **1 July 2011** which is the date of a single-page court document from the Philippines entitled "Certificate of Finality". It is signed by a person described as "Court Legal Researcher II, Acting Clerk of Court V" and the body of the document simply says:

> "The Decision rendered by this Court in the above-entitled case dated March 28, 2011, has become final and executory and that the same has not been amended, supplemented or otherwise modified by a subsequent order".

## The High Court Judgment

**15.** The High Court judge dealt with three issues in her judgment:

(1) The effective date of adoption;

(2) Whether or not the adoption was in accordance with the requirements of the Hague Convention; and

(3) Whether or not the adoption was substantially compliant with the Hague Convention.

**16.** With regard to the effective date of adoption - the main issue on this appeal - Reynolds J. said that to qualify as a foreign adoption effected before the 1 November 2010, the adoption must conform to the definition of "foreign adoption" set out in section 1 of the Adoption Act 1991. She said that the decision of the Philippine Court dated the 28 March 2011 recorded in its body that the minor would be freed of legal obligations of obedience and maintenance with respect to her natural parent and, to all legal intents and purposes, be the legitimate child of the petitioners. She said that it was evident that no *de facto* transfer of parental rights and duties occurred in November 2009 and that the adoption did not fulfil the criteria to be a valid foreign adoption within the meaning of section 1 of the 1991 Act. She said that it was accepted by the appellants that the adoption could have been revoked even after the decision of the court in March 2011 and up until matters were finalised on the 1 July. Accordingly, she concluded that the effective date of the adoption was the 1 July 2011.

**17.** As to whether or not the adoption was in accordance with the requirements of the Hague Convention, she said that it was common case that the adoption was not certified by

the competent authority in the Philippines (i.e., the Philippines Inter-Country Adoption Board). Further, Article 17 of the Convention had not been complied with in circumstances where the competent authority must determine that the prospective adoptive parents are eligible and suitable to adopt before the adoption is effected. The appellants had conceded that they did not engage with the appropriate authorities in Northern Ireland prior to effecting the adoption in circumstances where they were unaware of such requirements. Accordingly, she held that sections 90 and 57 of the 2010 Act had not been met.

**18.** With regard to whether the adoption was "substantially compliant" with the Hague Convention thereby possibly affording the court some degree of flexibility or discretion with regard to the registration, she referred to the decision of the High Court in the *O'C* case. She said that the approach of Abbott J. was to hold that some flexibility could be adopted by the court in situations where the requirements of the Hague Convention were broadly met but she distinguished that case on its facts from the present one in circumstances where the appellants had no prior engagement with the Authority and where no declaration of eligibility or suitability had been obtained. She therefore refused the application.

## The appeal

**19.** On appeal the following matters were not in dispute.

- There is no doubt as to the appropriateness of the appellant's adoption of A nor any question as to the *bona fides* of the appellant and his wife in relation to the adoption.
- The adoption process was properly processed through the family courts in the Philippines.

- The appellant and his wife were not habitually resident in the Philippines at the time of the adoption and therefore cannot fall within section 57(2)(b)(i) of the Act.
- The adoption was not certified by the competent authority of the Philippines (i.e., the Philippine Inter-Country Adoption Board) as having been effected in accordance with the requirements of the Convention.
- The appellant was unaware during the adoption process in the Philippines of the necessity to ensure that the adoption was compliant with the Hague Convention.
- The minor continued to reside with her birth mother until the 1 July 2011.
- The appellant, for the purpose of the appeal, did not contest the High Court's finding that the adoption order did not comply with the requirements of the Hague Convention.

**20.** A net issue for decision is presented to the Court on this appeal, and it is this. When was the adoption in the Philippines "effected"? Was it: (a) the date of the petition to the Philippine Court (i.e. the 9 November 2009, prior to the commencement of the Act); (b) some other date prior to the commencement of the Act; (c) the date of the order of the Philippine Court of the 28 March 2011 (which post-dates the Act's commencement); or (d) the date the Certificate of Finality issued by the Philippine Court (i.e. the 1 July 2011, which also post-dates the Act's commencement). Depending on the answer to that question, the case either does or does not fall within section 57(2)(a) of the 2010 Act. One of the complicating factors in this case is the existence of a retroactivity provision in Philippines law.

## Additional documents on which the appellant sought to rely during the appeal

**21.** In the course of this appeal, the appellant appended some additional documents to his written submissions. Among these were a letter dated the 9 February 2018 from the Department of Justice in the Philippines which refused his request for a legal opinion but set out certain provisions of Philippine legislation (Republic Act No. 8552), including section 13 which provides:

> "*Decree of Adoption*. – If, after the publication of the order of hearing has been complied with, and no opposition has been interposed to the petition, and after consideration of the case studies, the qualifications of the adopter(s), trial custody report and the evidence submitted, the court is convinced that the petitioners are qualified to adopt, and that the adoption would redound to the best interests of the adoptee, *a decree of adoption shall be entered which shall be effective as of the date the original petition was filed*. This provision shall also apply in case the petitioner(s) dies before the issuance of the decree of adoption to protect the interest of the adoptee. The decree shall state the name by which the child is to be known." (Emphasis added).

**22.** He also appended a document which was a "Non-Precedent Decision of the Administrative Appeals Office" of the U.S. Citizenship and Immigration Services to show that this particular office had taken the view that a Philippine adoption law was retroactive to the date of petition. He appended certain provisions from the Family Code of the Philippines (i.e., Executive Order No. 209 Title VII, Adoption) Articles 183-193. He also sought to draw the Court's attention to an email exchange in June 2017 between himself and an attorney in the Philippines, a Mr. Duano, in which the latter explains the meaning of "finality" but adds that it is a technical matter and that the appellant should consult his own lawyer, and that he had replied only because he thought it was "for academic discussions".

**The submissions of the parties at the appeal**

**23.** Although he had no affidavit of laws, which is the usual and appropriate method for proving the content of foreign law, the appellant submitted that the date of the petition (which in this case pre-dates the commencement of the 2010 Act) is retroactively deemed under Philippine law to be the date upon which the adoption takes effect. He argued that this was reflected in the body of the order of March 2011.

**24.** He said that there was only a limited fifteen-day period from the date of petition within which a birth parent or other person was entitled by law to register an objection to the adoption and that once this period had passed, the petition in practical terms became effective because nobody could at that stage lodge any further objection. He said that the delay thereafter was merely a procedural delay on the part of the courts in formally drawing up the order but that this did not impact upon the effectiveness of the original order of November 2009 concerning the petition. He also makes the point that the case suffered from delays because there had been periods of illness on the part of the judge who eventually retired, resulting in the appointment of a new judge to deal with the case.

**25.** The appellant placed considerable reliance on the Philippine Domestic Adoption Act 1998 (Republic Act No. 8552) and New Rule A.M.02-6-02-SC (2002), copies of which he furnished to the Court. He submitted that under Philippine law, adoptions are retroactive to the date of petition in order to protect the successional and inheritance rights of children. These are, he said, real and *de facto* actual rights such that the child inherits even if the parents die before the decree is issued; this being the case, parental rights also come into effect at the date of petition. He says that the right to inherit the property and finances of the

parents are very important to protect the child and are a parental right with respect to the child, whether the parents live or die.

**26.** He laid emphasis on the fact that it was what he referred to as a "relative" adoption. He says that in a non-relative adoption there would be a mandatory trial custody period from petition of at least six months, with temporary parental rights in place, but that the position is different with regard to "relative adoption" cases. He said that from the initiation of the petition, all expenses accrued by the child are the responsibility of the adoptive parents and that the appellant and his wife must support the child from petition to finality. He said that as a matter of fact, the wife had done so since the child was born, and both he and his wife had done so together since their marriage in 2004.

**27.** He said that once finality was reached (as it was in this case on the 1 July 2011) the date of adoption is retroactive with genuine transfer of parental rights through vested permanent parental rights, succession rights, mutual tax relief, any available corporate and state benefits, parental responsibilities for accommodation, education, medical, travel and other expenses for the child. The temporary parental rights at petition become permanent parental rights at finality.

**28.** The appellant also made the point that the appellant and his wife were entitled to exercise the power by allowing the child to stay with the birth mother which was deemed to be in her best interests at the time but submitted that this factual position did not undermine the legal position which was that they had the legal power to choose where she lived. He had stated on affidavit that "the adoptive mother had a pre-existent and close relationship with

the child… and they had lived together in the grandparents home and at many other times since then at the birthmother's home, before and after marriage".

**29.** The appellant also referred to *M O'C and BO'C v Údarás Uchtála na hÉireann* [014] IEHC 580 (i.e., the First Mexican Case) and sought to bring himself within its parameters. He also sought to rely on the best interests of the child principle and in this regard referred to the judgment of O'Donnell J. in *J.B. and K.B.*

**30.** The respondent's position at the appeal hearing was as follows. Its counsel observed that no affidavit of laws was provided from any foreign expert as to the effect of Philippine law and that this was the accepted method of proving foreign law in an Irish court.

**31.** The respondent said that the focus of the definition of foreign adoption in section 1(b) of the 1991 Act is on whether the substantive effect of the order was equivalent to that of an adoption order made in Ireland. From that perspective, the effective date of the adoption in the Philippines would have to be the 1 July 2011 because that was the date at which the termination of the old, and creation of the new, parental rights and obligations became final. The crucial words in section 57(2)(a) were "*at that time*", i.e., an adoption which at that time conformed to the definition of foreign adoption, which in this case is a date falling after the commencement date of the 2010 Act. It submitted that even if the order of November 2009 could be said to operate retrospectively, this would not mean the adoption was "effected" prior to that date. He submitted that no new parental rights accrued until 2011 at the earliest. One could not say that definitive parental rights were in place until then.

**32.** The respondent noted that the appellant himself had recognised that the mother could revoke her consent after November 2009 in his affidavit of reply in these proceedings. Counsel on its behalf also noted that the appellant had made the same point in a written skeleton argument on his behalf to a UK First Tier Tribunal (in an appeal against the refusal of entry to A to enter the UK), which was furnished to the Court among the exhibits. He said that the retroactivity clause is concerned with the discrete matters of succession and inheritance but that nothing in the material submitted suggested that the parental relationship between the natural mother and child had been terminated between the 9 November 2009 and the 1 July 2011. He pointed out that the child lived with her natural mother in that period.

**33.** The respondent also submits that if the interpretation put forward by the appellant were to be accepted, a foreign authority could at any time grant an order of adoption and state on the face of the order that it was retroactive and thus at the stroke of a pen circumvent the requirements of the Hague Convention. This would be entirely contrary to the structure and purpose of the 2010 Act which was intended to make the Convention machinery the sole and comprehensive route to validating intercountry adoptions after the commencement of the Act.

**34.** The respondent also pointed out that the decision of the High Court in the present proceedings was referred to with approval by two members of the Supreme Court in the *J.B.* case.

**35.** Counsel invited the Court to look at section 57(2)(a)(ii) and section 57(3), both of which he says support the interpretation he contends for. Subsection (3) provides:

" Subject to *subsection (4)*, if an intercountry adoption effected outside the State that, under *subsection (2)*, is recognised and deemed to have been effected by a valid adoption order has the effect in the state of the adoption of terminating a pre-existing legal parent-child relationship, the adoption, as of the date of the deeming under that subsection, has substantially the same effect as an adoption effected by an adoption order."

## Additional documents obtained after the appeal hearing

**36.** Following the hearing of this appeal, this Court asked the parties to ascertain if further information could be obtained from the Philippines Central Authority. This unusual step was taken by reason of the subject-matter of the proceedings, the fact that the appellant was a lay litigant, and the fact that the documents submitted to date appeared to indicate some support for his argument as to retroactivity. The Court wishes to acknowledge that the respondent was extremely helpful in providing assistance to the Court in obtaining further information from the Philippines and to express its gratitude for this assistance.

**37.** The Court held a hearing on the 18 February 2021 at which further steps were discussed with the parties. A draft letter containing questions for the Philippines Central Authority was prepared with the assistance of the parties and the involvement of the Court. It was sent by the Authority to the Philippine authority on the 2 March 2021.

**38.** Under cover of a letter dated the 22 July 2021, an affidavit of laws, sworn on the 6 July 2021, was sent to solicitors for the Authority and furnished to the Court in due course. It was sworn by Bernadette B. Abejo, Executive Director of the Intercountry Adoption Board in the Philippines and answered the Court's questions in the following manner.

*Q. (a) "Under the law of the Philippines, when is the adoption deemed to terminate the legal relationship between the child and birth mother and to create parental rights and duties on the part of the adopter(s)?"*

A. (a) "Under the Philippine law, termination of parental authority is determined either administratively, through voluntary commitment of the biological parent(s) to the State, or judicially, through a court process. Section 7 of the Philippine Republic Act No. 9523 provides that the certification declaring a child legally available for adoption shall be issued within three (3) months following the filing of the deed of voluntary commitment signed by the birth parent(s). At this point, parental rights of the biological parent(s) over the child is legally terminated and consequently transferred to the Department of Social Welfare and Development. For involuntary committed child, the certification declaring the child legally available for adoption is issued within three (3) months following the involuntary commitment.

Section 16 of the Philippine Rule on Adoption provides that *'x x x a decree of adoption x x x shall take effect as of the date the original petition was filed even if the petitioners die before its issuance".* Accordingly, once the Decree of Adoption is issued, parental rights of the adopters over the child legally takes effect on the date of the filing of the original adoption petition at the Philippine local court.

The Philippine laws specify that parental rights of the biological parents(s) over the child is legally terminated three (3) months following the biological parent(s)' voluntary commitment of the child to the Philippine Department of Social Welfare and Development (DSWD) while parental rights over the child by the adopters, takes legal

effect at the time of the filing of the original adoption petition at the Philippine local court once the Decree of Adoption is issued."

*Q. (b). "Having regard to the fact that the Decision dated 28 March 2011 refers to itself as a 'Decree of Adoption, effective as of the date of the filing of this petition on November 9 2009', is the date upon which an adoption takes effect deemed to operate retrospectively such that the date of the petition is to be regarded as the date upon which an adoption takes legal effect? Alternatively, does the adoption take effect from the date of the final order and/or Certificate of Finality and if so, upon which of those two dates?"*

A. (b). "The date of the effectivity of the adoption retroacively [sic] takes effect on the date of the filing of the adoption petition once the decree of adoption is issued and not on the date of the final order or the Certificate of Finality.

The Philippine Rule of Adoption does not provide for the basis in retroactively implementing the effectivity of the adoption on the date of the filing of the petition as soon as the deree [sic] of adoption is issued. However, the positive assessment of the local court on the proposed adoption that culminates to the issuance of a decree of adoption along with the adopters' continuing desire to care and provide for the child may have contributed to the principle behind the provision."

*Q. (c) "What parental rights and duties, if any, terminate or are created at each of the following stages in the Philippine domestic adoption procedure:*

*a) Date of filing of the petition;*

*b) Date of the adoption order;*

*c) Date of the Certificate of Finality?"*

A. (c) "Parental rights and legal obligations of the biological parent(s) over the child is legally terminated three months following the signing of the deed of voluntary commitment for voluntary committed child and three months following the involuntary commitment.

a). Date of filing of the petition:

The date of the filing of the adoption petition, under Philippine law, causes the recognition of the child as the child of the adopters, and the adopters are recognised as the parents of the adopted child. The relationship is recognised as if the child had been born to the adoptive parents.

b). Date of the Adoption Order:

The date of the Adoption Order signals the succeeding steps to be taken by the adopters which is clearly stipulated in the order such as: the process of registration of the new name of the child once the certificate of finality of adoption is issued.

c). Date of the Certificate of Finality:

The date of the Certificate of Finality, under Philippine law, indicates that the decision of the court is definite and may not be retried and that no further appeal on the case may be taken.

The domestic adoption by foreign nationals married to Filipinos who habitually reside outside of the Philippines is not allowed under the Hague Convention of

1993. Domestic adoptions are incompatible with "convention adoptions". ICAB is not involve [sic] in the domestic adoption process initiated by petitioners in the local courts."

**39.** By letter dated the 28 September 2021, the solicitors on behalf of the Authority wrote to the appellant, setting out their view of the position following the receipt of affidavit of laws, in the following terms:

"The Authority has reviewed the Affidavit of Laws provided by the Central Authority of the Philippines. It appears from that Affidavit that the parental rights and legal obligations of the biological parent(s) of a child are legally terminated under Filipino Law either:

(i) Three months following the signing of a deed of voluntary commitment; or

(ii) Three months following the involuntary commitment through a court process.

As you will be aware from previous engagements, and from the submissions made by the Authority in the High Court and Court of Appeal, the date at which the legal rights and obligations of the biological parents were finally and conclusively terminated has been a key issue in these proceedings.

The Authority has reviewed the materials previously supplied by you in light of the Affidavit of Laws. It does not appear to contain either a deed of voluntary commitment, or an order relating to a judicial process of involuntary commitment. It is the Authority's view that these are potentially important documents which may have a bearing on your application.

You will also be aware from previous engagements, as previously advised, that you are entitled, at any time to re-apply to the Authority to have the child's adoption registered on the Register of Intercountry Adoptions ("RICA"). Any re-application may include evidence or documentation that was not presented to the Authority when it originally determined your application.

While the Authority cannot pre-judge any application you might make, the Affidavit of Laws does appear to provide a basis for the Authority to consider entering the child's adoption on the Register, provided adequate proof of the date of final termination of parental rights and duties is supplied.

With that in mind, the Authority would invite you to consider and confirm whether

(i) you intend to re-apply to the Authority;

(ii) you are in possession or believe you can obtain either a copy of a deed of voluntary commitment or an order of involuntary commitment.

… "

**40.** The respondent, by way of replying email, stated:

"I believe the birth parents consent is stated on the petition and the deed of voluntary commitment would have been part of the contents of the petition submitted to the Regional Trial Court and that the presiding judge would not have granted the petition without it. Judge Reynolds in her judgment (17 July 2017, 2016 No. 374 MCA) stated

(S6) the application was properly processed through the Family Courts in the Philippines."

**41.** The Court sat again on the 7 October 2021. Following further discussion, it was decided to pose some further questions to the Authority as the affidavit of laws did not, in the Court's view, definitively answer all points required for the satisfactory resolution of the case.

**42.** By letter dated the 11 October 2021, and at the request of the Court, the solicitors on behalf of the Authority posed the following questions by way of request for further explanation:

"1. Please can the Philippine Central Authority provide a copy of the Deed of Voluntary Commitment or Order relating to a judicial process of involuntary commitment in relation to the child?

2. If the answer to question 1 above is no, please can the Philippine Central Authority confirm the date of signing of the Deed of Voluntary Commitment or Order relating to a judicial process of involuntary commitment in relation to the child?

3. If the answer to questions 1 and 2 above is no, please can the Philippine Central Authority confirm how the Adoption Authority of Ireland can obtain a copy of the Deed of Voluntary Commitment or Order relating to a judicial process of involuntary commitment in relation to the child, or alternatively receive confirmation of the date of signing of the Deed of Voluntary Commitment or Order relating to a judicial process of involuntary commitment in relation to the child?

4. Is there a period of time after the signing of the Deed of Voluntary Consent or judicial order terminating parental authority during which the natural mother could have revoked her consent?

5. If the answer to 4 is yes, when does that period end?"

**43.** A reply letter dated the 7 February 2022 was received by the Court by email on the 15 February 2022. The relevant paragraphs are as follows:

"The DSWD stated that [A]'s adoption was a non-convention adoption. The couple filed a petition for domestic adoption before the Regional Trial Court in Tabaco City, Philippines. The adoption petition was granted by the court on March 28, 2011 and a Certificate of Finality was issued on July 1, 2011. Notwithstanding regular procedures, the DSWD was not given any notice of the proceedings hence no Certification Declaring the Child Legally Available for Adoption (CDCLAA) was issued for [A]

The court social worker which handled [A]'s adoption stated that the court did not require submission of a Deed of Voluntary Commitment (DVC) by the birthparents was not provided. Instead, the PAPs submitted an Affidavit of Consent to Adoption signed by the birthparents.

DSWD is requesting the court to certify that neither a DVC nor a CDCLAA was submitted. NACC will forward the certification as soon as it becomes available."

**44.** At the request of the Court, further written submissions were provided by the parties dated the 21 February 2022 and 23 February 2022 respectively.

**45.** Also, on the 23 February 2022, the appellant furnished the Court with two documents which he had lately been able to locate, being the sworn affidavits of consent of each of the parents to the adoption of the minor, dated the 9 November 2009. Each of these provides as follows:

1. That I am the [father/mother] of minor child [A], born on April 4, 1995 in [name of] City;
2. That the above-named child has been living with my sister-in-law, [the appellant's wife] since birth up to the present and the latter treated her as her own child;
3. That [the appellant's wife] and [the appellant] has provided the above-mentioned child with all her growing needs, physically, mentally, emotionally and spiritually;
4. That I have not at any time abandoned the above-mentioned children;
5. That due to my inability to support said child and believing it would be for her own benefit and interest, I hereby give my express and voluntary consent in writing that my above-mentioned child be adopted by spouses [appellant] and [appellant's wife]."

## Relevant legal framework

**46.** The cornerstones of the legal framework relevant to this case are the Hague Convention and the 2010 Act, although certain provisions of the Adoption Act 1991 continue to have some relevance.

### The Hague Convention

**47.** The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 was a major international landmark in the area of intercountry adoptions. A comprehensive description of the background to, and content of, the Convention was set out

in the judgments of McMenamin J. and McKechnie J. in *J.B. and K.B.* [2019] 1 IR 270 para. 174 et seq, and para 21 et seq, respectively. For present purposes, the following description of its content should be sufficient.

**48.** The Convention applies where a child, "habitually resident" in one contracting state ("the state of origin"), has been, is being, or is to be, moved to another contracting state ("the receiving state"), either after his or her adoption in the state of origin, by spouses or a person who is "habitually resident" in the receiving state, or where a child is moved for the purposes of such an adoption, to be effected either in the receiving state, or the state of origin. The Convention is confined to adoptions which create a permanent parent-child relationship. The term "habitual residence" refers to the place where a child has his or her close family and social and cultural interactions. Prior to consideration of a placement, there must be a determination in the state of origin that intercountry adoption is in the child's best interests. There must be counselling of the natural parents, both parents must freely consent, and the natural mother's consent must be given after the birth of the child. Article 4 lays down requirements for the counselling of the child, and for the child's consent, having regard to his or her age. Any financial inducement to the natural parents is prohibited. 'Mirror' compliance provisions for potential adopters are applied by the central authority of the receiving state. This includes an assessment which must consider how the intercountry adoption will protect the child's best interests.

**49.** Key to the operation of the Convention is the role of "central authorities" in each jurisdiction. The functions of these bodies are to monitor, regulate, collect and preserve information and provide for the accreditation of bodies within a state. The designated central authorities and other accredited bodies are to be registered with the Permanent Bureau of the

Hague Convention on Private International Law ("the Permanent Bureau"). Persons who wish to engage in intercountry adoption must apply to the central authority of their state of habitual residence. As McMenamin J. noted, the intention underlying these provisions was, so far as possible, to eliminate the exploitative practices of some international "adoption agencies" which financially benefited from directly arranging such adoptions with vulnerable natural parents in another state. Articles 15 to 22 deal with the duties of the receiving state central authority. That central authority is primarily responsible for determining that the prospective adopters are eligible and suited to adopt, and that they have been appropriately counselled. The central authority is also charged with ensuring that the child will be allowed to enter and reside permanently in that state.

**50.** Two key documents are described in the Convention. The first is the Article 17 "placement approval notice", which provides that a child may only be removed from a country of origin to a receiving state when there is agreement or consent from the adopters, when the receiving state (through the central authority) has approved the decision, and once eligibility has been determined. Thereafter, the central authority may issue a placement approval notice.

**51.** The second key document is the Article 23 certificate. Chapter V of the Convention deals with recognition by operation of law by the central authority of a certificate of adoption. An "Article 23 adoption", certified by the competent authority of the state of adoption as having been made in accordance with the Convention, shall be recognised by all other contracting states. This "certification" must specify when, and by whom, the agreements under Article 17 were given. This is, in effect, a form of international "licence" that the adoption may proceed and be recognised in all other contracting states.

**52.** Exceptions are dealt with in Article 24, such as where a mother had been induced to give consent by fraud, duress or financial gain. Article 29 contains a general prohibition on contact between prospective adoptive parents and the child's natural parents before it is decided that the child is free to be adopted and that the appellants are eligible and suited to adopt. The purpose of this provision is to thwart the activities of local adoption "brokers". There is an exclusion to this rule in the case of intra-family adoptions.

**53.** Importantly, Article 40 provides that "no reservation to the Convention shall be permitted".

**54.** It can be seen therefore that the Convention was intended to provide a thorough and comprehensive system regulating intercountry adoptions in a manner which protects children and seeks to prevent exploitative practices. I hasten to add that there is no question, on the facts of the present case, of any such exploitation or that the motives of the appellant and his wife were anything other than the very best interests of the child A.

## Relevant Irish legislation

**55.** Section 9 of the 2010 Act provides that the Convention has "the force of law" in the State. The Convention itself is, therefore, directly applicable as part of Irish domestic law. Section 10 of the 2010 Act provides that when interpreting any provision of the Convention, a court, or the Authority, as the case may be, "shall pay due regard to" the explanatory report prepared by Gonzalo Parra-Aranguren in relation to the Convention **("the Explanatory Report"**).

**56.** Some provisions in the Act deal with "domestic adoptions" while others deal with "intercountry adoptions". An "intercountry adoption" means the adoption of a child, habitually resident in the "state of origin", who is to be transferred into the "receiving state" by a person or persons habitually resident in that state. The 2010 Act recognises that the welfare of the child is paramount in any question relating to the arrangements for the adoption of a child, for the making of an adoption order, or for the recognition of an intercountry adoption effected outside the State (see section 19).

**57.** The Authority is identified as the "competent authority" (section 64) and its functions defined (section 96). By section 20 of the 2010 Act, the Authority is empowered to make an adoption order for a child who has been "adopted in an intercountry adoption effected outside the State". It is in those circumstances that the Authority may recognise such an adoption, and, once accompanied by a certificate issued by the competent authority of the "state of adoption", identified by section 57 of the 2010 Act, the Authority may register an intercountry adoption effected outside this state that complies with the requirements of the 2010 Act in relation to such adoption (section 90(7)). In effect, therefore, the general rule is that the Authority can only recognise an intercountry adoption, which, *inter alia,* is compliant with Article 17 and Article 23 of the Convention.

**58.** The 2010 Act requires that adopters shall inform the Authority within three months of bringing an adopted child into the State (section 82). It sets up a register of intercountry adoptions to be maintained by the Authority (**"the Register")**, on presentation of a certificate pursuant to section 57 of the Act and Article 23 of the Convention (section 90).

**59.** For present purposes, section 57(2) is particularly important and is set out in full below. What is relevant here is that different principles apply depending on whether the foreign adoption was effected prior to or after the establishment day, which was the 1 November 2010. The repeated use of the word "effect" or "effected" in the section may be noted. I have highlighted in bold the part of section 57 within which the appellant contends that the adoption in this case falls to be entered upon the Register of Intercountry Adoptions.

**60.** Section 57(2) of the Adoption Act 2010 provides as follows:

"(2) Subject to *subsections (3) and (4)*, an intercountry adoption effected outside the State that—

**(a) if effected at any time before the establishment day—**

**(i) is an adoption that, at that time, conformed to the definition of "foreign adoption" in section 1 of the Adoption Act 1991, and**

**(ii) has been certified under a certificate issued by the competent authority of the state of the adoption as having been effected under and in accordance with the law of that state**, or

(b) if effected on or after the establishment day, has been certified under a certificate issued by the competent authority of the state of the adoption—

(i) in the case of an adoption referred to in *paragraph (b)* of the definition of "intercountry adoption effected outside the State" *in section 3 (1)*, as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption under and in accordance with the law of that state, and

(ii) in any other case, as having been effected in accordance with the Hague Convention or with a bilateral agreement or with an arrangement referred to in section 81, as the case may be,

unless contrary to public policy, is hereby recognised, and is deemed to have been effected by a valid adoption order made on the later of the following:

(I) the date of the adoption;

(II) the date on which, under *section 90*, the Authority enters particulars of the adoption in the register of intercountry adoptions."

**61.** Accordingly, there are three categories of foreign adoption which will be recognised and entered upon the Register:

(1) A foreign adoption (within the meaning of the 1991 Act definition) which was effected before the 1 November 2010 and certified by the competent authority of the state of the adoption as having been effected in accordance with the law of that state (section 57(2)(a)). In that scenario, exceptionally, there is no requirement that the adoption be Hague Convention-compliant because it was effected *before* the Act came into force.

(2) A foreign adoption effected on or after the 1 November 2010 where a certificate has been issued by the competent authority certifying that the adopters were habitually resident in the state of the adoption at the time of the adoption and the adoption was in accordance with the law of that state (section 57(2)(b)(i)). This "habitual residence" scenario does not apply in the present case as the appellant and his wife were not habitually resident in the Philippines.

(3) A foreign adoption effected on or after the 1 November 2010 where a certificate has been issued by the competent authority certifying that the adoption was effected in accordance with the Hague Convention. This is the general rule, and it is now agreed between the parties in these proceedings that the adoption was *not*

effected in accordance with the Convention and therefore this scenario does not apply.

**62.** Section 90(6) provides that all applications for entry in the Register of intercountry adoptions must be accompanied by the relevant certificate referred to in section 57.

**63.** Finally, I note that Section 92(1) of the Act provides that the High Court can direct the Authority to enter particulars of an adoption into the Register, and the Authority is required to comply with any such direction (section 90(8)). No preconditions are specified as to the exercise of the power under section 92(1) as it merely provides that the Court may make such an order if "satisfied….an entry should be made...". The scope of the power was the subject of detailed consideration in *Re J.B. and K.B.,* to which I will turn later in the judgment.

## Analysis and Decision

### The First Issue: Was the Philippines adoption of A effected before the commencement of the 2010 Act?

**64.** The key word which falls to be interpreted is the word "effected". It appears repeatedly in the relevant legislation including, indeed, in the long title to the 2010 Act. More particularly it features in section 1 of the 1991 Act and (repeatedly) in section 57 of the 2010 Act.

**65.** Section 1 of the Adoption Act 1991 provides the still-operative definition of "foreign adoption" and says:

> "'foreign adoption' means an adoption of a child who at the date on which the adoption was effected was under the age of 21 years or, if the adoption was effected after the commencement of this Act, 18 years, which was effected outside the State by a person or persons under and in accordance with the law of the place where it was effected and in relation to which the following conditions are satisfied:
>
> …
>
> (b) the adoption has essentially the same legal effect as respects *the termination and creation of parental rights and duties* with respect to the child in the place where it was effected as an adoption effected by an adoption order." (Emphasis added)

**66.** It is important, particularly for the purposes of this judgment, to note that there must be both (i) termination of parental rights and duties (i.e. those of the birth mother/parents) and (ii) creation of parental rights and duties (i.e. those of the adoptive parents), for the foreign adoption to be cognisable as an adoption.

**67.** Section 57(2) of the Adoption Act 2010 provides as follows:

> "(2) Subject to *subsections (3) and (4)*, an intercountry adoption effected outside the State that—
>
> **(a) if effected at any time before the establishment day—**
>
> **(i) is an adoption that, at that time, conformed to the definition of "foreign adoption" in section 1 of the Adoption Act 1991, and**

**(ii) has been certified under a certificate issued by the competent authority of the state of the adoption as having been effected under and in accordance with the law of that state**, or

(b) if effected on or after the establishment day, has been certified under a certificate issued by the competent authority of the state of the adoption—

(i) in the case of an adoption referred to in *paragraph (b)* of the definition of "intercountry adoption effected outside the State" in *section 3 (1)*, as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption under and in accordance with the law of that state, and

(ii) in any other case, as having been effected in accordance with the Hague Convention or with a bilateral agreement or with an arrangement referred to in *section 81*, as the case may be,

unless contrary to public policy, is hereby recognised, and is deemed to have been effected by a valid adoption order made on the later of the following:

(II) the date of the adoption;

(II) the date on which, under *section 90*, the Authority enters particulars of the adoption in the register of intercountry adoptions."

**68.** Accordingly, there are three categories of foreign adoption which will be recognised and entered upon the Register:

1) A foreign adoption (within the meaning of the 1991 Act definition) which was effected **before** the 1 November 2010 and certified by the competent authority of the state of the adoption as having been effected in accordance with the law of that state (section 57(2)(a)). In that scenario, exceptionally, there is no requirement that

the adoption be Hague Convention-compliant because it was effected *before* the Act came into force.

2) A foreign adoption effected **on or after** the 1 November 2010 where a certificate has been issued by the competent authority certifying that the adopters were habitually resident in the state of the adoption at the time of the adoption and the adoption was in accordance with the law of that state (section 57(2)(b)(i)). This "habitual residence" scenario does not apply in the present case as the appellant and his wife were not habitually resident in the Philippines.

3) A foreign adoption effected **on or after** the 1 November 2010 where a certificate has been issued by the competent authority certifying that the adoption was effected in accordance with the Hague Convention. This is the general rule and it is now agreed between the parties in these proceedings that the adoption was *not* effected in accordance with the Convention and therefore this scenario does not apply.

**69.** The appellant seeks – as he must do - to bring himself within the first category. In the present case, the permanent termination of the rights of A's birth parent(s) and the creation of new parental rights for J.M. and his wife certainly happened under Philippine law at some stage between the 9 November 2009 (the date of petition) at the earliest, and the 1 July 2011 (the date of the Certificate of Finality) at the latest, but the crucial question is *when.* The key question is whether the date upon which the adoption was "effected" was prior to the coming into the force of the Adoption Act 2010, being the 1 November 2010. If it was not "effected" until the date of the final order (i.e. July 2011), this was after the commencement of the 2010 Act. If it was "effected" on the date of petition (i.e. November 2009) or some later date prior to 1 November 2010, then it was "effected" prior to the commencement of the 2010 Act.

The appellant's central argument at all times was that although the orders of the 28 March and the 1 July 2011 post-dated the commencement of the 2010 Act, they operated retrospectively under Philippine law to the date of the petition, being the 9 November 2009, thereby conferring rights upon the adoptive parents on a date which pre-dates the Act's commencement. This is a difficult question to resolve in light of the evidence before the Court in the present case.

**70.** The starting point is that, having regard to the definition of "adoption" and "foreign adoption" in Irish law, two changes in the legal relations with the child must take place before an adoption can be said to have been effected: (a) the rights of the biological parents must be terminated; and (b) the rights of the adoptive parents must be commenced. If those two dates are different, then the adoption takes effect or is effected on whichever is the later date, because both events must have taken place. However, in the normal course of events one would expect that both events take place simultaneously. One need merely pause momentarily to consider each of the possible scenarios (i.e. creation of new rights without termination of old ones, or termination of old rights without creation of new ones) to appreciate the potential difficulties that might arise if both events do not occur simultaneously.

**71.** However, to decide *when* the rights of the biological parents were terminated and the rights of the adoptive parents were commenced in this case, it is necessary, under ordinary conflict of laws principles, to look at the foreign law in question. I did not understand the respondent to contend otherwise. In this regard, the information furnished by the Philippine Inter-Country Adoption Board after the appeal hearing is helpful.

**72.** The position, at least regarding the creation of the adoptive parents' rights, is now clear, following clarification *via* the affidavit of laws. The adoptive parents' rights are considered under Philippine law to operate retroactively to the date of the petition (i.e. November 2009). As the affidavit of laws stated:

> "The date of the effectivity of the adoption retroacively [sic] takes effect on the date of the filing of the adoption petition once the decree of adoption is issued and not on the date of the final order or the Certificate of Finality."

**73.** However, even if we accept that this situation amounts to the adoptive parents' rights having been "effected" on the 9 November 2009, the position regarding the extinguishment of the biological parents' rights is more difficult. As we have seen, the affidavit of laws furnished to the Court explained that there were two procedural routes to adoption in the Philippines. The affidavit said:

> "Termination of parental authority is determined either administratively, through voluntary commitment of the biological parent(s) to the State, or judicially, through a court process. "

**74.** The difficulty arising in this case is that neither of those procedural routes appears to precisely match the process that was adopted in respect of A's adoption. It was not an involuntary commitment through the courts, nor was it a voluntary commitment through the *administrative* process; instead it was a voluntary commitment through the courts.

**75.** The affidavit of the Board's deponent continued:

> "Section 7 of the Philippine Republic Act No. 9523 provides that the certification declaring a child legally available for adoption shall be issued within three (3) months following the filing of the deed of voluntary commitment signed by the birth parent(s). At this point, parental rights of the biological parent(s) over the child is legally terminated and consequently transferred to the Department of Social Welfare and Development. "

**76.** Thus, insofar as it involves a voluntary commitment for adoption, the procedure described involves (a) a filing of a "deed of voluntary commitment" signed by the birth parents; and (b) a certificate issuing three months thereafter, which terminates the parental rights of the biological parents over the child.

**77.** It now appears, however, that as a matter of fact there was no deed of voluntary commitment in the present case. This appears to be because the Regional Court in the Philippines "did not require submission of a Deed of Voluntary Commitment by the birth parents' in circumstances where 'an Affidavit of Consent to Adoption was signed by the birth parents" (see para. 43 above). The parents' affidavits of consent were sworn on the same date as the petition, namely the 9 November 2009. The Court was told by email on the 15 February 2022:

> "Notwithstanding regular procedures, the [Department of Social Welfare and Development] was not given any notice of the proceedings hence no Certification Declaring the Child Legally Available for Adoption (CDCLAA) was issued for [A].

> The court social worker which handled [A]'s adoption stated that the court did not require submission of a Deed of Voluntary Commitment (DVC) by the birthparents was not provided. Instead the PAPs submitted an Affidavit of Consent to Adoption signed by the birthparents. "
>
> (Emphasis added)

**78.** The Court has reviewed those Affidavits of Consent to Adoption sworn by the biological parents on the 9 November 2009. They were produced by the appellant shortly before or on the date of the final hearing of the Court in relation to the case.

**79.** Thus, from what the Court knows about Philippine law from the evidence before it, it appears that if the administrative process had been used, there would been a Deed of Voluntary Commitment and, after the passage of three months, a certificate would have issued which would in essence have confirmed that the biological parents' rights had terminated. However, because this particular adoption proceeded voluntarily through the courts, no such deed was required by the court, and no certificate issued. It would not be unreasonable to assume that the biological parents' rights would have terminated after the passage of three months in the same way, but there is no evidence before the Court specifically stating this to be case. Further, the wording of the order of the 28 March 2011 should be recalled. It recites: that there was a hearing on the 14 January 2010 and that nobody appeared apart from the parties and the Government; that the biological parents of the minor, as well as the minor herself, had given consent to the adoption; and that there was a report prepared by a social welfare officer that the appellants were fit in every way to adopt the child and recommending adoption. The order then says:

"WHEREFORE, finding the present petition for adoption to be sufficient in form and substance to the full satisfaction of this Court, the same is hereby GRANTED.

Accordingly, the minor [A] shall henceforth by virtue hereof be freed from all legal obligations of obedience and maintenance with respect to her natural parents and to all legal intents and purposes be the legitimate child of herein petitioners, acquiring reciprocal rights and obligations arising from the relationship of parents and child/daughter and that her name shall now be [A].

Likewise she shall become the legal heir of herein petitioners and shall remain the legal heir of her natural parents and other blood relatives."

**80.** The wording of the order refers only to the *minor's* rights and obligations and is notably silent as to any termination of her birth parents' rights having *already* occurred three months after the date of the petition. It will be recalled that the appellant submitted that there had been procedural delays in the Philippine system by reason of the illness and subsequent replacement of the original judge who presided in the case. It may be that what should have happened here, rather than the automatic termination of rights taking place three months after the petition, is that the termination would have been effected by a court order within a reasonably short period of time from the hearing date. In fact, there was a delay of some 14 months due to exceptional factors beyond the appellant's control, but it was unfortunately a crucial 14 months from the point of view of the commencement of the 2010 Act. Looking at the wording of the March 2011 order, together with the absence of any direct evidence that the biological parents' rights were extinguished by operation of law three months after the

date of petition and submission of their sworn affidavits of consent, I find myself unable to find, on the balance of probabilities, that the biological parents' rights were terminated before the commencement of the Act. We simply do not know what the effect of the dispensing of the need for the Deed of Voluntary Commitment was and for that reason there is a lacuna that cannot be filled to the required standard of proof.

**81.** Therefore, in my view, there is a lacuna in the evidence before the Court which prevents me from reaching a definitive conclusion that the adoption was "effected" before the commencement date of the Act (i.e. the 1 November 2010). Even if the adoptive parents' rights are considered to have been created in November 2009 (before the Act's commencement, by reason of the retroactive provision), there is no clear proof that the biological parents' rights had terminated three months after their affidavits of consent were sworn on the 9 November 2009 (as would have occurred had a Deed of Voluntary Committal not been replaced by affidavits of consent) and thus, before the Act's commencement. In the absence of proof that both events (termination *and* creation of rights) took place before the commencement of the 2010 Act, I cannot conclude that the adoption was "effected" before its commencement. I reach this conclusion, I must say, with some regret. However, the Court cannot in a case of this kind, concerning critical issues of personal status, reach a conclusion that a statutory test has been met on the basis of incomplete evidence or assumption.

**82.** This is a most unfortunate situation, and one which appears to have arisen through no fault of the appellant or his wife but because of the Philippine court's decision to dispense with the requirement to file a Deed of Voluntary Commitment (DVC) in the face of an affidavit of parental consent to adoption and/or the unusually slow progress of A's adoption

through the Philippine court process due to the illness of the presiding judge and, ultimately, the replacement of that judge. From all the documents we have seen, it seems likely that were it not for this delay, this adoption would have been finalised in the Philippines well before the commencement of the 2010 Act. Accordingly, I conclude that the evidence does not establish that the statutory test set out in section 57(2)(a) has been satisfied. In the circumstances, I will proceed to consider the question of the Court's discretion pursuant to section 92 of the 2010 Act.

## The Second Issue: the Court's power to direct pursuant to section 92 of the 2010 Act

**83.** The scope of the discretion conferred on the High Court by section 9 2 has been the subject of considerable discussion in the authorities. Section 92(1) provides as follows:

> "— (1) If, on application to the High Court in that behalf by a person who may make an application to the Authority under *section 90(3)*, the High Court is satisfied that an entry with respect to an adoption in the register of intercountry adoptions should be made, cancelled or corrected, the High Court may be order, as appropriate—
>
> (a) Direct the Authority to procure the making of a specified entry in the register of intercountry adoptions
>
> (b) Subject to *subsection (2)*, direct the Authority to procure the cancellation of the entry concerned in the register of intercountry adoptions, or
>
> (c) Direct the Authority to make a specified correction in the register of intercountry adoptions.

### *The first Mexico case*: *O'C. v. Údarás Uchtála na hÉireann* [2015] 2 I.R. 94

**84.** In *O'C. v. Údarás Uchtála na hÉireann*, the High Court made an order pursuant to section 92 for the entry of an intercountry adoption on the Register in relation to an adoption which did not comply with the requirements of the Hague Convention and where the adopting couple did not have a valid Article 23 certificate from the designated central authority in Mexico. The key fact which led to the court's use of section 92 was that the adopting couple had obtained a declaration of eligibility and suitability ("DES") from the Irish authority *before* they had travelled to pursue an adoption abroad, in accordance with the system in place under the 1991 Act. This happened prior to the commencement of the 2010 Act. The child in that case had been placed with the adopters prior to the 1 November 2010, i.e. four days after it was born, but the adoption was not legalised until some months later, at which point the 2010 Act had come into force. Abbott J. reached his conclusion that the adoption could be registered upon a concept of "vested rights" in circumstances where the adopters had engaged with the Authority and had received the DES before travelling to Mexico to adopt the child. As his views on the scope of section 92 have been overtaken by the judgments in *JB and KB,* I will not discuss these here.

**85.** The Authority did not appeal the decision and indeed not only entered the adoption into the Register but took the same course in relation to a considerable number of other Mexican adoptions with the same background, i.e. where the process had been commenced under the 1991 Act but had not been concluded by the date of the coming into force of the 2010 Act , approximately 15 in number (see paragraphs 40 and 61 of judgment of O'Donnell J. in the Second Mexico case, discussed below).

***Re J.B. and K.B.* [2019] 1 IR 270**

**86.** The Supreme Court gave extensive consideration to the issue of intercountry adoptions under the 2010 Act in the case of *Re J.B. and K.B.* Four members of the Court delivered judgments and a difference of opinion emerged on the scope of section 92 of the 2010 Act and related matters. However, all the judgments were careful to insist that the discretion under section 92 was circumscribed and that the "best interests" test was not a free-standing principle which could be used to subvert the overall intentions of the 2010 Act with regard to intercountry adoptions.

**87.** What arose for consideration in that case was whether the adoption in question could be entered into the Register as a *domestic adoption* in circumstances where the procedures concerning an intercountry adoption had failed to comply with the Hague Convention requirements. The applicants (or more accurately, one of them) had made an application for the adoption of two children (who were relatives of one of the applicants) to an authority in the state of origin ("Country A"). Unfortunately, the application was made not to the designated competent authority but instead to a provincial authority. The provincial authority approved the adoption and the children moved to Ireland with the applicants. When they were informed by their lawyers in Ireland that the Hague Convention procedures had not been properly complied with, they then applied to the Authority for a domestic adoption under section 23 of the Act. They did not seek registration of the adoption as a foreign adoption. After considerable correspondence, and an initial judicial review which was compromised, the Authority stated a case to the High Court to determine whether it was possible to make domestic adoption orders in those circumstances. The High Court answered this question in the affirmative. The Supreme Court reversed and unanimously held that a domestic adoption could not take place in those circumstances.

**88.** The Supreme Court held that a domestic adoption could not be used to circumvent what was in effect a flawed intercountry adoption, nor could an intercountry adoption be re-characterised as a domestic adoption by establishing habitual residence in the State (i.e. the habitual residence of the children in Ireland after they had been brought here). This would defeat the intention of the Oireachtas and of the Convention. The court also decided that there was no longer a common law power to recognise a foreign adoption and that the area was now entirely regulated by statute.

**89.** Where the Supreme Court judges divided was on the question of whether and how the situation could be remedied and whether or not the High Court had discretion under section 92 to direct the entry of the foreign adoption in the Register. A majority of the court (McMenamin, Dunne and O'Malley J.J. concurring) took the view that section 92 of the 2010 Act conferred a power on the High Court to direct entries in the register which was wider than that of the Authority under section 90 of the Act and that the High Court could, in an exceptional case, direct the Authority to make an entry in relation to an intercountry adoption that was not in full compliance with the Convention. The majority judges felt that this approach was accordance with the "best interests of the child" test in the Constitution and the legislation and would be consistent with the spirit of the Convention with regard to exceptional cases. Nonetheless, they also held that even though the power was broader than that of the Authority, it was still a limited discretion and was not as broad as had been suggested by Abbott J. in *O'C v. Údarás Uchtála na hÉireann.* Section 92 was to be interpreted narrowly and with great care.

**90.** At paragraph 96, McMenamin J. said:-

> "Both Article 42A of the Constitution, and the Convention itself, reflect and seek to give effect to the best interests test (See also the ECHR case of *Neulinger v. Switzerland*, App. No. 41615/07, [2010] E.C.H.R. 1053 (6 July 2010), on the question of 'best interests' in the context of the Child Abduction Convention). In this appeal, counsel for the Adoption Authority has urged that the best interests test is protected by giving full effect to the provisions of the Convention, as reflected in the Act. It is submitted by the Authority that such an approach is the explicit legislative intention, as only such interpretation prevents a circumvention of the Act. *I accept this argument, insofar as it conveys that a constitutional interpretation of the Act cannot be utilised to defeat the Act's clear legislative intendment, especially where, as here, the legislation is itself informed by the best interests test.*" (Emphasis added).

**91.** Although he went on to interpret section 92 as conferring a slightly wider power upon the court than the Authority possessed under section 90, he said that the section must nonetheless "*be interpreted narrowly and with great care*", adding –

> "… No interpretation can be relied on to, as it were, interpret the Act "*contra legem*", or contrary to its clear purposes. On one reading, the judgment in *M O'C* might be understood as saying that s.92 could be interpreted having regard to Article 40.1 considerations, such as invidious discrimination between categories of person. Such a wide-reaching proposition is too broad. *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 Act.* The Act effectively sets a very high bar against any categories of persons who seek to circumvent the adoption process. The requirement

is to protect the welfare interests of *all* children who may be involved in inter-country adoptions." (Emphasis added)

**92.** He went on to say that on the facts before him, which he clearly considered "exceptional", he thought that section 92 might be used in the future to regularise the position of the children in that case.

**93.** It is also noteworthy that the concurring judgment of Dunne and O'Malley J.J., who agreed with McMenamin J. that section 92 could be used to remedy the problem which had arisen, laid emphasis on the need for the court in any such application to give careful consideration to the circumstances surrounding the breach of the statutory requirements, mentioning, among other things, "*the role of official error on the part of a state agency in potentially contributing to the mistaken approach of the appellants*".

**94.** A minority (O'Donnell and McKechnie J.J.) took a more restrictive view of the scope of section 92. They were not persuaded that the power of the High Court under section 92 was wider than the power of the Authority under section 90. They considered that the "best interests" test in section 19 of the Act and Article 42A of the Constitution did not authorise any court to exceed the statutory limits of the decision-making process in an area where the area of discretion was defined by the statute.

**95.** O'Donnell J. said (at paragraphs 6-7):

"…the "best interests of the child" is a phrase with a long history in the law relating to children. There is near universal agreement on the merit of the test, but considerable

scope for vehement disagreement on what the test implies in a particular case, whether between parents and children, parents themselves, relatives, social workers, lawyers, and indeed judges. The best interests test involves both broad societal judgments and individualised determinations in a particular case. *In the context of a statute, it does not authorise the court to exceed the statutory limitations of the decision making process: rather, it means that, within the area in which a court has to make a decision, where there is a discretion, the decision should be made on the basis that the paramount consideration should be the best interests of the child, rather than the interests of parents, relatives, or the State itself. Article 42A.4.1º now underpins that. However, the area for decision making in which those considerations apply is defined by the statute.* If it were otherwise, then the effect of Article 42A.4.1°, far from being modest, would be dramatic, since it would mean that in the area of adoption, guardianship, custody and access, the legislation could be reduced to a simple provision that orders may be made or refused whenever it would be in the best interests of the child to do so, in the view of a court. This would be undesirable at a practical level, and also at the level of principle, since it would remove the Oireachtas almost entirely from the area." (Emphasis added).

**96.** In his judgment in the same case, McKechnie J. said (paragraphs 105-107):

"In the situation at hand, the paramountcy of the "best interests of the child", which is specific both to an individual child and in general to all children, is already built into both the Convention and the Act; it is reflected throughout the scheme of both instruments. Reference is made to the principle in the preamble to the Convention, with Article 1(a) providing that one of the objects of the Convention is "to establish

safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".

The Explanatory Report expressly confirms that the establishment of such safeguards in the Convention "will bring about the protection of the best interests of the child" (para. 64) and, to that end, the Convention puts in place a system of shared and mutual cooperation "to ensure the observance of those safeguards"(para. 66) . So, as an integral part of this measure, first, there is a recognition of the best interests of the child; second, safeguards are put in place to reflect this; and, third, a functional system of implementation stands behind it. Accordingly, in my view the international instrument fully reflects this concept of and by itself. So too does the implementing legislation: section 19 of the 2010 Act provides that in any matter relating to the adoption of a child, the Authority or a court shall regard the welfare of the child 'as the first and paramount consideration.'

In such circumstances, I do not believe that it is necessary to have regard to Article 42A of the Constitution as an external source for the protection of the best interests of the child, capable, at one end, of nuancing the interpretation of the Convention/ Act away from what it would otherwise be, or, at the other end, of overriding the requirements of the Convention and/or Act entirely. The Convention and the Act themselves provide the framework through which the best interests of the child are to be protected in a given case. As such, the constitutional obligation contained in Article 42A.4.1º has been discharged; the

best interests of the child having been enshrined in the 2010 Act (reflecting the Convention) as the primary consideration in such matters, in my view it is not necessary to draw again on Article 42A for the purposes of this specific case. Accordingly, I fail to see how that constitutional provision can have a further defining influence on the outcome of this case."

**97.** And at paragraph 109, he said-

"Furthermore, I do not believe that it is appropriate, for interpretive purposes, to import a totally free-standing concept of "the best interests of the child" from an external source, even from the Constitution itself. To permit this single consideration to stand removed from the system put in place by the Act and Convention, with the capacity to supersede all of the other requirements contained in those instruments, would be to open the entire regime up to abuse. "Paramount" consideration cannot mean "sole" consideration. As the Authority has stressed, *allowing the best interests of the children to become the only consideration in a given case runs the risk of setting at nought the protections of the Convention and of encouraging non-compliance therewith by adopters who feel that their actions will not be met by adverse consequences. This would have the capacity to jeopardise the entire structure of the Convention. Although the bona fides of* [*the appellants*] *are not in doubt, the Court must be vigilant not to decide these proceedings in a way which rewards, even encourages, inappropriate conduct on future occasions, or which undermines the Convention*. Accordingly, whilst ever mindful of the best interests of the children, meaning these children specifically, I am of the view that the same must nonetheless be achieved within the ambit of the Convention and Act, insofar as it is possible to do so". (Emphasis added).

**98.** It is clear, therefore, that the "best interests" principle cannot be used by the court to override the normal interpretation of the legislation simply because the adoptive parents (as here) were and are acting *bona fide* in the best interests of the adoptee in a particular case. A loose interpretation of the legislation, whether of section 57 or of section 92, would potentially invite a relaxed approach to the formal requirements of the legislation and circumvent the carefully crafted requirements of the Hague Convention regime. It is clear that such an interpretation is impermissible having regard to the judgments of the Supreme Court in the *J.B.* case concerning the scope of section 92.

**99.** An important point in the present context is that two of the Supreme Court judgments in *J.B. and K.B.* actually referenced the High Court judgment under appeal in the present case. In his judgment, which found in favour of directing registration of the adoption pursuant to s.92, McMenamin J. distinguished the case before him from the present case in the following terms:

> "[132.]Two other briefer observations may be made. The first of these relates to the judgment of Reynolds J. in the High Court in *JM v. The Adoption Authority of Ireland* [2017] IEHC 320, where she declined to register an adoption under s.92 of the Act of 2010. It is quite true that there are similarities between *JM* and the instant case. But there are other distinctions which are, to my mind, important. *Nowhere in J.M. is there to be found any of the unfortunate series of errors in advice and delays which, on the face of things, occurred in this case, and which, inter alia, render it so truly exceptional. The applicants in JM were not even aware of the Hague Convention. They did not engage with any State Agencies, as the applicants did here. There is no*

*evidence that the applicants in JM sought legal or other advice, either in the place where they were habitually resident, Northern Ireland, or in the Philippines.* One must be guarded, because of the state of the evidence, but even based on what is not in dispute, there are indications that these children have been let down in the statutory process. It is these deficiencies which, all other things being equal, in my view create a reciprocal duty to these children to now redress what occurred, in circumstances where, if proper procedures had been correctly followed, the outcome might have been so very different. (Emphasis added).

**100.** In his judgment, O'Donnell J., while explaining why he believed that s.92 should not be employed in the case before him, said at paragraph 8:

"I consider it important, therefore, to observe that I do not understand the decision of the majority in this case to give any support to this approach. That this is so can be seen by considering the nature of the hearing suggested by the court, and the manner in which the majority decision distinguishes the judgment of the High Court in *J.M. v. The Adoption Authority of Ireland* [2017] IEHC 320, (Unreported, High Court, Reynolds J., 17 July 2017). *The focus of any proceedings seeking relief pursuant to s.92 of the Act of 2010 would be on the innocence or otherwise of the error leading to the breach of the statutory provisions, the degree of official culpability, and the general excusability of deviation from what was contemplated by the Convention and the Act. None of these features were present in J.M.*. However, the aspects which loom large in this case, and which were correspondingly absent in *J.M.*, are logically distinct from any question of the best interests of the children. It might be argued in another case – and I wish to emphasise that it is not being suggested here – that where there

> was even a flagrant and deliberate breach of the provisions of the Convention by adults, that nevertheless the position had been arrived at where the best interests of the child might be seen to be served not just by recognition of a foreign adoption, but by a domestic adoption in Ireland. As I understand it, the court does not consider that such a course could be open even on the most expansive interpretation of s.92 in conjunction with s.19 and Article 42A. The fact that the court has expressed differing views on the question of the breadth of the jurisdiction under s.92 should not obscure the fact that all judgments conceive of such jurisdiction as narrow, and as not extending to permitting the court to make an order recognising a foreign adoption which does not comply with the requirements of the Hague Convention and the 2010 Act simply on the basis that the court considers it would be in the interests of the children to do so. If so, it does not appear to me that Article 42A.4.1º is a necessary or, indeed, a useful guide on the interpretative issue."

**101.** Thus, two of the judgments of the Supreme court in the *J.B. and K.B.* case expressly reference the High Court judgment in this case in terms which clearly suggest that neither of them believed that section 92 could be used in the present case, even though they were divided as to its use in the case before them. It is only fair to observe that this Court has had the benefit of much more information concerning the circumstances of the adoption of A, including the delay due to the illness of the judge, as well as the particulars of the law of the Philippines.

***The Second Mexico Case: Údarás Uchtála v. K and F and others*** **[2021] IR 751,**

**102.** Another Supreme Court decision in the area of intercountry adoption was delivered on the 19 October 2020, namely the decision in *Údarás Uchtála v. K and F and others* [2021] IR 751, or the "Second Mexico case". These proceedings (like the *O'C* case) involved adoptions in Mexico where the adopters had obtained a Declaration of Eligibility and Suitability (a "DES") before travelling to Mexico. The only difference from the *O'C* case was that the babies in question were *born after* the 2010 Act came into force. The Authority refused to register their adoptions on the basis that any vested rights were "*too contingent and speculative to be capable of being vested for the purpose of the accrued rights principle contained in s.27 of the Interpretation Act*". The Supreme Court disagreed and held that the adoptions *could* be entered into the intercountry adoption register, and that there was no valid distinction between those cases and the *O'C* case. O'Donnell J. at paragraph 47 said:

> "…Not only was there no requirement under the 1991 Act or under the DES granted under that Act that a prospective adoptee be born at the time of the grant of the DES, it was instead to be anticipated that a child to be adopted under a DES might well not be born at the time of the grant… there is, in my view, no logical basis to restrict such rights to adoptions which occurred in respect of children born prior to the 1 November 2010…"

**103.** Key to the decision was the fact that the Authority was prepared (after the First Mexico case) to register children whose situations were identical except in the single matter of the date of their birth. As O'Donnell J. pointed out at paragraph 40 of his judgment, the distinction of treatment by the Authority gave rise to a "*striking difference of treatment*" between one of the children (born after the commencement date) and a sibling (born before the commencement date), but only one of whose adoptions was entered into the Register. He

cited some leading cases on the constitutional principle of equality, including *McMahon v. Leahy* [1984] IR 525, *Hanley v. Minister for Defence* [1999] 4 IR 392 and *N.H.V. v. Minister for Justice and Equality* [2018] 1 IR 246 and concluded that the differential treatment of the children in the two Mexican cases was not based upon a "relevant consideration" within the meaning of the language as used by Henchy J. in the *McMahon* case, saying:

> "In my judgement, it would be a failure to hold the persons concerned equal before the law in such an important feature of their human personality if the law were to permit different outcomes in these cases…" (at paragraph 66)
>
> -and-
>
> "I think it appropriate to add that the principle of equality before the law guaranteed under Article 40.1 of the Constitution means that the Authority cannot lawfully refuse to register the adoptions in this case in the register of intercountry Adoptions." (at paragraph 68).

**104.** The present case presents entirely different facts from those arising in the First and Second Mexico cases, where the courts were prepared to order registration pursuant to section 92. In those cases, the adopting parents had engaged with the Irish authority and obtained a DES (the essential document under the 1991 Act regime) prior to travelling to Mexico. In those circumstances, the courts recognised that they had "vested rights" which required to be recognised. In the present case, the appellant and his wife did not engage at all with the Irish authority prior to taking steps to procure an adoption in the Philippines and

later seeking the entry of A's adoption into the Register of Intercountry Adoptions. Therefore, the question of vested rights simply does not arise.

*Application to Present Case*

**105.** It is true that the facts of the present case are distinguishable from those in the Mexico cases. There was no interaction between the appellant and the Irish authorities akin to that in the Mexican cases. Nonetheless, it is in my view important in addressing the application of s.92 to observe that the present case displays the following features:

i. The appellants commenced the adoption process in the Philippines, with the sworn consent of the birth parents and by means of a formal court petition, a full 12 months before the commencement of the 2010 Act;
ii. The adoption was carried out through the Philippine court with due formality and appropriate procedures and was ultimately finalised in accordance with the law of that jurisdiction;
iii. It appears that through no fault of the appellant and his wife, the illness of a judge and the judge's replacement led to delays in the issuing of the final necessary orders in the case, which was a straightforward application to which no objection was ever made and which was made with the consent of the birth parents;
iv. The only issue precluding recognition of the adoption is one of exact timing, that issue arising in a context that is both particular and unusual;
v. The foreign law in question (section 16 of the Philippine Rule on Adoption) provides that a decree of adoption shall take effect 'as of the date the original petition was filed' and the Order of March 2011 in this case confirms that it is itself '*a Decree of Adoption, effective as of the date of this petition on November 9, 2009'*;

vi. Under the law of the Philippines, containing as it does a retrospective provision, the rights of the adoptive parents are *now* deemed to have commenced on 9 November 2009 i.e. a date *before* the commencement of the 2010 Act;

vii. The affidavit of laws further confirms that as of the date of the filing of the petition in November 2009 the relationship between the adoptive parents and A is recognised '*as if the child had been born to the adoptive parents*';

viii. There remains only an evidential lacuna as to when precisely the birth-parental rights were terminated under the foreign law;

ix. If the adoption had proceeded through either of the two channels described in the affidavit of laws, the extinguishment of the birth parents' rights would have taken place, automatically and by operation of law, 3 months after the petition in November 2009; and the minor evidential lacuna arises because the affidavit of laws did not confirm the position with regard to the procedure actually used in this case—a procedure in which the local court (and not the appellant) dispensed the requirement for the filing of a Certificate of Voluntary Committal;

x. It appears likely that had it not been for the delay in the court process leading to the issuing of final orders, the extinguishment of the birth parents' rights and the creation of the adoptive parents' rights would have taken place well before the 2010 Act had commenced;

xi. That the case is genuinely exceptional and not likely to lead to general or repeated circumventions of the Hague Convention requirements;

xii. There was no subjective attempt on the part of the appellant or his wife to circumvent the requirements of the 2010 Act or the Hague Convention;

xiii. The appellant and his wife acted at all times in good faith and in the best interests of the child;

xiv. The Authority itself has recognised that the Affidavit of Laws does indeed appear to provide a basis for it to consider entering the child's adoption on the Register, had the proof of the date of final termination of parental rights been supplied;

xv. The obtaining of the aforesaid proof required by the Authority is not within the power of the appellant because of the local court's decision to dispense with the filing of a CVC in circumstances where it had before it the sworn consent of the birth parents and where the weight of such evidence as is available to the Court points to the 9 November 2009 as being the date upon which the adoption became effective; and

xvi. That to exercise the discretion in section 92 in this case would not in my view defeat the object and intent of the 2010 Act.

**106.** I appreciate that the exceptionality in this case is not of a similar kind to that arising in the Mexican cases, which involved the active involvement of Irish authorities (or what was described as "official error"), but section 92 itself does not constrain the type of exceptionality that may justify its deployment. What is important is that the Court stays within the parameters of the discretion as identified by the Supreme Court in the authorities described earlier, and that it does not use the discretion in such a manner as to undermine the intentions and objects of the legislation. In my view, the Court would be remaining within the appropriate parameters by exercising the discretion pursuant to section 92 on the facts of this case and I propose therefore to direct that A's adoption be entered upon the Register

**107.** I have reached this conclusion notwithstanding that the High Court decision in this case (which this Court proposes to reverse) was referred to by the Supreme Court with

apparent approval in the *JB and KB* case. As I have already observed, the explanation for the difference in approach lies in the fact that considerably more information has come to light during the course of this appeal as to the precise circumstances of this adoption together with the legal framework under the law of the Philippines. This was not available at the time of the High Court decision, nor was it available to the Supreme Court at the time of its observations in *KB and JB.* Accordingly, having carefully considered those remarks, and while affording those remarks the respect they deserve, I conclude that it is nonetheless appropriate to reach a different conclusion to that of the trial judge by reason of the greater pool of evidence and information which was laid before the Court on this appeal.

**108.** I also wish to observe that the Court proposes to exercise its discretion by reason of the particular facts of this case. The respondent had argued that reliance upon retrospective provisions of a foreign law could lend itself to abuse by other jurisdictions. I am satisfied that this situation does not arise in the present case and is not a reason for refusing to exercise the discretion in the appellant's case.

**109.** In view of my conclusions on both aspects of the case, I would allow the appeal and make an order directing that the Registrar enter the adoption upon the Register. Murray J. and Power J. have both had an opportunity to read this judgment and have authorised me to express their agreement with it.

**110.** The appellant was self-represented. Unless the respondent wishes to make representations to the contrary and so notifies the Registrar of the Court within 14 days, the Court proposes to make no order as to costs.