THE COURT OF APPEAL
Civil

UNAPPROVED
NO REDACTIONS NEEDED

Appeal Number: 2022/170

Whelan J **Neutral Citation Number [2022] IECA 196**

Costello J

Power J

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (AS AMENDED)
AND
IN THE MATTER OF MISS B, A MINOR,

BETWEEN/

CHILD AND FAMILY AGENCY AND MS A

APPELLANTS

- AND –

THE ADOPTION AUTHORITY OF IRELAND

FIRST RESPONDENT

-AND-

MS C

SECOND RESPONDENT

-AND-

MR Z

JUDGMENT of Ms Justice Máire Whelan delivered on the 10th day of August 2022

Introduction

1. This is an appeal from the order of Mr Justice Barrett made in the High Court on the 6th July 2022 wherein he refused the application pursuant to section 54(2) of the Adoption Act 2010 (as amended) that the first named respondent be authorised to make an adoption order in relation to the child, Miss B, in favour of the second named appellant Ms A. There is some degree of urgency attendant upon the within application by reason that Miss B will attain the age of majority in the coming weeks. Judgment was delivered by the High Court on the 27th June 2022, (with a neutral citation as follows: *Child and Family Agency and Anor. v The Adoption Authority and Ors.* [2022] IEHC 389).

Background

2. The background facts are considered in very great detail in the High Court judgment. Briefly put they include the following factors. Miss B was born prematurely, at 28 weeks, in September 2004, to Ms C and Mr Z, the third child in their marriage. Ms C, deposed in her affidavit that at that time she was experiencing emotional, physical and sexual abuse by her husband and had not realised that she was pregnant with Miss B for a time. She stated she was drinking alcohol to excess during the pregnancy to cope with the abuse she was experiencing. Miss G, Ms C's older daughter, the half-sister of Miss B, had disclosed in 2004 that Mr Z had been sexually abusing her. Ms C experienced difficulties following the birth. She gave signed consent for the placement of Miss B in voluntary care in December 2004. She has been residing with the foster carer from that time to date – a period of over 17 and a half years.

3. Ms C completed a 28-day rehabilitation programme in 2005 and has been sober ever since. Two other minor children of Ms C and Mr Z were placed in care while she attended this programme. Ms C also completed parenting courses and a psychological assessment. A barring order against Mr Z was obtained in March 2006. She received custody of her other

two children, Mr F and Miss G in 2006, after allegations their foster father was sexually abusing another child. The care orders were discharged in 2007.

4. Miss B was subsequently the subject of a diagnosis of Foetal Alcohol Syndrome and associated global developmental delay. She has a moderate general learning disability.

5. Ms A, the foster mother of Miss B, seeks to adopt her. She is described by the trial judge as a divorced single woman with two adult children. She had stated that she had discussed guardianship but since it would cease upon Miss B reaching the age of majority, she felt that adoption offered the best option to provide permanency and security for Miss B. She stated she completed a foster care course in 2003 and has availed of many courses since then.

Legislation

6. The Adoption (Amendment) Act 2017 amended and replaced some key provisions of the Adoption Act 2010.

The resultingly amended section 19 provides: -

> **9.** The Principal Act is amended by the substitution of the following section for section 19:
>
> "19. (1) In any matter, application or proceedings under this Act which is, or are, before—
>
> (*a*) the Authority, or
>
> (*b*) any court,
>
> the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.

(2) In determining for the purposes of *subsection (1)* what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including—

(*a*) the child's age and maturity,

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

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

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

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

(*f*) the child's upbringing and care,

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

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

(3) In so far as practicable, in relation to any matter, application or proceedings referred to in *subsection (1),* in respect of any child who is capable of forming his or her own views, the Authority or the court, as the case may be, shall ascertain those views and such views shall be given due weight having regard to the age and maturity of the child.

(4) Without prejudice to the generality of subsection (3), the Minister may make regulations prescribing the procedures by which the Authority or the

court, as the case may be, shall determine how best to ascertain the views of the child, in so far as practicable, in any matter, application or proceedings, and, without prejudice to the generality of the foregoing, such regulations may—

(*a*) make provision for the procedures that are to apply to enable a child to present his or her views in person or in writing or by other means (including by electronic means) to the Authority or the court, as the case may be,

(*b*) make provision for the procedures that are to apply to enable a child to nominate an appropriate person to present the child's views orally or in writing or by other means (including by electronic means) to the Authority or the court, as the case may be,

(*c*) prescribe as appropriate persons—

(i) a class or classes of persons who, in the opinion of the Minister having regard to the functions to be performed by members of such class or classes of persons under this section, are suitable to be appropriate persons for the purposes of such functions, or

(ii) a class or classes of persons who, in the opinion of the Minister having considered the qualifications, training and expertise of such class or classes of persons by reference to the functions to be performed by members of such class or classes of persons under this section, are suitable to be appropriate persons for the purposes of such functions,

(*d*) make provision for the procedures that are to apply in respect of any consultation by the Authority or the court, as the case may be, with a child or an appropriate person,

(*e*) make provision for the consultation by the Child and Family Agency with a child for the purpose of ascertaining his or her views and for the procedures relating thereto, including procedures relating to the preparation and submission of any written reports arising from such consultation to the Authority or the court, as the case may be,

(*f*) prescribe the standards to be applied by an appropriate person to the performance by the person of his or her functions under this section,

(*g*) prescribe the allowable expenses that may be charged by an appropriate person referred to in *paragraph (c)(i)* and the fees and allowable expenses that may be charged by an appropriate person referred to in *paragraph (c)(ii)*,

(*h*) make provision for such other matters as the Minister considers necessary to ensure that appropriate persons are capable of performing their functions under this section.

(5) Regulations under this section may—

(*a*) make different provision in relation to—

(i) children of different ages and maturity, or

(ii) different classes of appropriate persons,

and

(*b*) contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.".

The resultingly amended section 54 provides: -

24. (1) Section 54 of the Principal Act is amended—

(a) by the insertion of the following paragraph in subsection (1):

"(a) if the Child and Family Agency is satisfied that every reasonable effort has been made to support the parents of the child to whom the declaration under section 53(1) relates,".

(b) by the substitution of the following subsection for subsection (2):

"(2) On an application being made under paragraph (a) or (b) of subsection (1), the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants and to dispense with the consent of any person whose consent is necessary to the making of the adoption order.",

(c) by the insertion of the following subsection after subsection (2):

"[2A] Before making an order under subsection (2), the High Court shall be satisfied that—

(a) for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section

53(1) relates, have failed in their duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected,

(b) there is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare,

(c) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child,

(d) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents,

(e) the child—

(i) at the time of the making of the application, is in the custody of and has a home with the applicants, and

(ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants,

And

(f) that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents.",

And

(d) by the substitution of the following subsection for subsection (3):

"(3) In considering an application for an order under subsection (2), the High Court shall—

(a) have regard to the following:

(i) the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child);

(ii) any other matter which the High Court considers relevant to the application,

And

(b) in so far as is practicable, in a case where the child concerned is capable of forming his or her own views, give due weight to the views of that child, having regard to the age and maturity of the child,

and, in the resolution of any such application, the best interests of the child shall be the paramount consideration.".

The High Court Judgment

7. To a substantial extent the judgment is focused on the failures and omissions of the Child and Family Agency ("CFA") towards the birth mother, Ms C and in facilitating her level of contact with Miss B over the years. The trial judge noted: -

> "*1. The natural father has never played any meaningful part in Miss B's life and has placed no affidavit evidence before the court. So although I touch upon his refusal of consent later below, the real focus of this application is the well-intentioned refusal of consent by Ms C, a demonstrably competent mother, who has raised her other children well.*
>
> *2. As will be seen in the pages that follow this is a case in which the Child and Family Agency has not done a good job…*"

The judgment then carries out an extensive analysis of the engagement between the CFA, and its predecessor body, and Ms C.

8. Thereafter, the trial judge considered the various factors he is required to take into account pursuant to the statute and analyses the evidence of the parties adduced in respect of same. In his legal analysis the trial judge observed; at paras 17-20: -

> "*17. Section 19(1) of the Adoption Act 2010 (as amended) requires me to have regard to the best interests of the child as the "paramount consideration" (albeit not the sole consideration) in the resolution of any matter, application or proceedings under the Act of 2010. I note and of course accept the observations on the meaning of the word "paramount" in the judgment of Walsh J in G v An Bord Uchtála [1980] I.R.32 and, e.g. in such cases as CFA and Ors v EM and Anor. [2018] IEHC 172. In determining what is in the best interests of Miss B, over the preceding pages I have (i) had regard to all the factors/circumstances that seem relevant to Miss B, including those expressly iterated in section 19(2) of the Act of*

2010 and, (ii) pursuant to section 19(3) of the Act of 2010, ascertained and had regard to the views of Miss B.

18. I do not see what adoption at this time (about 10 weeks before Miss B turns 18 years of age) will achieve. As is clear from Ms A's affidavit evidence, Miss B is genuinely loved by her wider foster-family and that love patently does not rest on Miss B's standing as a foster-child rather than an as an adopted child. (Love is not determined by legal links). If Miss B wants the surname of her foster-family she can change her name by deed-poll when she turns 18 years of age. And if Ms A wants to bequeath property to Miss B, her adult children are now raised and 'gone from the nest' and no longer dependants so she can bequeath her property however she wants. So all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency). I do not see that to cut that 'natural mother - natural child' legal link at the very moment when a child is about to enter adulthood, when I can see no particular advantage to the adoption, and when that adoption seems unlikely to have the slightest effect on Miss B's day-to-day existence is somehow in Miss B's best interests – and I note that those interests, while paramount, are not the sole interests at play. I am allowed also, without in any way compromising the paramountcy of Miss B's best interests, to have regard to the interests of Ms C in wishing to retain both natural and legal bonds with her child (a wish which in this case seems to me to be compatible with Miss B's best interests).

19. Also, for the reasons outlined above and following on my meeting with Miss B. I am not entirely persuaded that she fully understands the significance of what adoption means in terms of her legal relationship with her natural mother.

20. Turning next to s.54 of the Act of 2010, the Child and Family Agency is clearly satisfied that every effort has been made to support the parents of the child to whom the declaration under s.53(1) relates. I do not myself see how the Child and Family Agency can properly be so satisfied when one has regard to the patent deficiencies in its dealings with Ms C (as addressed by me in the consideration of her affidavit evidence). However, this is not a judicial review application and I merely note that the Child and Family Agency is (strangely) so satisfied."

9. The High Court clearly determined that it was satisfied that the factors in section 54[2A](a), (c), and (e), respectively, had been met on the application of an objective test. Thereby, *inter alia*, compliance with same is not in contention and there is no cross-appeal against the relevant findings, including, that for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the second and third respondents, the parents of Miss B had failed in their duty towards her to such an extent that her safety or welfare is likely to be prejudicially affected – [2A](a). The trial judge was further satisfied that failure constituted an abandonment on the part of the parents of all parental rights whether under the Constitution or otherwise with respect to Miss B – [2A](c).

10. Having reviewed section 54[2A] and determined that the necessary proofs specified in section 54[2A] (b), (d) and (f) had not been met to his satisfaction, as regards the birth mother Ms C, albeit finding that the requirements pursuant section 54[2A](a), (c), and (e) had been satisfied, he observed at para 21, page 37: -

"*…Again, I do not see what adoption at this time (about 10 weeks before Miss B turns 18 years of age) will achieve. As is clear from Ms A's affidavit evidence, Miss*

B is genuinely loved by her wider foster-family and that love patently does not rest on Miss B's standing as a foster-child rather than an as an adopted child. (Love is not determined by legal links). If Miss B wants the surname of her foster-family she can change her name by deed-poll when she turns 18 years of age. And if Ms A wants to bequeath property to Miss B, her adult children are now raised and 'gone from the nest' and no longer dependants so she can bequeath her property however she wants. So all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency). I do not see that to cut that 'natural mother natural child' legal link at the very moment when a child is about to enter adulthood, when I can see no particular advantage to the adoption, and when that adoption seems unlikely to have the slightest effect on Miss B's day-to-day existence is somehow in Miss B's best interests. All the foregoing being so I do not see that I can safely conclude that the adoption by Ms A. is a proportionate means by which to supply the place of both parents (or even of Ms A alone)."

11. Concerning the application of section 54(3), he observed at para 22, pp 37-38, that: -

"*…there is not the slightest suggestion that in the circa. 10 weeks until Miss B turns 18 years of age or at any time thereafter that Ms A (should Miss B elect at all times in the future to stay with her after she turns 18 years of age) has the slightest intention of not looking after Miss B. And were Miss B to decide sometime after she reaches the age of 18 years that she wishes instead to live with her natural mother (and she has manifested no such intention but were she ever to do so) it is obvious that Ms C is willing and able to provide her with a home and look after her to the extent that*

Miss B requires looking after as an adult. So regardless of whether or not she is adopted, Miss B's right as a child to have her welfare safeguarded is secure for the remaining period of her childhood (and, indeed, her welfare will continue to be protected thereafter)."

12. Re-iterating his position to an extent, the trial judge noted at para 23, p38;

"*23. Added to that, I do not see what adoption at this time (roughly 10 weeks before Miss B turns 18 years of age) will achieve. As is clear from Ms A's affidavit evidence, Miss B is genuinely loved by her wider foster-family and that love patently does not rest on Miss B's standing as a foster-child rather than an as an adopted child. If Miss B wants the surname of her foster-family she can change her name by deed-poll when she turns 18 years of age. And if Ms A wants to bequeath property to Miss B, her adult children are now raised and 'gone from the nest' and no longer dependants so she can bequeath her property however she wants. So all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency). I do not see that to cut that 'natural mother-natural child' legal link at the very moment when a child is about to enter adulthood, when I can see no particular advantage to the adoption, and when that adoption seems unlikely to have the slightest effect on Miss B's day-to-day existence is somehow in Miss B's best interests – and I note that those interests, while paramount, are not the sole interests at play. I am allowed also, without in any way compromising the paramountcy of Miss B's best interests, to have regard to the interests of Ms C in wishing to retain both natural and legal bonds with her child (a wish which in this case seems to me to be compatible with Miss B's best interests).*"

He refused to make the order sought.

Notice of Appeal

13. By Notice of Appeal dated the 7th July 2022, the appellants appealed the entire decision on the following grounds: -

(1) the trial judge erred in his refusal of the Orders sought

(2) the trial judge did not correctly apply the provisions of Section 19 of the Adoption Act 2010 (as amended)

(3) the trial judge did not properly have regard to the best interests of the child and/or the paramountcy of such interests as provided for by law

(4) the trial judge did not properly take into account the views of the child

(5) the trial judge did not correctly apply the provisions of Section 54(1) of Adoption Act 2010 (as amended)

(6) the trial judge did not correctly apply the provisions of Section 54(2) of the Adoption Act 2010

(7) the trial judge erred in law and in fact in his examination of and/or factual determinations based upon the Affidavit evidence before him

(8) the trial judge did not take proper or sufficient account of all the evidence submitted on behalf of the appellants.

14. The first-named respondent, the Adoption Authority of Ireland, sought that this Court allow the appeal and that it make an order pursuant to section 54(2) of the Adoption Act 2010 (as amended), and an order to dispense with the consent of any person whose consent is necessary to make such an adoption order. The second-named respondent, the biological mother of Miss B, Ms C, opposed the appeal.

Written submissions of the parties

The Appellants

15. Briefly put, regarding the application of section 19 of the Adoption Act 2010, the appellants emphasise that the best interests of the child is the paramount consideration in light of Article 42A.4.2. of the Constitution.

16. They argue that the Child and Family Agency complied with the provisions of section 54(1) as amended, citing MacGrath J in *Child and Family Agency and HR and FR v Adoption Authority and PW and AW (Re CW A Minor)* [2018] IEHC 515 (*C.W.)* and in particular para 108 of the said judgment.

17. The appellants emphasise that it has never been disputed that the child, Miss B, was never in the care of either the birth mother or birth father who in December 2004 left the maternity hospital. She went directly into the care of her foster parent, Ms A, where she has resided for over 17 years. They emphasise that the trial judge determined that criteria (a), (c), and (e) of section 54[2A] had been satisfied – findings not disputed in this appeal.

18. Factors relied upon included that the biological parents played no parental role in caring for the child since her birth, never sought to discharge the Care Order granted in July 2007 and that the foster parent has cared for her on a day-to-day basis throughout. They cited McGuinness J in *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252 (*NAHB)* as to the meaning of "*parental duties*" in the context of a child.

Section 54[2A](b)

19. They contend the trial judge did not give adequate or proper consideration to (b), as the focus must be on any potential prejudice to the child and not solely on parental competence; the trial judge did not give adequate consideration of the effect of removing the child from caregivers she had known all her life and the consequences this would have on a

stable foundation for adulthood. *N.A.H.B.* and *C.W.* were relied on. *Southern Health Board v An Bord Uchtála* is also cited.

Section 54[2A](d) and section 54[2A](f)

20. They argue that the ongoing failures of the respondents as to its nature and duration satisfy the threshold for intervention by the state, through the making of the order as sought and that proposed adoption would be proportionate in the circumstances. They contend, contrary to the second-named respondent's submissions, that wardship would be unnecessary, the stability and security of the child would thus be taken away unnecessarily, and the second-named respondent would not have a legal relationship with Ms A in those circumstances.

21. The appellants note that Miss B is well looked after by her foster family, has been living happily and safely in the placement for the past 17 years and is thereby similar to many children with a moderate general learning disability who are looked after by their family in childhood and throughout adult life.

Section 54(3) and section 19

22. Walsh J in *G v An Bord Uchtála* [1980] IR 32 at p76 is cited in regard to the meaning of "*paramount*" in this context: -

> "*The word "paramount" by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word "paramount" certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case*."

23. In having regard to the best interests of the child, section 19(1) of the Adoption Act 2010 sets out a list of factors including *inter alia*, the age and maturity of the child, the likely

effect of adoption, the physical, psychological and emotional needs of the child, which, the appellant submits, was not properly analysed by the High Court. They contend that from the evidence and the affidavits, the trial judge ought to have been amply satisfied the best interests of the minor favoured the adoption order and the dispense of the consent.

24. The appellants argue that *Strand Lobben and Ors v Norway* (ECHR:2019, Application no. 37283/13), which the trial judge had relied upon in refusing to make the orders sought by reason of perceived failures on the part of the CFA to adequately support the re-integration of Miss B into her birth family, is distinguishable and does not support the respondent's claim that the orders ought not to be made,

25. They also submitted that the overriding circumstances disclosed by the evidence demonstrate that there are no real prospects for family reunification, and it is instead in the child's best interests that the proposed adoption by the foster mother, Ms A should proceed.

First-Named Respondent's Submissions

26. The Adoption Authority ("The Authority") supports the appeal and similarly seeks the adoption order to be made under section 54. The Authority relies upon *C.W.* wherein MacGrath J found each of the requirements in section 54[2A] of the Act must be met; he adopted an objective approach in examining the reality of the child's living circumstances as opposed to the reasons for the failure on the part of the parents. This respondent drew an analogy between his comments at para 111 of the judgment that the parents objectively had no involvement in the child's upbringing which amounted to an abandonment and the circumstances disclosed by the evidence in this case.

Section 54[2A](b)

27. The trial judge, the Authority contends, had erred in his approach to section 54[2A](b) as the consideration is not the competence of the parent but the safety and welfare of the

child which, they argue, would be prejudicially affected if she was removed from the only home she has ever known and put into the care of the biological mother.

Section 54[2A](d) and section 54[2A](f)

28. Regarding section 54[2A](d), the Authority relied on the decision of MacGrath J in *CW* which provided that the State's requirement to supply the place of the parents does not lessen with the maturity of the child and more mature children should not be excluded *per se* from the benefits of adoption. The Authority submitted that the trial judge had erred in his approach to section 54[2A](f), when he observed that he did not see what adoption would achieve. Adoption was the only means to give legal effect to the established sense of identity, security and belonging that existed between Miss B and her foster family.

Section 19

29. In relation to the paramountcy of the best interests of the child, Denham J (as she then was) in *McD v L* [2010] 2 IR 199, was relied on, particularly at p276 of the judgment, where she observed "*the circumstances in which a child lives and the relationships of the child are important factors in determining the best interests of the child*" and her observation that the persons with whom the child lives will be an important aspect of their life, and that factor should weigh heavily in determining their welfare.

30. Regarding the child's views, the Authority acknowledged her views of adoption are limited owing to her disability, but she did understand that her foster mother will be her mother and she will continue to reside with her foster mother "*forever*". The High Court appeared to place a burden of persuasion on Miss B, it argued, which has no precedent in authority when he said he was not entirely persuaded the child understood the consequences of adoption on the legal relationship between her and Ms C. It considered that the averments in the relevant affidavits supported that conclusion.

31. The Authority expressed deep concerns regarding the comments of the trial judge finding there is little merit or purpose in making an adoption order where the child is on cusp of adulthood which was incorrect in the circumstances of the case and contrary to precedent, noting Jordan J's observation in *Child and Family Agency and MH and IAH v Adoption Authority* [2021] IEHC 53.

Second-Named Respondent's written submissions

32. The second-named respondent opposes the appeal for the following reasons: -

(1) the trial judge had afforded fair procedures in the context of the affidavit evidence;

(2) the trial judge had proper and due regard of all the factors in respect of the best interests of the child for the purposes of section 19 of the Adoption Act 2010 as amended;

(3) the trial judge had proper regard to the wishes of the child;

(4) the proofs under section 54[2A](a)-(f) were not satisfied and thus, the adoption order was not warranted; and

(5) the failures of the CFA in their statutory and ECHR duties impacted on Miss B being brought up in the family in her best interests.

33. In her written submissions, the second-named respondent submitted that the affidavit evidence of the social worker was hearsay so the trial judge did not deny fair procedures by not considering it whereas the affidavit by Ms C related to matters within her own knowledge.

34. Regarding the best interests of the child, Ms C submits the trial judge had proper and due regard of all the factors in respect of the best interests in the application of section 19(1)-(3). While counsel noted that it would have been preferable for the trial judge to set out the factors pertaining to the best interests under section 19(2), he was not obliged to and his

judgment clearly sets out he considered all those factors and the evidence in reaching his conclusion. *QR v ST* [2016] IECA 421 is authority that a failure to stipulate all the factors expressly will not necessarily mandate an appeal, though it is not sufficient for a trial judge to make a bald assertation that they had considered all the factors. Furthermore, the approval of the dicta of Hoffman L.J in *Piglowska v Piglowska* [1999] 1 WLR 1360 by the Court of Appeal in *QR* is relied upon to support the contention that there is no hierarchy as between the of factors specified in section 19(2). Counsel submitted that very little evidence as to Miss B's best interests had been adduced to the Court, such as pertaining to her capacity and the impact of the order on her. The CFA's affidavits set out the background facts with an absence as to their failings. The evidence that was submitted was framed in a manner in the context of why an adoption order should be made.

35. The trial judge's observations were relied on particularly where he opined at para 4: -

> "*So all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency)*."

36. Citing O'Donnell J (as he then was) in *In the Matter of JB* [2018] IESC 30, counsel for Ms C argues that the best interests of the child test calls upon the trial judge to make their own determinations using their own training and experience to achieve such. They submit the blood link has been long recognised in this jurisdiction, noting in *N v HSE* [2006] 4 IR 374, where Hardiman J observed such a bond is highly valued by parents, children and siblings alike and is illustrated by the frequency of the phenomenon of the adult who seeks to find their biological parents years later after separation.

37. Counsel for Ms C also submitted the trial judge properly had regard to the wishes of the child, which in child abduction cases is usually achieved through guardian ad litem or a

report, the latter being absent in this case. In *AU v TNU* [2011] 3 IR 683, Birmingham J in the High Court decision had noted while it is the case generally the older the child the more weight is given to their views, the views of an older child are not determinative and the weight afforded shall depend on the circumstances of the case. Miss B's understanding of the adoption process has been found to be "somewhat limited" by the Adoption Authority and the trial judge. *Child and Family Agency v ML* [2019] IECA 109 is distinguishable, it was said, on the basis the biological mother said she would discontinue access and the child had refused contact with the biological family for many years whereas, in this case, Miss B has a limited comprehension of adoption legally and enjoys contact with her biological mother who has a greater capacity to care for her than the parent in *ML*.

38. It was argued that the decision in *Re the Adoption (No. 2) Bill 1987* [1989] IR 656 was of relevance in approaching a consideration as to whether compliance with the various requirements of section 54 had been met. Finlay CJ therein had stated regarding section 3 of the Bill under consideration, which the respondent submit is largely similar to section 54, that each of the requirements of the section must be met before the court makes an authorising order. MacGrath J in *CW supra*, was relied on as confirming that the provisions of section 54(3) reflect the Constitutional mandate in Article 42A.4 that in proceedings concerning, *inter alia*, the adoption of any child, that the best interests of the child shall be the paramount consideration.

39. The second respondent states that regarding section 54[2A](b), the trial judge correctly decided that Ms C was a demonstrably competent mother, who has experience of working with people with intellectual disabilities, has good insight into the needs of Miss B, and is able to empathise with rebuilding the relationship with Miss B gradually and at her pace was supported by the evidence. In terms of section 54[2A](b), the trial judge correctly found that the CFA did not make a reasonable effort to support the relationship between biological child

and parent. The second respondent submits that the finding that the CFA failed to provide reasonable supports must be taken into account when assessing the proportionality of the adoption order.

40. Counsel for Ms C submits regarding section 54[2A](f) that an adoption order was not proportionate nor warranted in the circumstances, where the child is soon to reach the age of 18 and where the backdrop is that the CFA failed to facilitate the relationship between biological mother and child. Adoption would be disproportionate and contrary to her interests. Counsel for Ms C states that upon majority, Miss B can make decisions about her preferred family if she has capacity and if she lacks capacity, then wardship would be proportionate. The Grand Chamber in *Strand Lobben v Norway* is relied on in regard to Article 8 ECHR and proportionality as follows: -

> "*207. Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see Gnahoré, cited above, § 59).*
>
> *...*
>
> *208. Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (see, for instance, Olsson v Sweden (no. 1), 24 March 1988, § 81, Series A no. 130). The above-mentioned positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively as to increasing force*

as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child…"

Section 54[2A](f)

41. In the consideration of the proportionality of a potential adoption order, Ms C's senior counsel submitted that the court must be in a position to consider alternatives. MacGrath J in *CW* considered the English caselaw and in particular, the decision of Munby P. in *Re BS* [2014] 1 WLR 563 where the latter had stated at para 27: -

"*What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another…*"

42. Ms C's counsel noted that the appellant failed to consider the alternative of wardship which, if Miss B has an intellectual disability and is found to lack capacity after an assessment, would be appropriate. If, however, Miss B has capacity, then the trial judge is correct to find upon reaching the age of majority, the decision regarding her future relationships with Ms A and her foster family and Ms C and her birth family are hers alone. They submitted the trial judge was correct to conclude adoption would serve no particular advantage and would not affect Miss B's day-to-day existence.

43. Moreover, the second-named respondent drew the Court's attention to the CFA's breaches of their ECHR and statutory obligations, including, *inter alia*, Article 17(1) of the Child Care (Placement of Children in Custody) Regulations 1995 which requires a child to be visited a minimum of every six months, and under Standard 5, have an allocated social worker, which Miss B did not in the period of July 2014 to March 2017. Access plans were also not drawn up, nor were reasonable requests for increased access provided for contrary to section 37 of the Child Care Act 1991 which stipulates the CFA is under a duty to facilitate reasonable access to the child by their parents.

Arguments made before this Court

Arguments on behalf of CFA and prospective adopter

44. It was contended by Mr O'Higgins SC that all necessary procedural steps had been taken prior to the institution of the within proceedings by both the CFA and the Adoption Authority. He attached emphasis to the grounding affidavit sworn on behalf of the Adoption Authority which confirmed that in contemplation of the within application to the High Court all necessary procedural steps had been fully complied with, including the appropriate declaration pursuant to section 40 of the Adoption Act 2010, as amended in respect of Miss B the Adoption Authority had granted a declaration on the 15th February 2022 that it would, subject to the provision of section 53 of the said Act, make an adoption order in respect of Miss B for her adoption by the second named appellant. It was contended that the methodology adopted by the trial judge was flawed and, *inter alia*, that the trial judge had failed to pay sufficient heed to the views of the professionals involved. Further it was submitted that there were internal inconsistencies in the judgment and the conclusions were incorrect as a matter of law particularly with regard to the manner in which the trial judge treated the relevant factors and concluded the statutory exercise in his approach to the exercise pursuant to section 54[2A] and (3) and section 19(2).

45. Emphasis was placed on the evidence regarding the child's overall sense of identity and stability within the family of Ms A and the reality of the long-term relationships which she has developed and have meaning in her life in that household. It was contended the trial judge lost sight of those factors. It was emphasised that Miss B had never resided with her biological mother and the latter never had responsibility for her care. She is now fully integrated into the only family she has ever known, and a relationship of mutual familial love and affection exists between her and Ms A and the foster family.

46. Focus was placed on the day to day life of Miss B, it being observed that in relation to medical care and important life decisions with regard to schooling, education, medical treatment, prospective surgery, all such decisions have been made by Ms A in accordance with the tenor of the care order in place and the carrying into effect of all same have been the exclusive and sole responsibility of Ms A throughout the child's life. In that regard an Enhanced Rights Order pursuant to s43A of the Child Care Act, as amended, had been made in favour of Ms A for the benefit of the child in 2010 and the said order had been made with the knowledge and consent of the birth mother.

Section 54

47. Three aspects are in contention in this appeal in respect of the trial judge's assessment pursuant to section 54[2A](a)-(f) of the Adoption Act, 2010, as amended. The factors are distinct, and each must be objectively established separately to the satisfaction of the Court.

48. It is not in contention that the trial judge was correctly satisfied, within [2A](a), that for the 36 months immediately preceding the application, Miss B's parents had failed in their duty towards her to such an extent that her safety or welfare is likely to be prejudicially affected. Thus, the fact of the failure of the parental duty for that relevant temporal period and its likely prejudicial impact on the welfare of Miss B were made out.

Section 54[2A](b) "*There is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare*"

49. The trial judge determined that this ground was established as regards Miss B's natural father Mr Z but not in relation to her mother, Ms C. He noted: -

> "*However, I cannot conclude that there is no reasonable prospect that Miss C (a demonstrably competent mother) would not be able to care for Miss C in a manner that would not prejudicially affect Miss B's safety or welfare. There is of course no question of any change as to who will have the day to day care of Miss B in the roughly ten weeks before she turns 18 years of age. Even so, I do not see that I can properly conclude that there is no such reasonable prospect in the case of Miss B were Miss B to be entrusted to her*."(para 21, p35)

50. On behalf of the appellants it was contended that the trial judge fell into error in his analysis of the relevant facts and in his conclusions that factor [2A](b) had not been met. Counsel contended that as the trial judge was satisfied that the birth mother was, in general, a competent mother he had erroneously inferred that therefore she would have been in a position to provide appropriate care for the needs of Miss B. It was the view of the Adoption Authority that the trial judge had not properly assessed whether or not there was a "*reasonable prospect*" that the birth mother would be able to care for Miss B in a manner that would not prejudicially affect her welfare between the hearing and her attaining the age of majority.

51. Counsel on behalf of the appellants argued that the intention of the Oireachtas under subclause [2A](b) was to focus on the care needed for the child and "*specifically on the question of whether there is no reasonable prospect that the birth parents would be able to care for the child in a manner that will not prejudicially affect … safety or welfare*".

52. It was contended that the trial judge had failed to factor in sufficiently the realities of the case, particularly that Miss B had never resided with or been cared for by her birth mother.

Section 54[2A](c) "*The failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child*"

53. This factor had been proven to the satisfaction of the trial judge and no issue arose in relation to same.

Section 54[2A](d) "*By reason of the failure of the State, as guardian of the common good, should supply the place of the parents*"

54. The trial judge concluded: -

> "*There is no doubt that the place of Miss B's absent natural father could be supplied by the State. However, I am not persuaded that this standard is met in the case of Miss C She is a demonstrably competent mother (as evidenced by her thoroughly competent rearing of Mr F. and Miss G). Were for example the existing foster arrangements to collapse in the morning (and they will not but were they to do so) I have no doubt on the evidence before me but that Miss C would be perfectly able to function as a competent and loving mother to Miss B and that it would be overreached by the State to supply her place*."

It was contended by the appellants that, as with the approach adopted in relation to section 54[2A](b), the trial judge had applied a similar erroneous rationale to his approach to the criterion at [2A](d) having regard to the birth mother's relationship with other children.

Section 54[2A](e) "*The child – (i) at the time of the making of the application, is in the custody of and has a home with the applicants and (ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants*"

55. The trial judge had no difficulty in being satisfied that "*both of these requirements are satisfied*". No issue arose in relation to the said finding in this appeal.

Section 54[2A](f) "*That the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents*"

56. The trial judge was not satisfied that this criterion had been met, observing at p37 of the judgment: -

> "*I do not see what adoption at this time (about 10 weeks before Miss B turns 18 years of age) will achieve…*" as cited above at, *inter alia,* para 7.

57. Counsel for the appellants contended that the granting of the order by the Court would be proportionate in the context of the best interests of Miss B and also, in the context and having due regard to her clearly expressed desire to remain with her foster mother. He argued that the making of the order and the adoption of Miss B by the prospective adopter was warranted contending: -

> "*There is nothing disproportionate about taking the correct and necessary step in order to uphold this child's sense of identity and long-term security and stability*."

58. He contended that, contrary to the findings of the trial judge, the relevant tests had been met in respect of each limb. In this context, Mr O'Higgins SC submitted that in approaching the issue the trial judge did so on the basis that the granting of the order would bring no benefit to Miss B. He also indicated to the Court that his client, the foster mother, was willing to put on affidavit her proposals with regard to an undertaking concerning facilitating future contact between Miss B and her birth mother Ms C.

59. In response to questioning concerning the importance of the child's sense of identity and the approach to the proportionality assessment, Ms O'Toole S.C. suggested that the court was required to consider whether there were less serious or alternative measures open to protect the interests of Miss B. It was further contended that in carrying out the

proportionality assessment "*…it is important that regard should be had to section 54(3), and these are the statutory requirements that due weight must be given to the views of the child, having regard to the age and maturity of the child and secondly, that in the resolution of any application the best interests of the child is a paramount consideration*". He further argued that "*a consideration of the other potential options makes it clear that adoption is the only proportionate option*".

Arguments on behalf of the Adoption Authority of Ireland

60. Counsel for both the appellants and the Authority emphasised that section 19 of the Act, which is directed towards the correct approach towards the resolution of relevant factors concerning a child, operates and applies in respect of all of the Act and makes clear that the best interests of the child in question is the paramount consideration in the resolution of the issue to be decided. It was further contended that the prerequisite steps encompassed by the judicial exercise specified in section 54[2A](a)-(f) inclusive, give recognition and effect to the constitutional rights of the birth parents: -

> "*…It is saying when you are dealing with these constitutional rights we're going to set out thresholds that have to be met…[they represent] A statutory attempt by the Oireachtas to give effect to those constitutional rights*."

It was argued that the application of statutory criteria in section 54 effected "*a lot of the balancing… it takes the best interests on the one hand and says, well it's not just best interests… it's also the statutory criteria*".

61. In the context of proportionality in the trial judge's approach to section 54[2A](f), it was expressed generally with regard to the intrinsic value of adoption particularly in circumstances where a child is approaching their 18th birthday. Particular reference was made to a number of passages from his judgment including para 18, p34: -

"*So all that adoption would undoubtedly achieve at this time is to cut the link between a loving natural mother and a much loved natural child…*".

The judicial observations are substantially similar to the *dicta* of the trial judge at para 23, page 38, as set out at para 9 above.

62. Mr Carolan SC expressed concern that the trial judge appeared to have taken a view of adoption "*that focuses on only the severing of the relationship, and obviously that's important that's why section 54 is there. There is no consideration or no adequate consideration of what's created by the making of an adoption order*".

63. He went on to outline a series of positive or constructive benefits that would enure to Miss B in particular, and adoptees in general, from the making of an order. He emphasised particularly the circumstances where a child is older and approaching attaining the age of majority beyond which no adoption order can be made in law. He outlined that an adoption order: -

(a) "Gives legal recognition to the lived reality of this child, to the de facto family that she has been with for 17 years since she was four months old."

(b) Responding to submissions and arguments on behalf of the birth mother which had referred to decisions of the European Court of Human Rights he emphasised that the jurisprudence of that court pursuant to Article 8 has given legal recognition to the *de facto* family and that de facto families "are a consistent principle of the Convention".

(c) He emphasised that absent an adoption order the child has no legal relationship with the persons they know as their family once the care order ends on attaining the age of 18.

He further contended that the analysis of the trial judge undervalued "*the positive effect of adoption. It undervalues their effects not just for security and stability… but for the identity*

of the child to give legal recognition to that child and how that child sees herself… It is not just about her legal understanding, that's important obviously. But her understanding of who she is and who her mother is and who her family are. That is important".

64. Counsel for the Authority emphasised that the trial judge had failed to advert to the fact that were no adoption order to be made in the case of Miss B there would be no legal recognition of the relationship between Miss B and the person who has exclusively discharged all the functions and obligations of a mother since she was four months old. With regard to Miss B's foster family he observed: -

> "*She has no legal relationship to any other part of her foster family… those legal relationships all fall away at 18*."

By said contrast, counsel emphasised that the biological relationship subsists "*and will always subsist*".

Future contact with the birth mother

65. With regard to the maintenance of a future relationship between Miss B and her birth mother Ms C, in response to enquiries from the Court, counsel for the Authority emphasised that the trial judge did not refer at any point to the fact that beyond the determination of the Care Order there is no recognition in law of the relationship between Miss B and the foster family with whom she has resided from the age of four months. A legal relationship will subsist in the absence of an adoption order, with her birth parents. No legal relationship will exist between Miss B and the person "*she regards as her mother*". In the context of the importance of maintaining a *de facto* relationship or the possibility of same to be autonomously pursued by Miss B with her birth mother, counsel emphasised the importance of the fact that the foster mother in her affidavit had deposed that: -

> "*…I am very much in favour of and see the importance of Miss B's contact with her birth family. I say that I have facilitated contact throughout her childhood and*

without social work involvement. I say that I will continue to support Miss B to have contact with her birth family in the future."

66. Counsel for the Authority reiterated that there had been legal certainty and a legal relationship between Miss B and her foster mother from the age of four months which is ongoing but that that legal relationship will fall away at 18. He acknowledged "*that it is an aspect of our adoption system that it sunders one relationship as it creates another*". The judge, he argued, had focused on the sundering aspect and had not adequately focused on the creation of a relationship with the applicant/appellant. That relationship in the event that the adoption order is made would be "*a durable permanent legal relationship*". By adopting the stance he did, of considering that "*there wasn't any benefit to adoption*", he had failed to engage with the positive benefits of the subsisting legal relationship being rendered durable and permanent in nature. It was contended that the approach of the trial judge was contrary to the jurisprudence.

67. Counsel for the appellants and the Authority both emphasised that the approach of the trial judge to the potentially positive benefits or effects of adoption in respect of a child who is approaching their 18th birthday and the age of majority was erroneous. On behalf of the Authority it was contended that the trial judge's analysis had undervalued the effect of orders in respect of such children "*not just for security and stability… but for the identity of the child to give legal recognition to that child and how that child sees herself*…" in the context of her expressed wishes and legal understanding. In the context of Miss B, he emphasised that that understanding encompasses "*…who she is and who her mother is and who her family are*".

68. Both the appellants and the Authority also placed reliance on the decision of the High Court in *CFA v ML* [2020] IEHC 419 and the importance of having regard to the beneficial effects of the order for the person in question. Reliance was placed on the decision of Jordan

J in *Child and Family Agency v GK and Ors* [2020] IEHC 419, it being contended that the approach in the said court and in other recent jurisprudence from the High Court commended itself with regard to the application of the principles in question particularly in light of the age of Miss B.

Arguments on behalf of Ms C – the birth mother

Proportionality

69. In contending for an approach upholding the determination of the trial judge with regard to the factors considered pursuant to section 54[2A](b), (d), and (f), in particular, and a series of arguments were advanced that the child had a diagnosis of Foetal Alcohol Syndrome with developmental delays related to same. It was contended that there was "*no clarity as to what impact that has on the child*". It was submitted that her understanding of adoption was limited. But it was asserted that there was no information before the Court as to how the topic of adoption was dealt with her and further that there was no capacity assessment before the High Court in relation to her. It was accepted that these issues had not been raised before the High Court. Counsel referred to the Transcript of the interview between the trial judge and the child and note that all her answers to the judge's questions were "*yes*" and there was no suggestion that of her own volition she was "*actually able to formulate anything other than … a yes or no answer*". It was asserted that the wishes of Miss B were actually difficult to ascertain and accordingly the trial judge was entitled to come to a view that it was difficult to know whether "*they were her wishes because she just gave mono syllabic answers*".

70. It was agreed that the trial judge had dedicated a substantial part of the judgment to considering the historic interface between the birth mother, Ms C, and the CFA and the deficits of same. He had found multiple failings on the part of the CFA. It was contended that the said failings identified by the trial judge were relevant to a determination of the

question of proportionality of the adoption. It was accepted that whereas the two older siblings of Miss B had been taken into care in May 2005 they had subsequently been returned to care of the birth mother in 2007. By contrast, the birth mother had never initiated any application to vary the Care Order in respect of Miss B or to seek an order either for custody of Miss B or requesting additional access to her.

Custody and care not sought pending Miss B attaining 18 years

71. With regard to Ms C's proposals in connection with the future care of Miss B, it was indicated by her Counsel that pending the child attaining the age of majority Ms C was not seeking that Miss B be placed in her care. It was reported that it was Ms C's "*wish that she would ultimately come to reside with her but her mother has sufficient insight to know that that would have to be a gradual process and sufficient insight to know it would have to be at the child's pace. … When children are taken into care the onus is on the State to ensure that attempts at reunification are made and what actually happened here was that my client effectively under her own steam was able to keep this relationship with her daughter going until 2021*". With regard to recent jurisprudence from the High Court pertaining to section 54 and section 19 of the 2010 Act, it was suggested that the said authorities were distinguishable "*all of these cases turn on their facts*".

72. In regard to the course of dealings between the CFA and Ms C it was stated that "*there is a whole lot of 'what ifs' but the point about it is none of them were explored*". A significant number of complaints were raised directed towards the difficulties Ms C reported in funding travel and transportation to enable her to exercise access from 2011 onwards.

73. It was acknowledged by counsel for Ms C that Miss B does not have any deep relationship with her three birth siblings.

74. Directing her arguments to section 54[2A](f) and the question of "*proportionate means*" and whether the granting of an adoption order, on the facts, is proportionate it was

contended on behalf of Ms C that there had been "*abysmal failure*" by the CFA in carrying out its statutory duties and that the child's right to be brought up by her family and to know her family had not been respected by the CFA. It was said that since there is no question in this case that Miss B would be "*transferred willy nilly into the custody of her mother*" it was questionable whether to grant an adoption order would be proportionate in such circumstances.

Arguments of Ms C for wardship

75. It was contended that a more proportionate solution presented in the form of wardship. It was contended that wardship offered a formal legal structure predicated on best interests. It was elsewhere contended that Miss B would not be left in a vulnerable situation were the order being sought to be refused: -

> "*There's no suggestion she is going to be removed from her foster carers. She's going to have those relationships … enduring for so long as both parties wish to have that relationship. What we are talking here about is this child having the benefit of remaining a member of her constitutional family, with her birth mother and her birth siblings, and having the benefit of this … relationship with a family with whom she has grown up, and I would have thought that that's the best of both worlds. There's no suggestion or threat here*."

76. It was contended that the Ms C did not wish to be cut out and wished to rebuild the relationship with her daughter "*at her pace*". It was acknowledged that at no time did Ms C initiate any step such as would lead to Miss B coming to reside in her. Reliance was placed on the decision of *Pedersen v Norway* (ECHR:2020, Application no. 39710/15) in support of a contention that CFA was to blame for the difficulties encountered in relation to access and contact between the birth mother and Miss B. In conclusion it was asserted that: -

> "*In looking at the question of best interests and proportionality in terms of making this adoption order, the fact that there has been such failings across the board is a relevant consideration even to best interests at this point in circumstances such as the present where … the child is about to enter adulthood. … Where the child is about to enter adulthood and at least in theory be autonomous somewhat different considerations can apply*."

It was contended that the making of the adoption order as sought by the appellants' "*wouldn't be proportionate*".

General Observations

The standard of review

77. This matter was heard on affidavit before the High Court save and except that on foot of a notice of intention to cross examine Ms M, a social worker employed by the CFA, who had belatedly become involved with the file concerning Miss B. She was subsequently cross examined on her affidavits, sworn on the 27th April, and 13th June 2022 at the hearing. There were a number of areas of dispute between Ms C, the birth mother, and the said deponent concerning issues around the discharge by the CFA of its obligations, such as the extent to which notifications had been provided to her of the dates for Child in Care Reviews held pursuant to statute by the CFA in relation to Miss B and concerning the extent to which the CFA supported Ms C in attending scheduled access with the minor Miss B.

78. It is contended on behalf of Ms C that most if not all issues of contested fact between Ms C and the CFA were resolved by the trial judge in favour of Ms C. It is further argued that since in large measure the matters deposed to by the social worker Ms M pertain to events predating her involvement with the file in 2021, the averments in question constitute "*hearsay*".

79. As was observed by Charleton J in *Ryanair v Billigfluege* [2015] IESC 11 (para 4): -

"*The High Court has emphasised that where resolutions of fact are essential to a decision necessarily founded on contradictory affidavit evidence, the trial judge may need to hear such limited portion of the evidence as enables him or her to reach a proper conclusion.: Director of Corporate Enforcement v Seymour [2006] IEHC 369, and see Irish Bank Resolution Corporation Ltd. v Quinn [2012] IESC 51 in the Supreme Court*."

At para 5 he continued: -

"*Any party appealing a decision, however, bears the burden of demonstrating that the trial judge was incorrect as to whatever findings of fact underpin a decision. Where an appeal is taken against essential findings of fact drawn from affidavit evidence, the appellant must establish an error in those findings that is such as to render the decision untenable. Alternately, it may need to be established on appeal that the decision reached was impossible because an essential conflict could not be resolved on what was before the trial judge*."

80. The relevant authorities were the subject of a comprehensive analysis by Murray J in this Court in *A.K. v U.S.* [2022] 2 IECA 65. Having considered the decision in *Minogue v Clare County Council* [2021] IECA 98 of Humphreys J, which had categorised typical situations in which an appellate court is called upon to review findings of law or of fact or mixed questions of fact and law, and other relevant authorities including *Hay v O'Grady* [1992] 1 IR 210 and *Ryanair Limited v Billigfluege* [2015] IESC 11, at para 52 Murray J observed: -

"*Charleton J explained this further in McDonagh v Sunday Newspapers Limited (at para 163) as follows:*

'... The role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved,

but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong'."

Murray J continued at para 53 observing that: -

"*…It follows that in cases in which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inferences as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle. The appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. This, I should observe, reflects the standard of review referred to by Finlay Geoghegan J in D.E. v E.B[2015] IECA 104 at paras 39 and 40, while taking account of the decision in Ryanair Limited v Billigfluege de GmbH & Ors to which he also referred*."

81. In his judgment at para 71 Murray J observed that: -

"*While the trial judge's decision requires some considerable deference, not only is the need for that deference diminished by the fact that she … observed that her conclusion in this issue was marginal, but if this court believes the judge clearly*

erred in her application of the admitted facts to the proper meaning of 'habitual residence' it must – for the reasons I have outlined earlier – correct that error."

Hence where error is identified in the application of the law to admitted facts or where the approach discloses an erroneous understanding as to the law itself it is necessary to correct such error.

82. It is recalled that Collins J in *Betty Martin Financial Services Limited v EBS DAC* [2019] IECA 327 at para 39 observed that: -

"*...while as a matter of principle, "great weight" is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court*."

83. I am satisfied that when it is asserted that there are clear conflicts as between competing affidavit evidence it is firstly important that the court evaluates whether the conflicts contended for are in fact irreconcilable. Moreover and, separately, it is necessary for the court to consider whether such differences are in truth irreconcilable and whether they pertain to fundamental issues central to the determination that the court is called upon to make or whether, in truth, they are of secondary importance in the context of the core matters to be determined and do not fundamentally or materially conflict with a corpus of evidence which otherwise supports the claim being advanced for the relief sought.

Constitutional context

84. Article 42A provides:

"*1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*

2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as

guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4. 1° Provision shall be made by law that in the resolution of all proceedings—

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

ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

85. Article 42A came into operation on the 28th April 2015 by virtue of the referendum in respect of the 31st Amendment to the Constitution. O'Donnell J (as he then was), in *Re JB and KB (Minors)* [2019] IR 270 at p278 observed surmised that:

"*Article 42A was introduced to the Constitution by the 31st Amendment… Article 42A.4.1 does not stand alone. It was introduced as part of an amendment designed to ensure that the Constitution was more clearly child centred. For that reason, for*

example, a new Article 42A.1 states explicitly that the state recognises and affirms the "natural and imprescriptible rights of all children and shall as far as practicable, by its law protect and vindicate those rights".

As I understand it, the amendment as a whole was directed toward a perceived approach of statutory and constitutional interpretation as a matter of history, which was considered to be unsatisfactory in principle, and to give rise to potentially unsatisfactory results. That is because it was considered that issues in relation to children could be skewed by the emphasis placed by the Constitution as originally enacted on the family as the natural and primary educator of children, and as a moral institution possessing rights anterior and superior to positive law, which might lead to cases being resolved in a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents. This occurred perhaps most clearly in the field of the possible adoption of children born to married parents, or parents who were subsequently married. Article 42 can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children, and indeed explicitly permitting the adoption of children whatever the marital status of their parents. In that context, Article 42A.4 was unremarkable, and perhaps the least significant aspect of the amendment."

86. Miss B was born to Ms C and her husband, Mr Z and as such was born into a constitutionally recognised family within the meaning of Article 41. The constitutional protection afforded by Article 41 extends only to the marital family and the primary focus of Article 41 is the protection of the institution of marriage.

87. As is very clear from the tenor of Article 42A its provisions are not self-executing Legislative provision is required to give effect to its objectives and provisions. In the context of adoption that legislation is currently to be found in the Adoption (Amendment) Act 2017.

There is force in the analysis of O'Donnell J as outlined above that Article 42A and the legislation whereby the Oireachtas executed its objects are to be approached on the bases that it operates to effect a "*restating of the balance*" in pursuance of the protection and vindication of the rights thereby explicitly rendered.

"*Restating of the balance*"

88. The Supreme Court in its judgment in *In the Matter of JJ* [2021] IESC 1 observed:

> "*101. It is noteworthy that, in Article 41, the Constitution treats the family as a collective unit and having collective rights. It does not expressly refer to children as having such rights, although that follows by implication from the terms of Article 42.5 when, in referring to the circumstances in which the State may endeavour to supply the place of parents, it is required to do so 'with due regard for the natural and imprescriptible rights of the child'.*"

The Supreme Court went on to observe: -

> "*102. It is obvious that, under the Constitution, which in this respect has not been amended, the family as a collective unit has rights. However, a collective unit made up of individuals who themselves have rights. One issue which may, therefore, arise is the relationship of the collective unit with the State. But particular difficulties which have arisen in the case law are a perceived clash between the rights and interests of different members of the family and in particular, a tension which may arise between the rights and duties of the parents and the rights of the child. This issue is not addressed or resolved by reference to the collective rights of the family unit. This tension was addressed explicitly in Article 42.5 of the Constitution in 1937…*"

89. In Part D of its judgment, at paras 126-128 the Supreme Court observed: -

"*...It is, in our view, important not to focus solely on the textual changes between Article 42.5 and Article 42A.2.1° in order to understand the scope and application of Article 42A.2.1°. It is necessary to place Article 42A.2.1° in the context of Article 42A generally. It is of some significance that Article 42A.1 provides explicitly that 'the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights'. While, as already observed, the recognition that children had natural and imprescriptible rights was implicit in the provisions of the terms of Article 42.5, this is now made explicit. In doing so, the text crystallises and endorses a developing trend in the case law. As Denham J observed in NWHB: -*

> *'Initially cases were more protective of parental authority and the family in all but very exceptional cases. However, in recent times the child's rights have been acknowledged more fully.'*

The express statement in Article 42A.1 seems to cast some light in turn on the reference in the next subsection to the parental "duty" towards their children as, it seems, a corelative of those rights. This suggests that the parental duty includes protecting and vindicating those rights, and, moreover, that failure may be assessed by reference to the impact of the parental conduct on the rights of the child."

127. Article 42A.2.2° made provision for the adoption of any child where parents have failed for such a period of time as may be prescribed by law in their duty towards the child. This provision appears directed towards making it somewhat easier to permit the adoption of children of a marital family. The same test is now to be applied to adoption of such a child, regardless of the marital status of the parents. However, an adoption is not permissible merely where it can be said that the best interests of the child so require. Instead, the language of parental failure is used,

albeit that neither the formulae of Article 42.5 ("for physical or moral reasons") or of the preceding 42A.2.1° 'to such an extent that the safety or welfare of any of the children is likely to be prejudicially affected' is used.

128. Article 42A.4 provides that provisions should be made by law that in all cases either concerning the adoption, guardianship, or custody of, or access to, any child, or in proceedings brought by the State for the purposes of "preventing the safety and welfare of any child from being prejudicially affected", the best interests of the child shall be the paramount consideration. There is a clear linkage between the language in this provision and that of Article 42A.2.1° and it follows, therefore, that in proceedings where Article 42A.2.1° is invoked, the best interests of the child shall be the paramount consideration, albeit that provision shall be made by law to give effect to this. Finally, in this regard, it is to be noted that Article 42A.4.2° also makes provision that, in all such proceedings, where possible, the views of the child shall be ascertained and given due weight."

The Supreme Court emphasised at para 129: -

"*...It is also important to recognise that the essential structure of the Constitution was maintained. Thus, Article 42A removed Article 42.5 but did not seek to effect any amendment to Articles 41 and 42.1. Thus, the strong statement of the position of the family as the natural primary and fundamental unit group of society possessing inalienable and imprescriptible rights antecedent and superior to all positive law, and as such being the primary and natural educator of the child, is maintained. Article 42A as a whole, and Article 42A.2.1 in particular must be interpreted in that context*."

I am satisfied that the above analysis indicates the approach to be adopted in determining the matters at issue to be decided in this appeal.

Section 54[2A]

90. Each of the specific provisions within section 54[2A] must be established to the satisfaction of the High Court judge and each comprises a distinct legal requirement. The subsections of section 54[2A] constitute the prerequisite steps and proofs that must be established before the High Court proceeds to make an order authorising the Adoption Authority to make the adoption order in relation to the child in question in favour of the prospective adopter and further to proceed to dispense with the consent of the relevant persons who are holders of rights of custody whose consents are a prerequisite to the making of the adoption order.

91. The judgment of the High Court makes clear that the Court was satisfied to the requisite standard that section 54[2A](a), (c) and (e) had been established by the appellants. The appellant does not dispute the correctness of those objective findings.

Section 54[2A](b)

92. Subsection (b) provides that: -

> "*There is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare*."

The Supreme Court in *JJ* at para 57, having considered arguments advanced regarding various potential interpretations of the language observed "*…the other interpretation, more in keeping with the apparent intention of the amendment to make the Constitution more child centred, would read the requirement as merely delineating the type or nature of parental failure necessary before State intervention*".

93. It is noteworthy also that an argument advanced in the Supreme Court in *JJ* directed towards the interpretation of the words "*prejudicially affected*" contended that there was a twofold test to be established in respect of that requirement before the State could intervene in relation to supplying the place of parents the contention being that: -

"*There must be parental failure to such an extent that the safety or welfare of the child is likely to be prejudicially affected <u>and</u> the case must be exceptional*."

94. The Supreme Court in *JJ* had no difficulty in rejecting that construction, holding at para 138 that: -

"*…this cannot be the case. If there is parental failure to the extent required by the Constitution and the rights of children were prejudicially affected then it could not be the case that the State could be precluded from acting to protect the child because there were other children in a similar situation. As has been observed on a number of occasions, exceptionality is not a legal test capable of determining this or any other case. As has been observed, it is potentially dangerous in that it may lead to the wrong downgrading of significant circumstances just because they happen not to be exceptional or to their wrongful upgrading just because they happen to be exceptional." (H.H. (Deputy Prosecutor Italian Republic, Genoa [2012] UKSC 25, [2012] 4 All ER 739). Exceptional is better understood in descriptive terms – that is, describing the test of parental failure rather than adding a separate test. The Supreme Court cited the judgment of O'Donnell J (as he then was) in Minister for Justice and Equality v JA.T. (No. 2) [2016] IESC 17, [2016] 2 ILRM 262, where he stated:*

> *'If a standard for such failure were advanced which, if applied, might lead to considerable, even routine second guessing of parental decision making, then that would give rise to legitimate questions as to whether the standard was in truth that required by the Constitution'*."

<u>"*No reasonable prospect*" – section 54[2A](b)</u>

95. Section 54[2A](b) speaks to a continuing inability or failure – "*no reasonable prospect*" which implicitly compounds an already established subsisting failure of parental

duty (pursuant to section 54[2A](a) as held by the trial judge at para 21, page 35, of the judgment to have been established in respect of both parents in this case in connection with the care of Miss B their child). Not alone is there to be no reasonable prospect that the parents will be able to care for the child in question but it must also be shown that there is no reasonable prospect that they would be able to do so "*in a manner that will not prejudicially affect*" the child's safety or welfare, as the language of section 54[2A](b) makes clear.

96. Significant assistance is to be found as to the correct approach to such failure in the observations of the Supreme Court in *JJ* where at para 143 it observed:

> "*The label of parental failure is one which should not be lightly applied to any parent, particularly to parents where it is acknowledged that they are otherwise caring, considerate, and attentive to their children. There must be failure and, moreover, one which prejudicially affects safety or welfare. This requires something more than a determination that a child would be better off if a different decision were made. In cases where an individual decision is sought to be overridden, it is also important to consider the wider context, such as whether parental co-operation would be necessary and the likely impact on the functioning and operation of the family in the future. The observations of Denham J that the dynamics of relationships in the family unit are sensitive and important and should be upheld if possible, as it is usually to the child's benefit to be part of the family unit, remains apposite*."

Section 54[2A](d)

The *subsection* provides: -

> "*Before making an order under subsection 2, the High Court shall be satisfied that…*
>
> *(d) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents*."

97. In the context of assessing the correct approach to be adopted towards the issue raised in this appeal concerning whether failure has been established amounting in the circumstances to a reason why the order is required to be made by the court to supply the place of the parents in fulfilment of the State's obligation as guardian of the common good as specified in section 54[2A], I find the following excerpts of the Supreme Court's judgment in *JJ* of assistance: -

> "142…*If the court has a jurisdiction to supply the place of parents when the requirements of Article 42A.2.1 are present and the decision of the parents is found to prejudicially affect safety or welfare, then the court must make the decision in place of the parents. That decision must be compatible with the Constitution and the values it espouses, and Article 42A.4.1 is a part of that constitutional value structure. In any event, it is difficult to see how the court could reach its decision other than in the best interests of the child… We think it is best to approach this case on the basis that there is a significant area for family decision making which the Constitution requires the State to respect and protect, and within which parents may make decisions in relation to their children with which experts, and indeed courts and judges, may well disagree. The central issue in this case is whether the decision of these parents …. is one which lies outside the range of permissible family decision making and so that the position of the parents must, at least in this respect, be supplied by the State, in this case, the court.*
>
> ***143.*** *The Constitution requires, however, that a significant space be maintained between the views of families and particular parents and the point at which the State is obliged to intervene. If an official determination of the best interests of the child was to be the sole determinant, then the only decision which parents could, in truth, make will be one which would receive the approval of the representatives of the State.*

> *That is not what the Constitution requires. Instead, the point at which State intervention is required is deliberately set at something which can be properly described as a 'failure of duty' on the part of the parents*."

The matter at issue in that case concerned medical treatment of a child.

"What a loving and considerate parent would do"

98. The statutory exercise arising in the application of Sections 54 and 19 to given facts is, of course, never a question of the court imposing its own views. Judges often have strong personal views on the issues involved on the sanctity of the family within the Constitution, on the conduct of statutory bodies involved with children and on the very principle of adoption itself. Such views are of no relevance and require to be put to one side lest they cloud the objective assessment of the statutory criteria.

99. Though the facts are substantially different in the *JJ* case, I find the analysis at para 176 of particular assistance. The observations made were to the effect that "*in our view, the test is to consider what a loving and considerate parent would do once apprised of all the relevant information. Such a parent would take into account the views of the child, if expressed, and the character of the child, and would make a decision as to the best interests of the child in that context*".

100. The Court further observed that: -

> "*Where it is sought, whether by a decision in wardship or by exercise of the inherent jurisdiction or by making a general declaration, to override a contrary parental decision in relation to a child, then it is necessary to go further and be satisfied by clear and convincing evidence that the decision of the parents is one which prejudicially affects the health and welfare of the child to such an extent that the decision of the parents can properly be described as a failure of parental duty to the child in question*."

The Supreme Court also made clear at para 177(xii): -

> "*If it is established by clear and convincing evidence that the decision of the parents is one which prejudicially affects the safety or welfare of a child then exceptionality is not a separate requirement before the court may supply the place of parents*."

101. In light of the judgment of the Supreme Court in *JJ* including para 177 it appears that a parental failure in duty towards the child within the meaning of section 54[2A] may arise if the decision in question or its absence directly impacts on the child to such a degree that either the safety or welfare of the child in question is likely to be prejudicially affected. It is generally appropriate that the evidence both as to the failure of duty of the parent towards the child in question and the fact that the want of ability to care for the child as a result prejudicially affects her welfare be established by clear and convincing evidence. (*per* 177(xii) of *JJ*)

Effect of failure on child's welfare

102. The Supreme Court in *JJ* noted at para 134: -

> "*The removal of the reference to failure for 'physical or moral reasons', and the new requirement that such failure must be to such an extent as to prejudice the safety or welfare of the child, is a significant change of focus from the cause of parental failure to its effect. To that extent, we consider that the existing case law in parental failure decided by reference to Article 42.5 cannot be directly applied to the position under Article 42A. Indeed, to do so would ignore the fact of amendment. One example is that, given the shift of emphasis just noted, it can no longer be said that blameworthiness is an essential feature of the type of parental failure justifying State intervention. In a comment, referenced in this judgment at para 57, Doyle and Feldman observed that, taken on its own, and read both narrowly and literally, the fact that parental failure is now specified as being of such an extent as to have an*

effect on safety or welfare might be understood as somehow increasing the threshold, since the extent or nature of parental failure (as opposed to its cause) has not been identified under Article 42.5. However, when the provision is read as a whole, and understood in its context in the Constitution, and in particular having regard to the removal of the consideration of physical or moral reasons, we agree with the authors that this phrase is better understood as describing more clearly the type of failure which would always have triggered State involvement and to emphasise that the significance of any such failure is <u>its impact upon the child</u> rather than the motivating or reasoning of the parents." (emphasis added)

103. A net issue is whether in light of the failures in duty by both parents towards Miss B – (held by the trial judge to amount to abandonment in law within section 54[2A](c) by Ms C and Mr Z, her parents) – in the vindication of her natural and imprescriptible rights, the State, as guardian of the common good should supply the place of the parents by making the order sought. Such a formulation of language originally was to be found in Article 42.5 of the Constitution of 1937. The Supreme Court in *JJ* including *inter alia* at para 102, in that context, engaged with the "*particular difficulties*" which arise in the case law and a "*perceived clash*" between the rights and interests of different members of the family and the "*tension which may arise between rights and duties of the parents and rights of the child*".

104. The question is whether the conduct of the parents of Miss B amounts to a failure of parental duties such that the State, through the Court, is obliged to supply the place of her parents and provide the required consent to the proposed adoption pursuant to Article 42A of the Constitution. The trial judge concluded that it did not. In assessing whether his conclusion is correct assistance is to be found in the analysis of the Supreme Court in *JJ*, particularly paras 98-107, in the first instance regarding what constitutes parental failure that

falls within its purview and the historic constitutional and jurisprudential context in which its interpretation is located. The majority approached the exercise by observing at para 98 that "*it will be convenient to consider first whether the express provisions of Article 42A permit the court to grant the relief sought, since a positive conclusion on that issue might dispose of the case…*".

105. The Supreme Court then considered rights in the context of the protections of the family enshrined in Article 41, particularly at para 102 of the judgment as set out above: -

> "*...This issue is not addressed or resolved by reference to the collective rights of the family unit. This tension was addressed explicitly in Article 42.5 of the Constitution in 1937:-*
>
> > *'In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'*
>
> *As Irvine P. observed in this case, it might at one time have been argued that the text of the Constitution should be read as confining Article 42.5 to the provisions of Article 42 and, therefore, to the context of education. On this reading, it might be said that the State could intervene to protect children and their rights in areas other than education without satisfying the high threshold set by the text of Article 42.5, requiring not merely parental failure, but parental failure for physical or moral reasons: something which the Article acknowledges will be exceptional. However, it was well established before the Thirty first Amendment that this reading of the Constitution was not correct and that Article 42.5 sets out the terms upon which the State could intervene in families: that is, the family based on marriage, which the*

same Constitution recognised as the natural and primary unit in Society and the primary and natural educator of the child."

Circumstances "*sufficient to justify State intervention*"

106. The Supreme Court then reviewed the jurisprudence including the observations of Finlay CJ in *Re J.H. (An Infant)* [1985] IR 375 observing in relation to that judgment: -

"*104. Although Finlay CJ in the Supreme Court did paraphrase Article 42.5 so that the evidence of an exceptional case was a failure "to provide education for the child", the 1964 Act nevertheless concerned issues beyond the traditional understanding of education and, accordingly, the finding that the section 3 welfare principle was subject to the provisions of Article 42.5 was a conclusion capable, it seemed, of broader application.*

105. In any event, this conclusion was put beyond doubt by the decision of the Supreme Court in In Re Article 26 of the Constitution and In the Matter of the Adoption (No. 2) Bill 1987 [1989] I.R. 656. The case involved a reference to the Supreme Court by the President of the provisions of the Adoption (No. 2) Bill 1987 which was passed by the Oireachtas to provide for the possibility, for the first time, of the adoption of children of a married couple. The Act expressly provided that it was to provide for the adoption of children "in exceptional cases, where the parents for physical or moral reasons have failed in their duty towards their children" and thus explicitly echoed Article 42.5 of the Constitution. Finlay CJ, writing for the court, said the following at pp 662 to 663:-

'The rights of a child who is a member of a family are not confined to those identified in Articles 41 and 42 but are also rights referred to in Articles 40, 43 and 44. The terms of Article 42, section 5 are reflected both in the long title to the bill and in many of the provisions of section 3. Counsel for the Attorney

General placed considerable but not exclusive reliance on that section as justifying the proposals in the bill. In addition they submit that the State had the duty and right to protect and to vindicate the rights of a child who by reason of its parents' failure has lost, and is likely permanently to lose, not only its rights as identified in Articles 41 and 42 of the Constitution, but also other personal rights which, though unenumerated, derive from the Constitution. It has been submitted that in some circumstances adoption would be the method necessary to afford that protection and vindication.

Article 42, section 5, should not, in the view of the court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. In the exceptional cases envisaged by that section where a failure in duty has occurred, the State by appropriate means shall endeavour to supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child. The State would, in any event, by virtue of Article 40, section 3 of the Constitution be obliged, as far as practicable, to vindicate the personal rights of the child whose parents have failed in their duty to it'." (Emphasis in original *JJ* judgment)

At para 107 the Court further observed that "*...in the first place, it is necessary to decide whether the circumstances of this case are sufficient to justify State intervention under Article 42A*".

107. The Supreme Court in *JJ* proceeded to consider earlier decisions including *North Western Health Board v C.W. and H.W.* [2001] 3 IR 622 *(NWHB*) where the circumstances which could give rise to a failure sufficient to justify intervention by the State had been

explored by the court. The observations of Denham J in *NWHB* were considered at para 113: -

"*This distinction was to the forefront of the decision of Denham J She emphasised the constitutional rights of the child. There was, however, a presumption that such rights were protected within the family structure:-*

> *'The people have chosen to live in a society where parents make decisions concerning the welfare of their children and the State intervenes only in exceptional circumstances. Responsibility for children rests with their parents except in exceptional circumstances. In assessing whether State intervention is necessary the fundamental principle is that the welfare of the child is paramount. However, part of the analysis of the welfare of the child is the wider picture of the place of the child in the family; his or her right to be part of that unit. In such a unit the dynamics of relationships are sensitive and important and should be upheld when possible as it is usually to a child's benefit to be part of the family unit.'*

However, that statement of principle was immediately qualified, and it was recognised that there was a threshold for State intervention which would depend on the circumstances of the case: -

> *'Thus, if the child's life is in immediate danger (e.g. needing an operation) then there is a heavy weight to be put on the child's personal rights superseding family and parental considerations.'*

This focus upon the rights of the child resonates with the terms of Article 42A."

108. The approach of Murray J (as he then was) in *NWHB*, was considered by the Supreme Court in *JJ* as follows: -

"*115. Murray J … approached the case explicitly by reference to Article 42.5. He considered that what was in issue was whether the defendants had acted in such a manner that exceptional circumstances arose by reason of a breach of duty on their part which would justify the State overriding their personal decision with regard to their child in this case. That could not be achieved simply on the basis that the parental decision was not objectively the best decision in the interests of the child, since that would involve the State and, ultimately, the courts in a micro-management of the family, and parents with unorthodox or unpopular views or lifestyles might, for that reason alone, find themselves subject to intervention by the State or one of its agencies. While he did not consider it possible or desirable to define in one neat rule or formula all the circumstances in which the State might intervene in the interests of the child against the express wishes of the parent, it seemed to him:-*

> *'that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally, or socially, deriving from an exceptional dereliction of duty on the part of parents to justify such an intervention'.*

This suggested a more exacting test for State intervention than Denham J, but nevertheless contemplates that the State may intervene and override a single, though serious and fundamental, decision by parents in respect of medical treatment. Murphy J went perhaps furthest, in contemplating that what was required was 'general conduct or circumstances of the parents', rather than a particular decision made in good faith which could have disastrous results. However, even then, he did contemplate circumstances where 'the disastrous consequences of a particular parental decision are so immediate and inevitable as to demand intervention'.

116. In summary, therefore, the decision of this court in NWHB must be understood as concluding that, while there is a significant area for autonomy in family and, in effect, parental decision-making in respect of medical procedures, a single decision by parents may be such as to amount to a failure of parental duty – even in the terms of Article 42.5 – such as to require the State to supply the place of the parents and make a decision that vindicated the child's rights."

Impact of Article 42A

109. The Supreme Court in *JJ* also evaluated the weight to be accorded to the changes effected by virtue of the Amendment embodied in Article 42A. In that regard the observations at para 134 of *JJ* fall to be considered: -

"*It is also clear that the failure under Article 42A.1.2 can be a failure in one single respect and need not amount to a persistent failure tantamount to an abandonment of the parental role. This follows from the limited case law decided in relation to 42.5 already considered but is, if anything, clearer under Article 42A.2.1. The touchstone for State intervention is prejudicial effect on the safety or welfare of a child. This can occur in a single instance and as a result of a step taken or avoided by otherwise conscientious and attentive parents. It is also consistent with the requirement that any State intervention be achieved by a proportionate means since any State intervention may, therefore, be limited to supplying the place of parents in respect of a single decision rather than more generally. It is also noteworthy that a failure of duty sufficient to permit adoption must persist for a period of time to be prescribed by law…*" (emphasis added)

"The rights of the child are separate and individual"

110. The rebalancing of rights wrought by Article 42A was explored by the Supreme Court in *JJ* in the following terms: -

"*136… Since the introduction of Article 42A, the point at which that preference ends – and at which the threshold for State intervention is met – is somewhat clearer. It is also the case, however, that while the Constitution maintains a preference for parental views over those of third parties such as doctors and social workers, and for the family over the State, the fact is that the rights of the child are separate and individual and that the best interests of a child are capable of independent determination. At some point, therefore, the Constitution contemplates, and indeed requires, that the views of third parties be, in turn, preferred to parents.*

137. It is, perhaps, inevitable that, in considering the application of Article 42A and legislation giving effect to it, recourse would be had to decisions in respect of Article 42.5. However, those decisions must be approached with some caution not just because of the distinctions between the facts in such cases, but also because of the changes made to the Constitution. It seems that the introduction of Article 42A was not expressly directed towards reversing the outcome of any particular judicial decision rather than, perhaps, and more importantly, altering the general impression, particularly within State bodies and in the approach taken in the Kilkenny Incest Report referred to by McGuinness J in the judgment in the Baby Ann case (N v HSE, at p. 498). We do not think it is possible or useful to speculate as to the outcome of those cases decided by reference to Article 42.5 if they were now to be decided by reference to Article 42A. In the first case, as already observed, a range of differing views were expressed in the individual judgments. No single test emerged. Furthermore, it is clear that all of these cases involved a close scrutiny of the particular facts. No simple rule of thumb emerges. It is, however, possible to discern the direction of travel, as it were, and to observe, for example, that the

decision in a case such as that of Re Baby AB would, if anything, be made more readily today with regard to the provisions of Article 42A." (emphasis added)

That analysis makes clear that earlier jurisprudence predating Article 42A must be treated with significant caution.

Alternatives to adoption in the context of proportionality and Section 54[2A](f)

"*Proportionate means*"

111. A distinct proof of which the High Court must be satisfied, and the trial judge was not, derives from section 54[2A](f) "*that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents*". The said subsection gives expression to the constitutional mandate to be found in Article 42A.2.1 that the State may supply the place of the parents who have failed in their duty towards their child "*by proportionate means as provided by law*". As stated above in *JJ* the Supreme Court observed having due regard to the arguments advanced that: -

"*The legislative basis for the jurisdiction to supply the place of parents contemplated by Article 42A.2.1 could itself specify the proportionate means required but need not do so. It is sufficient that the proportionate means are applied and have a sound basis in law*."

Wardship

112. Ms C proposed wardship rather than adoption to govern the future relationships of Miss B. Wardship jurisdiction ought not to be lightly invoked. Baker J in her separate judgment in *JJ* on the 22nd January 2021, comprehensively reviewed the historical origins and key authorities concerning wardship. Admission to wardship is a cumbersome process and has the effect of removing all autonomy and the capacity of Miss B to make any decisions concerning her own future life and care. It is a highly paternalistic structure and in its current operation fails to have due regard to the actual true level of capacity of Miss B

and her autonomous right and entitlement to have her stated wishes and preferences respected. The United Nations Convention on the Rights of Persons with Disabilities sets the international norms regarding the recognition and vindication of such rights. The Assisted Decision-Making (Capacity) Act 2015 will in time operate to reflect such norms.

Section 19 best interests of child and views of child

113. Section 19(1) provides: -

> "*In any matter application or proceedings under this Act which is, or are, before*
>
> *(a) The authority or*
>
> *(b) Any court*
>
> *The authority or the court as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings*."

Best interests and the passage of time

114. Section 54(3)(b) requires the High Court to give due weight to the views of the child concerned, having regard to their age and maturity and that the best interests of the child is the paramount consideration. The approach to that exercise is informed throughout by section 19 of the Act. Section 19(2) of the Act provides a non-exhaustive check list of factors which the court must have regard to as set out above. The considerations specified in section 54[2A] are considered in the context or and with due regard to the underlying palimpsest of relevant factors specified in s19(2) of the Act as arise in the specific case under consideration.

115. O'Donnell J (as he then was) in his judgment of the 19th October 2020 in *PP, YY & K. & Ors. v Child & Family Agency* [2020] IESC 64 considered the passage of time in the context of "*best interests*". Speaking to the facts he observed that: -

"*…Each of the parties involved had acted conscientiously, having regard to their differing perspectives, and each is conscious of the best interests of the individual children involved. Nevertheless, the fact is that, almost ten years after both children were born, adopted and brought back to Ireland – they remain in a form of legal limbo and where, as it was put in the legal submissions made on their behalf, they are unrelated by the law of their habitual residence to their de facto parents with whom they live and unrelated by the law of the land of their birth to the people whom Irish law, it is said, maintains are their parents*."

116. O'Donnell J referred to the decision in *J.B and K.B (Minors)* [2019] 1 IR 270 observing, in relation to interpretation of the provision of the 2010 Act under consideration in that case, at para 41 in relation to same. He recalled that the majority in *J.B and K.B* had held that: -

"*The best interests guarantee under Article 42A of the Constitution was not to be seen as an interpretative trojan horse to undermine the 2010 Act. It is clear that both the majority and minority judgments were concerned that an interpretation of Act to permit either a domestic adoption or a broad interpretation of section 92, could permit the circumvention of the 2010 Act*…"

117. The decision in *J.B and K.B* offers helpful guidance with regard to the approach to the best interests including at para 37 where the Supreme Court reinforced the key principle that:-

"*…in any conflict between the parents' rights and those of the child, the best interests of the child must always be paramount*."

The general presumption is that the best interests of the child is vindicated within the family unit. It is therefore necessary to evaluate whether there is sufficient evidence to objectively demonstrate that that presumption has been rebutted in the instant case.

Section 19(2)(a) "*The child's age and maturity*"

118. An assessment of the best interests of a child involves a comprehensive welfare assessment in a very broad sense. It encompasses all aspects of a child's development as a human being and the child's present and anticipated future life. In the context of adoption, a consideration of welfare does not pertain to the here and now alone nor is it confined to a consideration of the future up to the date of attaining of the age of majority. Rather consideration is to be given to the impact that the proposed adoption, or its refusal, would be likely to have not alone on the child's immediate welfare and throughout the remainder of their minority but into and throughout adulthood. It encompasses a medium to long term evaluation, insofar as practicable, of the practical consequences for the child of the court's decision either to grant or refuse the order sought.

119. The importance of having regard to the child's age and maturity accord with the principles to be found in Article 12(2) of the UN Convention on the Rights of the Child which contains a broadly similar provision and also Article 24(1) of the EU Charter on Fundamental Rights.

120. The age and degree of maturity of the child, *inter alia*, informs the court as to the appropriate weight to be accorded to the views expressed by her in respect of her proposed adoption for the purposes of section 19(2)(d). In the instant case of course the trial judge did hear the views of Miss B and she was accorded the opportunity to express those views freely with the judge. In my view, her views were required to be taken into consideration as one of the factors to be weighed in the balance by the judge. The relevance of age and maturity is not exclusively directed towards an evaluation of a child's views.

Section 19(2)(b) "*The physical psychological and emotional needs of the child*"

121. An assessment of best interests in the context of the proposed adoption encompasses an evaluation of physical issues being experienced by the child as well as psychological and

emotional needs. In the instant case the physical needs of Miss B are significant. She suffered from Foetal Alcohol Spectrum Disorder and this manifests in a number of distinct disabilities including associated Global Developmental Delay and some associated attention difficulties with a moderate general learning disability. Her physical issues and moderate cognitive disabilities require ongoing treatment necessitating the wearing of a hearing aid in her left ear, she also has a hearing deficit in her right ear. She has severe scoliosis and a curvature of the spine which affects her gait. It is anticipated that in coming years she will need to undergo surgery. She is on a waiting list at the nearest University hospital to undergo that surgery.

122. Arising from her birth in the context of Foetal Alcohol Spectrum Disorder with associated issues, she underwent a series of surgical interventions which included cardiac and open-heart surgery in 2006. Miss B also suffers from eye duct problems which require surgery. Occasionally she experiences severe asthma and has been hospitalised, including on her tenth birthday in 2014 in connection with a severe asthma attack. She has the use of orthotics in connection with her gait, walking and mobility problems She has undergone corrective surgery to her eye, however that has not been entirely successful. She has in the past experienced severe dental problems Many of these conditions derive from her prematurity at birth, being born at the 28th week and the diagnosis which was ultimately obtained in 2007 of Foetal Alcohol Spectrum Disorder with associated Global Developmental Delay. Her birth mother very fairly acknowledged that she was abusing alcohol and was availing of medication in connection with severe panic attacks in the time prior to Miss B's birth.

123. Miss B has been in the care of Ms A since she was four months old. She is now approximately 17 years and 11 months. The latter has provided for all her emotional needs and has pursued and secured for her a wide variety of assistance and support though

advocacy and through proactive engagement with social services and local and relevant health authorities and bodies including charities.

124. Undoubtedly her world is simple and rural and very stable. She owns a horse and enjoys pony riding. She has a cat. She lives in the vicinity of Ms A's daughter whom she characterises as her sister who has two infant children whom Miss B views as being her own nephews.

125. Given her emotional age and some lack of maturity any severance of the relationship with her sole carer since the age of four months to date or risk or possibility that that might take place at some unspecified time after her 18th birthday in a few weeks' time, can be readily understood to be likely to introduce uncertainty into her future and risks visiting a very substantial traumatic upheaval upon her such as would adversely impact her psychological and emotional needs. At this point she has not completed her secondary school cycle and has a further year to attend school before doing so.

Section 19(2)(c) "*The likely effect of adoption on the child*"

126. Adoption will give legal effect to the *de facto* lived reality of Miss B over the past 17 and a half years. It will establish legal certainty as to her place and position in the only family she has ever known. She will have legal parity with the children of the foster family. Given that children of all ages up to the age of 18 are the subject of adoption and such a process is precluded once they attain the age of majority, having regard to our legal structures, in light of Miss B's disabilities the trial judge attached insufficient weight to the fact that adoption by Ms A would provide continuity of an established long standing relationship with the only person *in loco parentis* to Miss B throughout her entire life. The Court failed to have regard to the potential adverse impact on Miss B of being deprived permanently of the right to belong within the household and be the legally recognised child of the foster family which

had extended great love, devotion, commitment and care towards her during the previous 17 years.

127. The likely effect of adoption would be to regularise and stabilise the status quo that has obtained since December 2004. Under the general law, foster care ends on the child attaining their 18th birthday. On the other hand, an order for adoption imposes significant obligations on the adoptive parent, for instance in respect of maintenance and there is a potential liability until the child attains their 23rd birthday. Likewise, in the context of succession law should an adoptive parent die intestate or any Will be struck down for any reason there is a potential of an intestacy. A child may have potential entitlements in the event of an intestacy. Section 67(3) of the Succession Act provides:

> "*If an intestate dies leaving issue and no spouse, his estate shall be distributed among the issue in accordance with subsection 4. Subsection 4 states:*
>
> > *'if all the issue are in equal degree of relationship to the deceased the distribution shall be in equal shares among them, if they are not it shall be per stirpes'*."

That could potentially vest in Miss B an absolute entitlement to a share in the estate of her adoptive mother. In the event of a Will being made she would have entitlements to whatever share or provision was made for her and significant tax advantages would enure to her by virtue of her status as a child of the testatrix in law. Though material benefits and rights are not of supervening importance in this context, neither are they irrelevant.

128. In the event that the provisions made under the terms of any Will were considered not to constitute "*proper provision*" for Miss B in accordance with her needs, it is open to a court to determine that Ms A as testatrix had failed in her moral duty to make proper provision for Miss B in accordance with her means, enabling the court in such circumstances were it to be

established to make orders for such provision out of the estate of the testatrix/adoptive mother as "*the court thinks just*" in accordance with section 117(1) of the Succession Act.

Section 19(2)(d) "*The child's views on his or her proposed adoption*"

129. This gives practical effect to of Article 42A.4.2. The child's age and maturity is particularly of relevance in the court's endeavour to establish the wishes and views of the child regarding the proposed decision, which is to be considered in the light of the child's age and understanding as evaluated by the judge in the context of maturity.

130. There are undoubtedly many cases when it is not feasible or practicable for a court to evaluate the views of the child where, for instance, they lack all insight into the practical consequences of an adoption. That might arise because of profound disability either mental or physical, or because of their chronological age, or for any other reason. This is not such a case. The interview transcript, taken with the reports from the social worker regarding ongoing expression of positive view by Miss B concerning the proposed adoption clarify that she adequately understood its key relevant implications for her future welfare and positively wished for it. The trial judge erred in not taking those views into account and in failing to attach sufficient weight to them in the overall balancing exercise required under the statutory framework.

131. Those views are ascertainable and encompass any expressed preferences and feelings whether optimistic or pessimistic, positive or negative regarding the prospect of the adoption. Such views are to be considered in light of the child's age and degree of maturity and in particular their understanding of what is being proposed and its implications for their life in the short, medium and the long term. The interrelationship between section 19(2)(a) and (d) is very clear as was observed by MacMenamin J in the Supreme Court in the majority judgment in *Re J.B and K.B(Minors)* [2019] IR: -

"*…in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight, having regard to the age and maturity of the child*."

Section 19(2)(e) "*The child's social intellectual and educational needs*"

132. There can be no doubt that the child requires some degree of ongoing support for her intellectual and educational development. That is being supplied by the prospective adopter, Ms A through ensuring that she attends school as is evident from her school reports.

Section 19(2)(f)

133. Ms A is the only parent the child has ever known. Miss B never was cared for by her birth parents at any time.

Section 19(2)(g)

134. Miss B does not know her birth father. Her relationship with Ms C derives from occasional direct access once or twice a year, interrupted by the Covid-19 Pandemic, and recent Facetime contact (videocall communication) approximately once per month in very recent years.

Weight to be attached to complaints of Ms C against CFA

135. Section 3 of the Child Care Act, 1991, as amended, provides concerning the functions of the CFA: -

"*(1) It shall be a function of the CFA to promote the welfare of children who are not receiving adequate care and protection.*

(2) In the performance of this function the CFA shall –

(i) *...*

(ii) *have regard to the rights and duties of parents, whether under the Constitution or otherwise –*

a. regard the welfare of the child as the first and paramount consideration, and

b. insofar as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and

(iii) *have regard to the principle that it is generally in the best interests of a child to be brought up in his own family*."

136. In the instant case, the evidence of Ms C suggests that the CFA and its predecessor did not facilitate or enable her to maintain a relationship with her child to the extent that she wished to do so and that is a matter that has caused great upset to her. In mid-2007 a care order was made on consent pursuant to section 18 of the Child Care Act, 1991 to continue until the child's 18th birthday. Ms C exercised weekly access to her daughter for about 14 months up until late 2008 when she moved to the city with two of her children. It appears such access took place in the birth mother's home and the child's two siblings were present. Miss B was three or four years old at that time. Throughout the years 2005-2008 the birth mother had attended every Child in Care Review in connection with her daughter.

137. In the years 2008-2011 the birth mother continued to exercise access as best she could with her daughter. Her oldest child was resident in the County during those years and so she had a place to stay. Transport was difficult and she encountered many obstacles including that the CFA ceased to provide funding to assist her with travel. Her position was precarious, and she was lacking in finances. At times she was dependent on the foster carer to bring Miss B to the city, which happened infrequently and perhaps once or twice a year.

138. A further concerning issue is that during the time July 2014 to March 2017, critical years in the life of the child, there was no social worker allocated to the case and Ms C ceased to be notified of Child in Care Reviews. Further obstacles were put in her path wherein at times Child in Care Reviews took place at 10am in the relevant county town in circumstances

where the birth mother, who was wholly reliant on public transport, was unable to be in attendance at the time because of public transport scheduling obstacles. The ensuing circumstances resulted in the birth mother only seeing her daughter once a year, 2014-2017 inclusive.

139. There is on record a letter written by Ms C setting out her concerns regarding the lack of access which the trial judge found had been sent in the year 2016. The CFA indicate that the letter was sent/received in 2017. The letter was responded to in 2017 after a social worker was allocated once more to the case. At that point Ms C renewed her requests for further access to her daughter and this is clearly recorded as having taken place at the Child in Care Review that took place in 2017. As a result, access was increased from once to twice per annum. However, a reasonable request on the part of the mother to have video access was not facilitated and no reason or explanation was forthcoming for that failure.

140. Miss B's biological parents were married to one another at the date of her birth. She has an older biological half-sister, the daughter of Ms C. The father played no part in these proceedings other than it being indicated that he supported the position of Ms C. Miss B does not know her father. He visited her once following her birth in 2004. He has had no connection or engagement with her life thereafter.

141. In the context of finding the correct approach in seeking to balance the competing rights as between the family as a unit group possessing inalienable and imprescriptible rights on the one hand and the natural and imprescriptible rights of all children, but particularly this child, as acknowledged and given expression to by virtue of Article 42A of the Constitution I find assistance to be had in the judgment of the Supreme Court in *Re Article 26 and the Adoption (No. 2) Bill 1987*, [1989] IR 656 in respect of their analysis and approach. At para 50 of its judgment the Court observed: -

"…*The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose. The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.*

51. The Court accepts the submission made on behalf of the Attorney General that the right and duty of the State to intervene upon the failure of parents to discharge their duty to a child can be considered under both Article 42, section 5 and Article 40, section 3. By the express provisions of Article 42, section 5, the State in endeavouring to supply the place of the parents is obliged to have due regard for the natural and imprescriptible rights of the child. Any action by the State pursuant to Article 40, section 3 endeavouring to vindicate the personal rights of the child, would, the Court is satisfied, be subject to a similar limitation…"

142. The close focus of the Supreme Court's consideration was upon section 3 of the Bill and the factors which had to be established to the satisfaction of the High Court judge before an order was made authorising the Adoption Board to make an order for the adoption of a child whether or not the child was born within or without wedlock by prospective adopters.

143. The Court in essence had to consider whether in circumstances where a contemplated adoption would have the effect of extinguishing a marital child's right as a member of a family unit to belong to that particular family, such a right was inalienable and

imprescriptible and thereby the adoption of a marital child as proposed in the legislation was impermissible. It concluded that it was not.

144. The Supreme Court emphasised the cumulative nature of the statutory proofs that had to be met to the satisfaction of the High Court judge under section 3 observing:

> "*It is of importance to emphasise that not until each of the matters above outlined has been successfully established to the court does the court come to consider whether adoption is an appropriate means to supply the place of the parents*."

Section 54(3) and complaints of Ms C against the CFA

145. In reaching a determination on the issues, I derive assistance from recent jurisprudence from the High Court including *The Child and Family Agency and H.R.F.R v The Adoption Authority of Ireland & Ors.* [2018] IEHC 515 in the first instance. In that regard there are certain material parallels with regard to facts including that the child in question had been initially placed in emergency care shortly following their birth and thereafter a full care order was made in terms that it was to be effective until the child attained the age of majority. As was observed at para 63 by McGrath J: -

> "*Section 54(3) obliges the court considering an application for an order under section 54(2) to have regard to the rights, whether under the Constitution or otherwise, of the persons concerned including the natural and imprescriptible rights of the child, and any other matter which the High Court considers relevant to the application. Section 54(3)(b) provides that in so far as it is practicable, in a case where the child concerned is capable of forming his or her own views, the court shall give due weight to the views of that child, having regard to the age and maturity of the child. In the resolution of any such application, section 54(3) provides that the best interests of the child shall be of paramount consideration*."

146. In my view section 54(3) fulfils a significant aspect of the constitutional mandate to be found in Article 42A.4.1: -

> "*Provision shall be made by law in that in the resolution of all proceedings*
>
> *(i)…*
>
> *(ii) concerning the adoption… of any child*
>
> *The best interest of the child shall be the paramount consideration*."

147. In turn, in the ascertainment of the "*best interests*" as well as the views of the child, both of which are expressly adverted to at section 54(3)(b), as well as the non-exhaustive check list of factors as found in section 19 of the Act. The exercise mandated thereunder is to be carried out with regard the best interests of the child which is the paramount consideration.

148. As with the instant case, in *CFA & HR & FR v The Adoption Authority & Ors.* [2018] IEHC 515 the birth mother was critical of the CFA for their failures to make sufficient efforts to support reunification of the child with her/his parents and siblings. At para 108 McGrath J considered the arguments advanced that there had been a failure on the part of the CFA to be satisfied that every reasonable effort had been made to support the parents of the child to whom a declaration under section 53(1) of the Adoption Act related. The Court noted: -

> "*This obligation arises by virtue of section 54(1)(a) of the Act of 2010 as amended by the Act of 2017. On my interpretation of that section it appears that this is a matter upon which the Child and Family Agency must satisfy itself before it makes the application which is now before the Court. Section 54(1) addresses issues and requirements which must be fulfilled before the application is made; section 54(2) concerns the jurisdiction of the court on the hearing of such application. Section 54(1)(a) therefore appears to stipulate that this is a matter within the competency of the Agency. It is not specified in section 54(2) that this Court must also satisfy itself*

that the Child and Family Agency has complied with the provisions of section 54(1) before it may consider the making of an authorisation order or an order dispensing with the consent of a person whose consent is required, or that the application under section 54(2) should act as an appeal from a decision, declaration or determination of the Child and Family Agency in that regard. On the face of it, therefore, it seems to me that any remedy or challenge to compliance with the provisions of section 54(1)(a) may lie in a different forum."

I am satisfied that this is a correct statement of the law.

Conclusionary Remarks

Exceptional case

149. This is an exceptional case insofar as the child has never been in the care of either her birth father or birth mother, both of whom oppose the proposed adoption. She is 17 years and 11 months old. She has never spent a night in the care of her mother or father. Neither parent has ever sought custody of her or the discharge of the Care Order. She was released from hospital at the age of three and a half months and has resided thereafter in the care of her foster mother Ms A, the prospective adoptive mother, at all times. She wishes to be adopted into the only family she has ever known. Her birth mother wishes for her to be taken into wardship but there is no evidence that there is a legal basis for doing so.

Section 54[2A](a), (c) and (e) – Findings of Trial Judge not appealed against

Section 54 [2A](a)

"*Before making an order under subsection [2A], the High Court shall be satisfied that–*

(a) *for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53(1) relates have failed in their duty*

towards the child to such an extent that the safety or welfare of the child is likely to be prejudicially affected."

That factor was determined by the trial judge to have been met with regard to both the biological father and mother of the child. At para 21, p35 of the judgment he concluded: -

"*I proceed on the basis that the above-mentioned failure presents*…"

There is no appeal/cross appeal to this Court from the determination of the trial judge that the requirement in section 54[2A](a) of the Act has been satisfied.

Section 54[2A](c)

150. The trial judge concluded that abandonment had been established in respect of both birth parents. The issue of abandonment was not argued in this Court and no cross-appeal was brought in connection with the said determination.

Section 54[2A](e)

151. The trial judge found that this criterion had been met. That determination was not the subject of any cross-appeal and the appeal proceeded on the basis of the correctness of the trial judge's determination in regard to criterion (e).

Section 54[2A](b)

152. The trial judge gave insufficient consideration to the lived reality of Miss B from her birth. Irrespective of the reasons, the incontrovertible fact was that the birth mother, Ms C, failed in her parental duty, *inter alia*, in respect of making crucial decisions regarding the health, education, surgical interventions, and developmental needs of Miss B, in addition to having had no involvement in relation to her day-to-day care and upbringing.

153. The judge erroneously conflated the issue of the general competence of Ms C with the issue of an evaluation of the safety and welfare of Miss B. There was clear evidence that her welfare would be prejudicially affected if she was removed from the only home she has ever known. That was implicitly acknowledged by Ms C who did not seek such an order but

rather vaguely wished that it might occur in the future. That was not a valid basis to refuse the order sought. The appellants are correct that such reasoning "*focuses unduly on the question of the mother's general competence as opposed to what it should have focused on, the question as to this particular child and the question as to whether this particular child will be cared for in a manner that will not prejudicially affect her safety or welfare*". It was not sufficiently directed towards the circumstances of the child the subject of the application. This factor engages with the actual and specific the care requirements and future needs of the child in question.

154. There was no relevant or probative evidence that Ms C had any reasonable prospect of being able to care for the child in a manner that would not prejudicially affect her welfare or that she had ever wished to do so at any time to date. She clearly did not wish to do so between the trial date and Miss B attaining the age of majority. I am satisfied that the trial judge had erred in his approached this aspect of the test by placing insufficient emphasis on the lived reality of the child and attaching undue weight to the care said to have been provided by Ms C to two other children. He overlooked the fundamental fact that the child in question has never resided with her birth mother. He did not consider the health, educational, medical, or special needs of Miss B, and her ongoing needs into the future which are being provided for ably and exclusively by Ms A at all times.

155. He attached insufficient weight to the fact that throughout her entire life her complex care needs had been provided for completely by the foster carer. As was submitted by counsel for the appellants "*…the judge's analysis has failed to take sufficient account of the inevitable severe disruption to her life that would ensue were she now to be refused adoption for the objective of facilitating the desire of her birth mother of [Miss B] potentially being placed with her at some time uncertain in the future and that that could only be achieved by wardship and her being taken away from the only family she has ever known*".

156. In essence, what the Court has to consider was firstly, were either birth parent to seek to care for her pending her majority, would that prejudicially affect her safety or welfare. The father has a history of serious physical and sexual violence towards the mother. He has sexually abused Miss B's half-sister. Were he to seek to care for Miss B, and he does not, I am satisfied that it would profoundly and prejudicially affect her safety and be inimical to her welfare. There was no evidence that the mother was able to care for the particular needs of Miss B pending her majority. It is highly relevant in my view that she does not seek that outcome pending the majority of Miss B. It would involve removing Miss B from the safety, stability, security, and certainty of an environment, where she has thrived and progressed to leave behind her friends, foster family, school, pony, and way of life, to reside in a house with her birth mother and two half siblings, with whom she has never resided before far distant from her established environment and in what would be to her an alien world. In my view the sheer duration of the separation of Miss B from her mother – being the entirety of her life to date - in and of itself, on the facts of this unusual case, means that any removal of Miss B to the care of Ms C would prejudicially affect the child's welfare.

157. In my view the stance of the mother effectively concedes this; Ms O'Toole SC, having agreed that Ms C did not seek to care for Miss B during the remainder of her minority and otherwise having accepted that the child had never during her entire life been cared for by or resided with Miss B, observed at the appeal hearing on the 27th July 2022 that: - "*It is her mother's wish that she would ultimately come to reside with her but her mother has sufficient insight to know that that would have to be a gradual process and sufficient insight to know that it would have to be at the child's pace. But I don't consider that to be fatal to my application or at all*". Such a stance is inconsistent with the obligation that the best interests of the child are to be accorded the paramount consideration. In my view the stance of the mother demonstrates that section 54[2A](b) has been satisfied to the requisite standard in

this case. There was clear and convincing evidence of the continuing and total failure from birth by both parents to supply the welfare needs of Miss B as might be expected to be supplied by a loving and considerate parent and that such failure would continue throughout the entire minority of Miss B. The impact and effect of this failure was demonstrated to have been so complete on Miss B who has spent her entire life within the care system that the obligation of the State, as guardian of the common good was engaged to supply the place of the parents, in the manner sought.

158. The risks inherent in what is being proposed by Ms C by way of alternative are obvious in that it requires, in effect, that no adoption order be ever made in order to facilitate the hypothetical possibility that at some future unspecified time, Ms C might seek to have Miss B come to reside with her in a distant city where Ms C would try to care for her. Such a proposition was never made at any time over the past 17 years and 11 months by Ms C. No application was ever made by her to set aside or vary the Care Order or seeking custody. Neither did Ms C ever seek overnight access throughout that time. Were the adoption order made it would have no impact on the objective realisation of this wish since once she attains the age of majority Miss B has the autonomous right to visit or stay or indeed reside permanently wish Ms C if she wishes. The proposal was entirely unrealistic and little or no weight ought to have been attached to it since the making of the order would not impact the wish of Ms C coming to pass in the future if Miss B so wishes otherwise. Although wardship was proposed there was not one scintilla of evidence that the legal basis for such an application existed in the case of Miss B.

159. The possibility of ever having an Adoption Order made in respect of Miss B will be completely extinguished in four weeks' time. Therefore should this hypothetical proposed trial relocation of Miss B, who will be an autonomous adult by then – who has never indicated any wish or desire to reside with Ms C in the city – take place and fail for any

reason, the foster care arrangement will have been terminated, the possibility of adoption will have been extinguished by operation of law and Miss B will be left in a demonstrably more precarious position as a result of any failed experiment at family reunification – irrespective of the reasons for such a failure.

Section 54[2A](d)

160. The trial judge fell into significant error in failing to give due consideration to the practical consequences for the child were he to refuse to make the order sought. She would be permanently excluded from ever establishing a formal legal relationship with her foster mother and foster family. Further, he erred in not taking into account the fact that, in the words of counsel for the Authority "*...granting an order would not expunge the biological link between biological parent and child*".

161. Further, in light of Article 42A.2.1 and the duties of parents towards their child, and the fact that Miss B is now aged approximately 17 years and 11 months old, that when factors including the sheer and sustained duration of the failure of the birth parents had been established to the satisfaction of the Court, when abandonment within [2A](c) had been determined to have been established on the part of the parents of their parental rights *vis á vis* Ms C, that the criterion at (d) was established, the existence of abandonment was a relevant factor and the weight to be attached to same is case-dependent.

162. There was no evidence that the parents were "*...caring, considerate, and attentive to their child* [Miss B]…" in the manner or to the degree envisaged by the majority in *JJ* at para 143, referred to above, such as would preclude the establishment of "*failure*" within the meaning of section 54[2A](d).As the Supreme Court has emphasised, the cause of failure is not material, its *effect* upon the child is.

163. Where, as on the specific facts of this case, Miss B was never in the care of Ms C and there is in reality no reasonable prospect that Ms C will care for her during the remainder of

her minority and where neither birth parent seeks to care for her pending her majority and she has never been in the care of either parent from her birth in 2004 to date those factors need to be carefully weighed in light of ss.19 (2) (f) and (g) of the Act. The evidence before the court, considered in light of the Supreme Court's views as set out above, strongly suggest that not making the order sought Miss B, now aged 17 years and 11 months, will prejudicially affect her welfare and is contrary to her best interests and the evidence in its totality when balanced against the constitutionally recognised rights of the parents, requires the State, through the courts, to supply the place of the parents.

164. The evidence of the social workers, with exhibits, and of the foster carer concerning Miss B's welfare needs, is strongly in favour of the adoption being necessitated for the continued protection of the social, educational, physical, and psychological welfare of Miss B, who has a moderate disability and continues in secondary school. I am satisfied that to refuse the order would prejudicially affect the health and welfare of the child to such an extent that the decision of the parents can properly be described, on the facts as proven, as a failure of parental duty to the child in question – in light of the Supreme Court decision in *JJ*.

165. In refusing to find failure such as required the State, acting through the courts, to supply the place of the parents by making the order sought the trial judge fell into error. The Supreme Court has held that "*The touchstone for State intervention is prejudicial effect on the safety or welfare of a child*". The vulnerable circumstances of Miss B and the evidence of her ongoing disabilities demonstrated the risk of prejudicial effect were the order not made, and readily satisfied the requirements of section 54[2A](d).

166. It is uncontroversial that there has been failure on the part of both parents within the meaning of section 54[2A](a) and further that in both cases that failure constitutes "*abandonment*" within the meaning of section 54[2A](c). O'Higgins CJ in *G v An Bord*

Uchtála [1980] IR 32 explored the duty of the State "*as guardian of the common good" in the context of Article 42.5 of the Constitution, a provision now replaced of course by Article 42A. In considering the duty of the State as "guardian of the common good*". O'Higgins CJ further observed "*In my view this obligation stems from the provisions of Article 40, section 3, of the Constitution*".

167. Article 40.3.1 provides: -

> "*The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> *(ii) The State shall, in particular, by its laws protect as best it may from unjust attack, and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen*."

168. I find myself in agreement with the approach adopted in *CFA H.R and F.R. v The Adoption Authority and Others* at para 117 where the Court observed: -

> "*I do not believe that subsection (d) should be interpreted in a manner inconsistent with the objective of the adoption, in appropriate circumstance of all children under the age of 18 years including children of greater maturity. To interpret the section is implying that the greater the child's maturity, there is necessarily a lesser requirement for the State to supply the place of the parent, while on one interpretation may be arguable and permissible such interpretation may have the unintended effect of excluding more mature children, who have not yet attained majority, from the benefits of adoption*."

169. The further exceptional factor in this case is the passage of time and sustained duration of the failure. The duration of the failure – measured at the entire lifespan to date of Miss B in this case, entitles the court to consider the failure – as to its sustained nature and duration

is a relevant factor and further supports my conclusion that there is clear evidence that this ground has been established.

170. To construe subsection (d), as the trial judge appears to have done, by finding that "*failure*" and the provisions of subsection (d) had not been met on the basis of saying that "*I have no doubt on the evidence before me but that Ms C would be perfectly able to function as a competent and loving mother to Miss B and that it would be overreach for the State to supply her place*", was an error in that it took account of irrelevant considerations. There was no evidence before the trial judge that the birth mother ever had or could have discharged the functions of a "*demonstrably competent mother*" *vis á vis* the child in question, Miss B. The evidence, such as it was, in regard to her rearing and relationship with her children Mr F and Miss G, was substantially self-reported, at least in respect of more recent years. That aside, evidence in connection with them is not probative of Ms C's capacity to discharge the functions that are required in respect of Miss B as a parent in all the circumstances, having regard to the evidence on affidavit before the Court concerning her disabilities in light of section 19(2)(b) and (e).

171. The trial judge erred in concluding that it would be overreached by the State to supply the place of the mother. I am satisfied further, having regard to the long duration of 17 years and 11 months, during which the child had never even spent one night in the care of Ms C, in and of itself, in light of the other factors, including the needs of Miss B, that a failure was established in this case of a kind which warranted and required that the State, acting through the Court, as guardian of the common good should supply the place of Miss B's parents and do so by making the order sought. In all the circumstances of this case it is both necessary and appropriate that the Court should supply the place of both parents and that that is satisfied by the making of the order sought in respect of this child.

Section 54[2A](f)

172. The finding of the trial judge that the CFA had failed to provide reasonable supports for access is noted. However, it must be balanced against the fact that no legal step was ever taken by Ms C in the 17 years that the child was in care to seek further access or have the care order varied or discharged. Refusing to make the order sought on that ground or by reason of perceived failures on the part of the CFA in the context of all the facts, the age of the child and the absence of any prospect of reunification of Miss B with her birth family during the remainder of her minority, was a disproportionate response by the trial judge in the circumstances.

173. The trial judge attached undue weight to the complaints made by Ms C against the CFA and implicitly attributed blame to the Agency for the difficulties encountered by Ms C in relation to maintaining contact/access with Miss B. This led him into error in his assessment of the likely effect and potential benefits of adoption for Miss B. He erred in his assessment that "*…all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency)*".

174. The trial judge in his analysis devalued the potential benefits of adoption in general and in the case of Miss B in particular as an important factor in ensuring stability and legal certainty for her on a long-term basis. He attached excessive weight to the fact that the order would sever the legal link between Ms C and Miss B. He erred in assuming that the order, if made, would or could, *per se,* impact adversely on the prospects of the birth mother and daughter developing a relationship in her adulthood which was what the mother wished for. He did not attach sufficient weight to the fact that the foster mother was willing and open to facilitating contact between Ms C and Miss B continuing if Miss B so wished.

175. The trial judge erred in his assessment of the inherent benefits of adoption for young persons in general – particularly those nearing the age of majority. Such a child can thereby obtain, if they wish, legal recognition to their established and enduring relationship with their carer, at a point close in time to when a fostering or other care arrangement or relationship will no longer have legal recognition or be possible. The judge failed to have regard to the fact that absent an adoption order, Miss B, who has moderate disabilities, will have no legal relationship of any kind with the persons she knows as her family once the care order automatically ends on her attaining the age of 18.

176. There is force in the argument of counsel for the Authority when, in addressing the repeated observations of the trial judge, he posited: -

> "*It is difficult to accept that giving legal recognition and creating a permanent durable legal relationship doesn't achieve anything.*"

177. Whilst Ms C identified certain deficits by the CFA in facilitating access to Miss B over the years and the discharge of its functions in her case, that fact, were it established, does not warrant refusal of the order sought. Ms C beyond writing a letter in 2016, when Miss B was about 12 years old seeking further access, took no formal steps to pursue more access at any time. Arguments of deficits by CFA in facilitating family reunification of Miss B with Ms C were first articulated in 2022, when Miss B was 17 and a half years old. It was never sought by Ms C at any time prior to the institution of the within proceedings. Times arrow has transfixed the realistic options and prudent considerations that now inform the proper evaluation of the best interests of Miss B. There is no prospect now of family reunification of the minor during her minority with her birth family. Ms C does not seek such reunification. Moreover, Miss B can autonomously pursue that relationship at any time and the existence of an adoption order will have no material impact on that decision. It is unproductive now to look backward and an audit of default or an auction of blame between the CFA and Ms C

will not avail the vindication of the welfare rights of Miss B which the Constitution ordains is a paramount consideration.

178. An audit now of 17 years and 11 months' worth of access will not avail us nor assist the process as constitutionally mandated and provided for under the Act. Ms C deserves great credit for her resilience and fortitude. She survived serious violence including sexual assaults by her own husband. She overcame alcohol abuse and crippling panic attacks. She overcame many vicissitudes which would have overwhelmed those of lesser endurance. It is to be borne in mind that she did have many challenges but on the other hand she pursued successfully a course of studies over several years culminating in obtaining a degree. Adoption is considered in the context of the best interests of Miss B for now and for the time to come. It is forward looking and connotes no blame of any kind of Ms C.

179. Undoubtedly the CFA could have done more and shown greater proactivity in assisting, supporting, and encouraging the birth mother to maintain contact by facilitating access. The mother's involvement was exclusively via access currently face-time contact once per month and in-person access once or twice per annum. Unfortunately, it is too late now, and nothing can be done to rewind the wheel of time or unpick the weave and weft of Miss B's life and the bonds that have been established in her life with Ms A and her foster family. At most Ms C wishes that were it feasible that at some time in the future her daughter would come to reside with her. Whether she envisaged that this would be permanent or otherwise was unclear. The Adoption Order *per se* in no sense adversely impacts upon the possible realisation of that expectation.

180. The prospective adoptive mother, Ms A, has indicated a willingness to facilitate ongoing contact and same is set forth with great clarity in her affidavit at para 14. In addition, her counsel, Mr O'Higgins SC, having taken instructions, indicated her willingness to confirm that position if necessary, by way of undertaking to the Court. Though Ms C is

desirous of leaving open the possibility that Miss B might come to reside with her in the future at a time unspecified beyond her 18th birthday, the prospect is highly contingent. The existence of an adoption Order will not alter in any way the possibility or likelihood of this occurring. It imposes not bar to such a development. Miss B will be an adult and can "*vote with her feet*" as regards where and with whom she may decide to reside in the coming years.

181. It would be disproportionally burdensome on Miss B were she to be deprived now of the opportunity of having full legal status with the family who have reared her from the age of three and a half months to date either by reason of the alleged deficits on the part of CFA in pursuing the reintegration of Miss B into her birth family or for the purposes of fulfilling a future possibility on the part of Ms C as was outlined.

182. Once Miss B attains the age of majority, she will have no legal impediment preventing her in any way from spending time in the city with Ms C should she wish to do so. Ms C's concerns in that regard appear to be unduly heightened. That is understandable. The prospect of the proposed adoption of her daughter understandably heightens focus on past events and the various unhappy circumstances which befell Ms C in those years. However, it is worth recalling, as was observed by McGrath J: "*A decision to make, or not make, the orders sought is not a reward or punishment for any party, nor should it be seen as such*". The concerns of the birth mother that the nexus with her and her siblings will be lost is misplaced in this case. The blood bonds between the family endure irrespective of the making of the Adoption Order. It will be open to her siblings to engage with her as it has been up to now should they wish to do so. Ms C has always sent birthday cards and is to be commended for doing so and that will no doubt continue.

183. Whilst, no doubt, it was and has been the aspiration and hope of Ms C that at some time in the future a relationship would be established whereby Miss B would reside with her, this would not be the restoration of any *status quo* that ever existed between them since Miss

B never resided with her or her birth family at any time since her date of birth to date. That latter factor was not considered or accorded any weight by the Court which contributed to the erroneous approach of the trial judge.

184. In my view complaints now advanced by Ms C of alleged failure of statutory obligations by the CFA as articulated by Ms C in her affidavit sworn in June 2022 at a time when Miss B was 17 years and 9 months are not properly justiciable to a final determination within the ambit of the within proceedings. The court is entitled however, to take account of same in the context of assessment of proportionality and section 54[2A](f) and consider the hinterland of fact surrounding same balanced against the passage of time that has elapsed since the alleged events or omissions are said to have occurred. Regard should also be had, insofar as that is considered appropriate, to the conduct of the parent in question and the reasons given for any delays in raising concerns or taking any step to exercise access which was available or seek changes insofar as they were considered desirable until the eve of a child's 18th birthday. In my view, the complaints were accorded excessive weight by the trial judge and he further erred in the balancing exercise engaged in and thereby afforded disproportionate weight to Ms C's complaints against the CFA, failed to have regard to the clear evidence that the adoption of Miss B, relative to all other options advanced, was the most proportionate means by which to supply the place of her parents in the instant case. He further erred in his assessment of proportionality in giving inadequate regard to the criteria and factors in s19 as outlined above. In his overall approach he failed to accord the best interests of Miss B paramount consideration, contrary to section 54(3). He thereby fell into error in determining that section 54[2A](f) has not been satisfied on the evidence before him.

Proportionality and Wardship

185. In the context of proportionality, it is important to have regard to all the other options and the primary alternative option under consideration in this instance was wardship. I am

satisfied that the proposal on behalf of the birth mother that the wardship jurisdiction of the High Court should be deployed for the purposes of managing the future care and welfare of the minor amounts to a disproportionate measure in the instant case. There was no evidence that such an application would be successful if ever made. The wardship structure is particularly cumbersome. Although it is available in respect of a minor or person in respect of whom there are no assets, admission to wardship has the effect of removing autonomy and capacity to make any decisions. As was observed by Mr Carolan SC it is a paternalistic measure. It has not been warranted or required at any stage up to now. It is a measure that would not in any sense be bespoke to the established needs or welfare of the minor. It fails to have any or any adequate regard to her actual capacity and her autonomous right and entitlement to have her stated wishes respected. In that regard I find assistance in the judgment of Ms Justice Baker in *JJ* wherein she alludes to *"... the profound consequences for the rights and freedoms of a person, the taking into wardship is not a mere administrative matter...*".

186. I am satisfied that an order taking into wardship of the minor Miss B would be disproportionate and no valid basis has been identified in support of the making of such an order. The taking into wardship for the purposes of securing the continuation of contact in circumstances where the prospective adopter is willing to voluntarily agree to such future contact so long as Miss B wishes and is agreeable to continue same meets the concerns in question and a wardship order in all the circumstances is disproportionate.

187. This proposition advanced on behalf of the birth mother is not appropriate. Counsel for the birth mother spoke of "*...if Miss B has an intellectual disability and is found to lack capacity after an assessment...*". There was not a single shred of evidence before the Court that she lacked capacity. The respondent failed to demonstrate that wardship was even

possible. I am satisfied that there was no evidence to showed that wardship was in the interests of the child.

188. I am satisfied that taking Miss B into wardship is not warranted. No step was ever taken by Ms C to establish if there was even a valid medical basis in the context of the capacity of Miss B for the taking of such a measure.

ECHR Article 8

189. I am not satisfied that the authorities cited on behalf Ms C support her contentions that the order ought not be made. In relation to *Strand Lobben v Norway*, the crucial facts distinguishes it from the present case. The child had resided with the mother and been cared for by her following the birth. When Care orders were made, she contested them, sought contact and sought custody of her child and fully pursued integration of the child back into the birth family. The child in question was aged just 4 years when the Norwegian Supreme Court dismissed the appeal against the final adoption order. By contrast, Miss B was never in the care of Ms C and the latter never sought and is not at this present time seeking reunification. Miss B does not wish for it. Ms C never sought to vary the court orders or applied to court for orders seeking custody. She did not bring applications to discharge the care order or to seek additional access. Miss B was never in the care of Ms C at any time and never sought on any basis to care for her such s through overnight access. The decision in *Pederson v Norway* is likewise distinguishable on similar grounds. Ms C never suggested or sought reunification with Miss B or that the child would reside with her birth family. Further the ages of the children in those cases contrast starkly with the position of Miss B.

190. Insofar as the trial judge relied on the said jurisprudence and in refusing to make the order sought Article 8, he failed to strike a proportionate and fair balance between the competing interests of the child and the birth mother. He further erred in failing to apply the statutory principles with due regard to the principle that the child's interests were paramount,

a principle recognised in the ECHR jurisprudence particularly in light of the 2010 decision of *Neulinger & Shuruk v Switzerland* (ECHR, Application no. 41615/07).

191. The trial judge erred in the weight he accorded to the wish of Ms C to be reunified with Miss B after she attained her majority. That was an irrelevant consideration. Decisions regarding her relationship with Ms C will be autonomously decided by Miss B, irrespective of whether she is adopted or not. The trial judge accorded insufficient weight to the sheer duration of the time Miss B has lived with her foster mother and the fact that, given her age and the circumstances, there is no prospect of reunification with Ms C during the remainder Miss B's minority – as Ms C accepts – in light of *R and H **v** United Kingdom* (ECHR:2011, Application No. 35348/06).

Section 54(3) & Section 19(1) – Best interests/paramount consideration

192. Article 42A.4.1 is reflected statutorily both in section 54(3) and section 19(1) of the 2010 Act. The need to belong, to integrate, to enjoy all the tangible and intangible benefits that enure to a member of a family do not abate merely because a child has acquired a significant degree of maturity or may be close to becoming self-sufficient or reaching 18 years.

193. The trial judge fell into significant error in his approach to the legal analysis of section 19 and thereby failed to have adequate regard to the best interests of Miss B and further failed to treat the child's best interests as the paramount consideration. He unduly downgraded the likely benefit and effect of the proposed adoption for Miss B, including by distilling its facets into surname-change and inheritance rights. He erred in his approach in asserting at para 18 that "*…all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency)*".

194. Such an approach failed to accord adequate weight to evidence that was before the Court in regard the various needs of the child, who has moderate disability, which had been supplied for over 17 years by the foster mother. Further the trial judge erred in determining that the legal effect of an adoption order was to "*to cut that 'natural mother - natural child' legal link at the very moment when a child is about to enter adulthood*". This failed to consider the legal benefits which would enure to Miss B from the making of the order. Further the judge erred in considering that the age of the child, Miss B, in and of itself was a factor which militated against the making of the order sought.

195. His conclusion that "*...I can see no particular advantage to the adoption…*" was contrary to the evidence and the weight of the evidence before him – including of the social workers, the child and the foster mother. His assessment that "*…adoption seems unlikely to have the slightest effect on Miss B's day-to-day existence…*" was incorrect in circumstances where the Care Order was about to cease to be operative and Miss B was about to be left in legal limbo with the only family she has ever known or lived with. The trial judge failed to properly assess the proposal whereby Ms C sought that she would be made a ward of court and further proposed that Miss B would in the future come to reside with her in the city and be cared for by her.

196. There was no evidence before the Court that Miss B had ever from her birth spent a night in the care of Ms C nor was any evidence put before the Court by Ms C that wardship was appropriate or warranted. There was no medical or expert evidence put before the Court by Ms C that a medical or any basis existed for seeking to have Miss B taken into wardship.

197. The trial judge further erred at para 18 in his approach to the statutory exercise in section 19(1) and section 54(3) in determining that the wish of Ms C to maintain natural bonds with Miss B was a valid basis for refusing to make the order and in determining that the wish of Ms C to maintain legal bonds with Miss B was a valid basis for refusing to make

the order and in determining that on such a basis his refusal to make the order sought was either compatible with Miss B's best interests or did not compromise the paramountcy of Miss B's best interests. The order does not affect the immutable fact that Ms C is Miss B's biological mother. The trial judge gave insufficient weight to the duration of time Miss B had resided with the foster carers and her need for permanency and certainty concerning its continuation.

198. The trial judge disregarded the clear commitments offered by Ms A. on affidavit to facilitate contact between Ms C and Miss B into the future. His approach in substance risked conferring a veto on the birth mother in respect of the adoption. Further he erred in according undue regard to the desire of Ms C in wishing to retain both natural and legal bonds with her child, a wish which in light of the clear facts in this case and the clear ongoing physical, psychological and educational needs of Miss B, her lived experience, views, age and disabilities seems to me to be incompatible with Miss B's best interests which require that the adoption proceed and the order be made.

199. The overall approach of the trial judge failed to have sufficient regard to the import and effect of Article 42A, as provided by law pursuant to section 54[2A], section 54(3) and section 19(1), (2) and (3), which operates to effect a "*restating of the balance*" concerning the rights of the child, as was held by O'Donnell J (as he then was), in *JJ* in pursuance of the protection and vindication of the rights thereby enshrined. He thereby fell into error as outlined above and herein.

200. The passage of time spent other than in the custody of her constitutionally recognised family in the instant case equates to the duration of her entire life. Miss B who is now on the cusp of attaining the age of majority. The sheer extent of time she has lived in foster care and the fact that, as her counsel acknowledged, she has never spent a night in the custody of Ms C cannot be gainsaid. No blame is being attached to Ms C for that fact. But it is the

reality. Considerations of "*failure*", "*best interests*", "*the common good*", "*proportionality*" and risks of prejudice to her welfare must be approached and considered with due regard to the exceptional duration of Miss B's absence from her birth family and presence and integration into the foster carer's family.

Section 19(2)(a) – age and maturity

201. The trial judge's observations regarding the lack of merit in the application based on the age of the child was erroneous and has no basis in law. There is force in the Authority's contentions that his approach in the context of the child's age was incorrect in the circumstances of the case and contrary to precedent. I am satisfied that the decision of Jordan J in *Child and Family Agency and MH and IAH v Adoption Authority* [2021] IEHC 53, more correctly reflects the primary consideration regarding the benefits of adoption that unlike guardianship or other arrangements, adoption creates a legal parental-child relationship of permanent duration.

202. Age and maturity or lack thereof may, in and of themselves, speak to the relatively high level of welfare needs of a child, their needs for protection and safety, which may in certain instances be greater or lesser than their chronological years might suggest. In the instant case Miss B is variously described as having a moderate learning disability or, according to her school a "*mild disability*". At the behest of Ms A, Miss B was the subject of assessment in 2009 when she was then aged approximately five years old and found to have a moderate learning disability with certain associated attention difficulties. The school is of the view that Miss B is more within a "*mild learning disability range*" than "*moderate*".

203. It appears that she has one more year of studies to complete her secondary school cycle and "*would like to go to college after school*". The trial judge accorded insufficient weight to the clear views of the child and improperly subordinated them to the wishes of Ms C.

Age and Adoption

204. I agree with the analysis of the Authority and the appellants that the rights derived from Article 42A in the context of adoption cannot be appropriately construed as abating or diminishing the greater the age and/or degree of maturity of the child in question. Such an approach is inconsistent with the clear language and intent of Article 42A.4.2 "*provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 … in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child*". Such a construction risks debasing the guarantee enshrined in Article 42A.4.2.

205. Adoption goes to status and determines the status of an individual potentially irrevocably and not merely until they attain the age of 18 years. The right to invoke the constitutional protection in pursuance of seeking an Adoption Order is a benefit vested in every child who is eligible to seek such an order. It cannot be diluted or downgraded by reason of the proximity of the minor in question to attaining his or her majority.

Section 19(2)(b)

206. The "*physical, psychological and emotional needs*" of Miss B were clearly established. There was compelling evidence that those needs were best satisfied by the making of the order sought. As outlined above the trial judge erred in failing to attach sufficient weight to such needs in the balancing exercise undertaken. He failed to have due regard to same and paramountcy to the child's best interests in his application of the relevant principles and his approach to this factor.

Section 19(2)(c)

207. The trial judge failed to have adequate regard to the rights the child would attain as a legal member of the foster family and the sense of belonging and identity attributable thereto

and the likely beneficial effects that the security and certainty so conferred would have on Miss B. The trial judge fell into error in approaching the proposed adoption order as having importance solely or mainly until she reaches 18 years. He erred in considering that her stable relationship with the foster mother and the certainty of it continuing were factors weighing against the making of the order"*…there is not the slightest suggestion that in the circa 10 weeks until Miss B turns 18 years of age or at any time thereafter that Ms A (should Miss B elect at all times in the future to stay with her after she turns 18 years of age) has the slightest intention of not looking after Miss B*" (para 21, p37).

208. The trial judge erred in finding that "*…were Miss B to decide sometime after she reaches the age of 18 years that she wishes instead to live with her natural mother (and she has manifested no such intention but were she ever to do so) it is obvious that Ms C is willing and able to provide her with a home and look after her to the extent that Miss B requires looking after as an adult*". There was no evidence that Ms C had ever cared for Miss B. There was no evidence before the Court that Ms C was able to care for Miss B or had cared for Miss B at any time from her birth to date or had sought to do so. The child had never spent a night of her life with Ms C. Further the trial judge failed to have regard to the fact the making of the order sought would not in any way affect the autonomy of Miss B in adulthood to stay with Ms C or reside with her should she wish to do so.

209. The trial judge's assessment at p37 that "*…regardless of whether or not she is adopted, Miss B's right as a child to have her welfare safeguarded is secure for the remaining period of her childhood (and, indeed, her welfare will continue to be protected thereafter)*" was not an adequate or correct basis or ground for refusing to make the order sought.

210. In evaluating the likely effect of adoption on Miss B it is relevant that she has no relationship with her birth father and quite limited access to her birth mother. Therefore, in my view, it is important that the court prioritise the needs of Miss B to have the security,

certainty, stability and support inherent in a functioning a full, lifelong parental relationship with the individual who demonstrated over the past 17 years that she best placed to supply that. In reality, Miss B has never resided with her mother or her father. Neither has she ever resided with her two siblings of the full blood or her half-sister.

211. The likely effect of the adoption on Miss B can be assessed from an evaluation of the past and how and by whom her care was provided, her present circumstances and in an assessment as best one can of the likely future trajectory if the order is granted or if it is not. It is necessary for the court to strike a proper balance between short and medium term considerations on the one hand and long term repercussions and considerations on the other. An assessment of the nature and extent of her relationship and its depth and duration with her birth family is important in evaluating the likely effect on Miss B should the court make the orders sought whereby she will cease to be a member of her birth family and become an adopted person and as such a member of the prospective adopter's family.

212. Regard needs to be had to her future security and stability in assessing the likely impact and effect of the orders. It is noteworthy for instance that Miss B has not articulated any antipathy or opposition to the proposed adoption or any negative ideation in relation to same She has never expressed any desire to live with her parents or reside with Ms C.

213. With regard to 19(2)(c), adoption it is likely to accord with Miss B's lived reality and regularise her legal position in the household and afford her equality in the home with her foster siblings. It is relevant that she sees the second named appellant as her mother, based on the bonds of attachment that have been formed over the past 17 years and 7 months.

Section 19(2)(d)

214. The trial judge erred in according insufficient weight to the views of Miss B. There was evidence before the Court regarding her views and in her interview with the judge she conveyed her views simply but unequivocally. The trial judge afforded disproportionate

weight to averments on the part of Ms C concerning Miss B's views, which were at best surmise. Arguably the trial judge ought not have afforded any weight to the conjectures of Ms C regarding the views of Miss B. The trial judge as a result failed to afford sufficient weight, in light of her age and maturity, to the will and preferences of Miss B and her clear view that she wanted the adoption to proceed. Neither her apparent anxiety after the interview nor her moderate disability could have been a basis for the judge's view that he was "*...not entirely persuaded that she fully understands the significance of what adoption means in terms of her legal relationship with her natural mother*".

Section 19(2)(e) - social intellectual and educational needs

215. Significant additional supports have been put in place to address the full panoply of her educational and intellectual needs. With regard to her social needs as a teenager there is evidence from the reports exhibited which do not appear to have been contested. Those needs have been supplied to date by the foster carer. Without any fault being attributed, the said needs were never supplied by Ms C or Mr Z.

Section 19(2)(f)

216. Miss B's upbringing in the exclusive care of Ms A for over 17 years, who was granted an enhanced Rights Order in 2010, was an overwhelming factor favouring the making of the order and pointing towards same being in the best interests of the child – as outlined in some detail above. The trial judge erred in failing to accord same the appropriate weight due.

Section 19(2)(g)

217. This aspect has been considered above. She has no relationship with her father. She barely knows her siblings and half sibling. She has had very limited access to Ms C. The trial judge failed to properly weigh the effect of these factors – and reached a conclusion based instead on the perceived causes for the deficits in the relationship between Ms C and Miss B. This led him into error and resulted in the best interests of Miss B not being accorded

paramount consideration. In the premises the trial judge fell into error which error requires to be reversed.

Ruling

218. As stated above I am satisfied that the appellants succeed in this appeal have clearly established by convincing evidence that; there is no reasonable prospect that either parent will be able to care for Miss B in a manner that will not prejudicially affect his or her safety or welfare within the meaning of section 54[2A](b) of the Act.

219. For all of the reasons stated above I am further satisfied that the appellants succeed in this appeal and have clearly established by convincing evidence that; by reason of the failure on the part of the parents, the State, as guardian of the common good, by means of the Order sought from the court in the within proceedings, should supply the place of the said parents within the meaning of section 54[2A](d) of the Act.

220. As stated and for the reasons adumbrated above I am satisfied that the appellants succeed in this appeal and have clearly established by convincing evidence that; the adoption by Ms A of the child Miss B is a proportionate means by which to supply the place of her parents within the meaning of section 54[2A](f) of the Act.

221. The Supreme Court in *JJ* spoke of the test for intervention being "*...to consider what a loving and considerate parent would do once appraised of all the relevant information. Such a parent would take into account the views of the child...the character of the child, and would make a decision as to the best interests of the child in that context*". Adopting that approach, applying all of the statutory principles and criteria to the facts in this case, the overwhelming thrust of evidence supports the making of the order sought.

222. I am satisfied that the order sought is proportionate and I attach particular weight to the age of the minor and her views clearly and unequivocally stated. Relevant also is the

very significant duration of time that she has spent in the care of the proposed adopter, a period of over seventeen and a half years at this stage.

223. It is inevitable that the making of the adoption order will result in the severance of the legal ties which Miss B has with her birth family but on balance the making of the order will provide very substantial security, certainty, stability for a young person with moderate disabilities and consequent ongoing needs. It is well understood that for such individuals change can be particularly challenging and distressing and in respect of whom generally uncertainty concerning her future may cause disproportionate fears and insecurities contrary to the best interests of such a young person.

224. In circumstances where the views, though succinctly put, were unequivocal, and there was clear evidence when considered in conjunction with the clear independent evidence from professionals who had spoken with Miss B on several different occasions, as to the views of the child. There was evidence before the judge and that she had attained an age and level of maturity that weight ought to be given to those views. She is a person with a moderate disability. Her will and preference as to the proposed adoption and her views as expressed must be considered with due regard to that fact. That she expressed the view she wanted to live with the foster mother forever or in simple terms ought not diminish the consideration that the views were clear and unequivocal. The trial judge erred in discounting them or setting up those views against the considerations and surmise of the birth mother as to how they might be evaluated.

225. The exercise in question was an exclusive judicial exercise and the comments or views of the mother did not warrant, in my view the discounting of the views and preferences of the minor in the manner that occurred. In assessing the views of the child, it was not appropriate to have regard to the scepticism expressed by the birth mother opposing the

proposed adoption, as to the genuineness of those views, a fortiori in the absence of a shred of evidence to suggest that they did not reflect Miss B's wishes.

226. It is particularly important that an older child such as Miss B who has some special needs and a myriad of health issues is able to be assimilated into the only family she has ever known. The prospective adoptive mother has demonstrated for upwards of 17 years and a half years very skilled parenting abilities and the unflagging interest, commitment and devotion to promoting the care and welfare and interests of the minor in question. As was observed the foster parent's family is the only family that she has known since the age of three and a half months.

227. The sheer duration of time she has lived with the family to the exclusion of all other care providers in my view is a quite exceptional factor in itself. Coupled with all the other factors including the stated wishes, preferences and views of Miss B herself which I am satisfied connote that she wishes to be adopted by her foster mother Ms A satisfies me that all the criteria have been met pursuant to statute. Therefore, alongside the finding of the High Court as to 54[2A](a), (c), and (e), this Court finds that (b), (d), and (f), are also present. The provisions of section 54[2A](3) and section 19 are also met and accordingly the order falls to be made with the best interests served by making the orders sought by the CFA.

228. I would accordingly reverse the trial judge's conclusion and grant the order sought for all the reasons stated above all of the distinct criteria pursuant to section 54[2A] having been met.

229. Accordingly, I would set aside the orders of the High Court insofar as they refused to make the order sought and instead I am satisfied that an order falls to be made pursuant to the provisions of section 54(2) of the Adoption Act 2010 (as amended) authorising the first named respondent above, namely the Adoption Authority, to make an adoption order in relation to the above named child, Miss B, in favour of the second named appellant. I am

further satisfied that an order requires to be made and the necessary proofs have been established to the appropriate standard, pursuant to the provisions of section 54[2A] of the Act dispensing with the consent of any person whose consent is required to the making of the said adoption order and in particular the above named second named respondent and third named respondent, being the birth mother named in the birth certificate of the minor and the birth father and that, insofar as necessary, a like order be made against any other person whose consent is required to the making of an adoption order.

Undertaking by Ms A

230. The Court requires an undertaking to be given by Ms A that to the best of her ability she will, having due regard to the wishes of Miss B, facilitate and assist Miss B in maintaining contact with her birth mother Ms C into the future.

231. Costello J has read this judgment in draft and has authorised me to indicate her agreement with the judgment and the proposed orders.