[2019] IEHC 935

THE HIGH COURT

[2018/853 SS]

IN THE MATTER OF SECTION 49 OF THE ADOPTION ACT 2010
AND IN THE MATTER OF K (A MINOR) AND F (A MINOR)
AND IN THE MATTER OF A CASE STATED BY UDARAS UCHTALA NA hÉIREANN

-AND-

PP, YY AND K (A MINOR)
XM, ZW AND F (A MINOR)
THE ATTORNEY GENERAL

-AND-

THE CHILD AND FAMILY AGENCY

NOTICE PARTIES

JUDGMENT of Mr. Justice Jordan delivered on 27th day of November 2019

1. Inter-country adoption as a subject of international cooperation was submitted on the 19th January 1988 by the Permanent Bureau of The Hague Conference on private international law to the Special Commission on General Affairs and Policy of the Conference. After much preparatory work and debate the Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption was concluded on the 29th May 1993. This Convention, known as The Hague Convention, was subsequently given the force of law in Ireland by the Adoption Act 2010 which came into force on the 1st November 2010. Insofar as inter-country adoption is concerned the Hague Convention is regarded as the gold standard with the force of law throughout the signatory states, numbering ninety-eight currently. As an international convention its effectiveness depends on all the signatory states adhering to its provisions as deviation from it would undermine the Agreement. Article 40 provides that, "no reservation to the Convention shall be permitted". The Convention is designed to protect children since many children are vulnerable and open to exploitation and require the protection of the international community. The preamble to the Convention states: -

> *"Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, recalling that each state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, recognising that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin, convinced of the necessity to take measures to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights and to prevent the abduction, the sale of, or trafficking children, desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20th of November, 1989, and the United States Declaration on Social and Legal Principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally (General Assembly Resolution 41/85, of 3rd December, 1986) "* – [the state's signatory to the Convention agreed the provisions detailed in it.]

2. One immediate consequence of the signing into law of the Hague Convention in Ireland and its commencement as and from the 1st November 2010 was that it altered the pre-existing system which prevailed in Ireland under the Adoption Act 1991 and which permitted the recognition of inter-country adoptions which resulted from private placements or privately sourced adoptions abroad. Under the Adoption Act 1991 it was perfectly permissible and appropriate for a couple who had obtained a declaration of eligibility and suitability from An Bord Uchtála, following assessment under the 1991 Act, to travel abroad with that declaration and to pursue a private placement adoption. The Convention moves the system away from the private placement option towards a public placement system. The Convention requires each signatory state to have a central authority. Adopting a child from a signatory state which is bound by the Convention requires the cooperation of the central authority in the child's state of origin and the central authority where the child is being relocated – the central authority of the receiving state.

3. Article 17 of the Convention provides as follows: -

> *"Any decision in the state or origin that a child should be entrusted to prospective adoptive parents may only be made if –*
>
> *(a) the central authority of that state has ensured that the prospective adoptive parents agree;*
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> *(b) the central authority of the receiving state has approved such decision, where such approval is required by the law of that state or by the central authority of the state of origin;*
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> *(c) the central authorities of both states have agreed that the adoption may proceed; and*
>
> *(d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is and will be authorised to enter and reside permanently in the receiving state."*

4. Article 23 of the Convention provides: -

> *"(1) An adoption certified by the competent authority of the state of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other contracting states. The certificate shall specify when and by whom the arrangements under Article 17, sub-paragraph (c) were given.*
>
> *(2) Each contracting state shall, at the time of signature, ratification, acceptance, approval or accession, notify the depository of the Convention of the identity and the functions of the authority or the authorities which, in that state, are competent to make the certification. It shall also notify the depository of any modification in the designation of these authorities."*

5. The shift in focus in terms of inter-country adoptions from the private placement process to the public placement process represented a sea change in terms of the availability of and recognition of inter-country adoptions for those couples wishing to travel abroad to adopt a child from abroad. As with other changes in the law there had to be transition provisions in circumstances where many couples hoping to adopt had already commenced the process before the Convention had the force of law in their country. This matter is before the court by way of case stated and is concerned with the situation in which two families find themselves. Each of the families consist of a couple and a child adopted by the couple in Mexico as a private placement adoption. In each case the couple had commenced the adoption process in Ireland under the 1991 Act but the child whom they adopted in Mexico was not born until after 1st November 2010 – being the date of commencement of the Adoption Act 2010 in Ireland. Essentially each couple is unable to prove compliance with The Hague Convention to the satisfaction of the Adoption Authority and they are thus unable to have the Mexican adoptions recognised in Ireland under The Hague Convention. They do not have the Article 23 certificate required by the Convention which allows the inter-country adoption in question be recognised by operation of law in Ireland and in the other contracting states. The two children in question are now approximately 9 years of age and were adopted in Mexico as infants. They are and have been happy, thriving and settled children in their family units. For almost all of that time their adoptive parents are and have been lost and wandering in the wilderness of uncertainty that exists by reason of the transition from the old to the new.

Background
Couple A: -

6. This couple are both approaching 60 years of age and married each other in 2003. They live together with their daughter, Baby K, who was born in November 2010 and whom they adopted in Mexico.

7. In early 2006 they made an application for an assessment of eligibility and suitability for adoption of a child. This is a critical step in the process of adoption. An adoption assessment was carried out and the assessment dated 24th November 2009 was exhibited before the court. This assessment recommended that the couple be approved to adopt a child of either gender, as young as possible, up to the age of 15 months. The first appendix to the assessment acknowledged Mexico as the country of choice. At the time of this assessment Mexico was an approved jurisdiction for the purposes of adoption abroad, and the procedures complied with the requirements for recognition of a foreign adoption under the Adoption Act 1991 (as amended).

8. A declaration of suitability and eligibility was granted to the couple by the Authority on 24th February 2010. The couple received a further declaration of suitability and eligibility dated 8th February 2011 from the Authority. There followed six explanatory letters to the couple from the Authority and the foreign adoption unit of the Irish immigration services. The couple agreed to all the necessary post placement assessments. All four of the scheduled assessments have at this stage been completed and are extremely positive.

9. Having been assessed as eligible and suitable and having already indicated their intention to adopt from Mexico the couple set about making the necessary arrangements in Mexico to progress the adoption in February 2010. On 21st March 2010 they made contact with Gabriella Chumacera, a Mexican lawyer. The couple began the Mexican adoption process with their Mexican lawyer. This process included them sending to her copies of their declaration, their home study, their passports and their birth and marriage certificates. They continued to engage with their Mexican lawyer on a regular basis afterwards. On 2nd August 2010 they signed a letter of acceptance. On 6th August, 19th August and 31st October 2010 they sent emails to the adoption society in Ireland which they were dealing with (PACT) advising it of their intention to travel to Mexico and requesting documents from it. On 29th September 2010 they emailed the Authority advising it that they were compiling their Mexican dossier and requesting documents from it, which documents were sent to them by post by the Authority. A similar email was sent to the Health Service Executive on 15th October 2010. By letter dated 3rd November 2010 the couple wrote to the Authority advising it that they were planning on travelling to Mexico and seeking a renewal of their declaration.

10. Following a referral, the couple travelled together on 17th November 2010. They first met Baby K in November 2010. They met the birth mother once after the Mexican court proceedings concluded. With the full knowledge of the birth mother they cared for Baby K from 22nd November 2010. The birth mother consented to the adoption on 14th March 2011 in court when the judge heard from her. The couple were grated the status of "temporary residents" while in Mexico on 6th December 2010. Following their application on 21st February 2011 the couple received an adoption permit issued by the Interior Ministry. On 14th March 2011 they attended a Mexican court with their witnesses. On 14th March 2011 the Mexican authorities, (the Department of Psychology, Desarrollo Integral de la Familia and the Department of Social Services) carried out a psychology survey on the husband and wife separately followed by a psychological assessment of them both, all of which were approved. On 13th May 2011 Baby K underwent a paediatric assessment for her passport.

11. On 10th May 2011 the couple adopted Baby K in Mexico and the Adoption Order was made by the Family and Civil Court of First Instance in United States of Mexico. In relation to Article 23 of the Convention the court ruled that it would not issue a separate document but rather that it would integrate it into the Deed of Adoption. In the context of the Adoption Order the court ruled that *"The Hague Convention of 29th May regarding the protection of children and cooperation in the matter of international adoption is formally enacted in Ireland. Therefore, this procedure of adoption intends to fully comply with the Article 23 of the above mentioned Convention"*. I should pause here to point out that the Mexican authorities subsequently advised the Adoption Authority in Ireland that the court was not a central authority for the purpose of the Convention and could not issue the Article 23 certificate.

12. The couple say, and I accept, that in all good faith they believed that they had complied with all necessary requirements of the Hague Convention. As far as they were concerned,

they had taken explicit steps in this regard while in Mexico completing the adoption procedures.

13. Towards the end of May 2011 the adoption decree was received by the couple and Baby K's birth certificate was issued. On 29th May 2011 a passport was issued to Baby K by the Mexican authorities.

14. Prior to the couple's departure with Baby K from Mexico, on 1st January 2011 and on 17th February 2011 the Foreign Adoption Unit of the Irish Immigration Services, by letter, and on the Authority's instruction, gave immigration clearance for Baby K, granting an authorisation to permit her travel to and enter into Ireland. On 2nd June 2011 the couple and Baby K arrived back to Ireland having flown from Mexico City through Amsterdam.

15. Having returned to Ireland on 2nd June 2011 and within the three-month statutory period on 5th June 2011 the couple applied to the Authority to have the adoption of Baby K entered in the Register of Foreign Adoptions. They say, and I accept, that they had no idea that any difficulty would arise in this regard. After all, they had been assessed to be eligible and suitable for adoption and since the outset of the adoption process it was known to all parties concerned that they had intended to adopt from Mexico.

16. The couple acknowledge that prior to travelling to Mexico they were aware that the law was changing and they actively sought clarification from the Authority in this regard. They were alert because of their inquiries as to the need for an Article 23 certificate. Prior to travelling their Mexican solicitor satisfied them that the adoption would comply with Article 23. Before travelling to Mexico the couple wrote to the Authority on 3rd November 2010 advising that they were travelling to Mexico to adopt a baby while at the same time including their application to renew their declaration and providing contact details. While in Mexico they were in touch with the Authority several times via email, including on 28th December 2010 when they emailed the Authority advising that they were currently in Mexico completing the adoption and pointing out that they had not received a reply to their request for a renewal of the declaration. The couple's Mexican lawyer wrote to the Authority on 4th January 2011 stating that they were in the process of adopting Baby K and that should the Authority require further information it should phone her. The letter went on to state that one of the court's legal requirements was to have the declaration updated by the Authority and with the new changes implemented on 1st November 2010 the declaration should reflect such changes. The renewed declaration issued without any reference to the changes in the law nor were any requests for further information received from the Authority. The couple say, and I accept, that they had numerous phone calls and exchanged numerous emails with the Authority while they were in Mexico. What the couple say is borne out by the documentation exhibited by them. Their Mexican lawyer sent the Authority a statutory declaration that they had sworn towards the end of December 2010 stating that they were in the process of adopting a baby in Mexico and that the process had commenced but was not complete.

17. The Authority issued a further letter on 9th February 2011 and headed it "to whom it may concern". It stated that "the bearer(s) (of the declaration) are entitled to seek an entry in

the register…upon their return to Ireland" and that "a foreign adoption…is deemed to be effected by a valid Adoption Order if the following requirements are satisfied – (1) as having been effected in accordance with The Hague Convention on Inter-Country Adoption (1993) or (2) the adoption must be a recognised 'foreign adoption' as defined in Section 1 of the Adoption Act 1991…and (3) is not contrary to public policy."

18. Following the couple's application to have the adoption entered in the Registry of Foreign Adoptions on 5th June 2011 it came as a shock to them when they were informed by the Authority that there were many difficulties in so doing. Then on 26th February 2013 the solicitors for the Authority wrote to the solicitor acting for the couple and stated that the Authority was refusing to register the adoption and that it was taking no steps other than to notify the Health Service Executive that it was so refusing. The couple say that this action caused them enormous distress and concern. They were concerned that it would appear to imply that their care of Baby K required the attention of the HSE even though they had successfully completed all adoption post placement requirements as required by the Authority. Their distress and concern is understandable and is not overstated.

19. There were nineteen "Mexican adoptions" which encountered difficulty because of the commencement of the 2010 Act. There is reference in the case stated to 20 cases encountering difficulty, but this difference is not material.

20. Fifteen of the nineteen Mexican adoptions were resolved as a result of the decision of Abbott J. in the case of *O'C v. Údarás Uchtála na hÉireann* [2015] IEHC 637. However, the Adoption Authority advised the couple by letter dated 26th February 2015 that it:

> *"determined that, on the basis that the third named notice party was not born by the time of entry into force of the Adoption Act 2010, vested rights could not have accrued under the Adoption Act 1991…the Authority had no option but to continue to refuse your application".*

Following discussions between their legal advisers and the Authority's legal advisers between December 2015 and February 2017 the couple did decide to consider and indeed to utilise Part 7 of the Adoption Act 2010 as their priority was to regularise Baby K's position in Ireland as soon as possible. The couple say, and I accept, that they have always been most anxious to resolve the problem in the least acrimonious, least expensive and most time-efficient manner possible and they have been happy to enter any dialogue that may result in a mutually acceptable resolution. However, difficulties arose with the Part 7 process in circumstances where the Child and Family Agency insisted on confirmation that a child is eligible for adoption before carrying out an assessment under s. 37 of the 2010 Act. This insistence gave rise to the third question in the case stated before me. At the commencement of the hearing, counsel for the Child and Family Agency indicated that it was no longer maintaining the position that it required confirmation that a child was eligible for adoption before carrying out the s. 37 assessment.

21. Insofar as the couple and Baby K are concerned it is also worth pointing out that, in addition to being completely settled into the family unit as a content and active young girl, Baby K's biological sibling lives in Ireland having been adopted by another Irish couple. Baby K and her sibling have a close relationship and see each other regularly. Baby K's sibling's adoptive parents first met their child in December 2010, who was adopted in Mexico approximately five months after Baby K who was adopted. Her sibling was born in 2008 and has had the particulars of the adoption entered in the Register by the Authority. This moving postscript to the events leading to the arrival in Ireland of Baby K is but one small part of the family dynamic that is such a vibrant undercurrent beneath the legal issues before the Court.

Couple B:

Baby F

22. The second set of parents are again a married couple in their mid-50s. They got married in 2005 and reside together with Baby F who was born in January 2011 in Mexico.

23. By letter dated 20th February 2007 the couple made an application for an assessment of eligibility and suitability for adoption of a child. The adoption assessment was carried out by the regional Child and Family Centre and the assessment resulted in a recommendation that the couple be approved to adopt one child of either sex as soon as possible. The first appendix to the assessment acknowledged Mexico as the country of choice of the couple. As already stated Mexico was at this time an approved jurisdiction for the purposes of adoption abroad, and the procedures complied with the requirements for the recognition of a foreign adoption under the Adoption Act, 1991 (as amended).

24. The first declaration of suitability and eligibility dated 26th May 2009 was issued to the couple by the authority under cover of an undated letter. The most recent, renewed, declaration was dated 25th January 2011.

25. All the necessary post-placement assessments were agreed to by the couple. All four of the scheduled assessments have been completed with positive results. These post-placement visits were carried out by the Health Service Executive in the context of the adoption processes administered and agreed to by the couple with the Authority.

26. Having been assessed as eligible and suitable and having already indicated their intention to adopt from Mexico, the couple set about making the necessary arrangements in Mexico to progress the adoption around February 2009. At that time, they made contact with Adoption Alliance in Colorado USA when they sent in a preliminary application. In 2008 an official of the Health Service Executive made the couple aware that Adoption Alliance specialised in Mexican adoptions. The couple's preliminary application was acknowledged by email dated 11th February 2009.

27. Following submission of further documentation, the couple were accepted on the waiting list and they were to await a match with a birth mother. On 17th April 2010 the couple

emailed their dossier to Adoption Alliance. The dossier comprised the documents which would ultimately be presented to the Mexican court. Initial matching with a birth mother occurred in July 2010 and the couple were informed that they had been matched with a birth mother. However, the arrangement did not proceed due to a change of mind on the part of the birth mother. Ultimately the couple were matched around January 2011 and they then applied for a renewal of their declaration so that it would not expire while they were in Mexico. It was due to expire on 25th May 2011. The wife, by arrangement, visited the Authority's offices in person towards the end of January 2011 in order to collect the renewed declaration – which is dated 25th January 2011. At that time, she indicated that she and her husband were planning to travel to Mexico soon. When the couple arrived in Mexico they gave all their original documentation to the Mexican lawyer.

28. Following a referral, the couple travelled to Mexico on 13th February 2011. They first met Baby F on 23rd February 2011. With the full knowledge of the birth mother they cared for Baby F from 23rd February 2011. The birth mother consented to the adoption on 24th March 2011, in court, when the judge heard from her. The couple were lawfully in Mexico on temporary visas. On 1st April 2011 the couple were interviewed by the Mexican authorities. A psychologist from Desarrollo Integral De La Familia and a social worker from the Department of Social Services conducted the interview. Later on that same day the couple attended the court with their witnesses. On 17th June 2011, Baby F underwent a paediatric assessment.

29. On 17th May 2011 the couple adopted Baby F. The adoption order was made by the relevant Family and Civil Court of First Instance, United States of Mexico. The court order recites *"the adopters have complied with the requirements ratified by the government of the United States of Mexico in the Convention on the Protection of Children and Co-operation in respect of inter country adoption established in The Hague on 29th May, 1993".* In May 2011, upon learning from another Irish adoptive couple that a s. 23 certificate would be required upon their return to Ireland, the couple asked their Mexican lawyer to request same and they received what they believed was the certificate dated 2nd June 2011. In that "Article 23 certificate" the Desarrollo Integral De La Familia in that location in Mexico wrote to the Central Authority of Ireland notifying it of the birth mother's consent and stating that "by virtue of Article 6, 17, 22, 23 and other Articles of (The Hague Convention) … declares the following: … certifies that the adoption proceedings were (mostly legitimate) … validating all the proceedings of the adoption …". I pause at this point in relation to the use of the word "mostly". It is curious. However, the use of this word may well be a translation issue as it does seem clear that the intention of the document is to confirm and provide the Article 23 certificate required under The Hague Convention. The couple say, and I accept, that in all good faith they fully believed that they had complied with all necessary requirements of The Hague Convention. They point out that they had taken explicit steps in this regard while in Mexico completing the adoption procedures.

30. On 24th June 2011 the adoption decree was received by the couple and the birth certificate was issued on the same day. On 28th June 2011 Baby F's passport was issued

by the Mexican authorities. Prior to the departure of the couple and Baby F from Mexico, on 28th January 2010 the foreign adoption unit of the Irish Immigration Services, by letter, granted an authorisation to permit Baby F travel to and enter into Ireland. On 6th July 2011 the couple arrived home in Ireland having flown from Mexico City through Amsterdam.

31. The couple, having returned to Ireland on 6th July 2011, applied within the three-month statutory period on 27th August 2011 to the Authority to have Baby F's adoption entered in the Register of Foreign adoptions – and enclosing the Article 23 certificate along with the application. No response was received from the Authority until 27th January 2012 when it informed the couple that it was in contact with the Mexican authorities. The couple say, and I accept, that they had no idea that any difficulty would arise. They point out that they had been assessed to be eligible and suitable for adoption and that since the outset of the adoption process it was known to all parties concerned that they had intended to adopt from Mexico. By this time Baby F was fully integrated and thriving in the family unit in Ireland. The couple say, and I accept, that no correspondence was received by them from the Authority relating to any alterations or changes which would arise from the Adoption Act 2010 prior to their adoption of Baby F. On 23rd February 2010 they sought an extension of their declaration. In response they received a letter dated 23rd February 2010 from the Authority requiring them to complete an affidavit which was enclosed and which they swore on 2nd March 2010. These documents made no reference to the Act of 2010 while making express reference to the fact that the couple's application for an extension of their declaration was being made pursuant to the 1991 Act. Before travelling to Mexico, on 16th January 2011, the couple wrote to the Authority advising that they were travelling within the next three to four weeks while at the same time seeking another extension of their declaration and requesting immigration clearance. The declaration was renewed without any reference to the changes in the law. A further letter issued from the Authority on 27th January 2011. It was headed "to whom it may concern" and it stated that "the bearer(s) (of the declaration) are entitled to seek an entry in the Register…upon their return to Ireland" and that "a foreign adoption…is deemed to be effected by a valid Adoption Order if the following requirements are satisfied – (1) as having been effected in accordance with The Hague Convention on Interlocutory Adoption (1993) or (2) the adoption must be a recognised 'foreign adoption' as defined in Section 1 of the Adoption Act 1991…and (3) is not contrary to public policy".

32. Following their application to have Baby F's adoption entered in the Registry of Foreign Adoptions, it came as a shock to the couple to be informed by the Authority that there were many difficulties in so doing. On 26th September 2012, after significant contact between the couple and the Authority, the latter wrote to the couple indicating that it intended to bring the matter before the High Court. During all this time the couple point out that the Authority was aware that Baby F was integrating into and bonding with the family – as was apparent from the post-placement reports carried out on behalf of the Authority.

33. Ultimately, the solicitors for the Authority wrote to the solicitors acting for the couple and stated that the Authority was refusing to register the adoption and it was taking no steps other than to notify the Health Service Executive that it was so refusing. Again, this second couple say that this caused them enormous distress and concern. In addition to the refusal, the communication to the HSE, the couple say, appeared to imply that their care of Baby F required the attention of the HSE even though the couple had successfully completed all adoption post-placement requirements as specified by the Authority. Once more, their distress and concern is as understandable as it is understated.

34. Reference is made by the second couple, and indeed by the first couple, to a general notice issued from the Mexican Embassy in Ireland in relation to Mexican adoptions generally. In common with the first couple, the position is that they have not been contacted by any agency in relation to any issues or investigations concerning children adopted in Mexico. The first couple and the second couple say, and I accept, that there has been no investigation concerning Baby K or Baby F in Mexico to their knowledge. Once more, the second couple point out that the procedure adopted in the case of Baby F complied in all respects with the requirements of the Adoption Act 1991 (as amended). As previously indicated, a group of Mexican adoptions were identified as problematic after the commencement of the 2010 Act. Some fifteen of the group of adoptions were resolved because of the decision of Abbott J. in *O'C v. Údarás Uchtála na hÉireann* [2014] IEHC 580. Again, insofar as Baby F is concerned the Authority has indicated that it would not register her adoption as she was born after the Adoption Act 2010 came into force. As in the case of Baby K the second couple agreed to pursue the Part 7 process procedure with a view to regularising the position of Baby F in this jurisdiction. The Part 7 procedure did not progress because of similar difficulties to those which arose in the case of Baby K.

35. Although Baby F does not have a sibling resident in Ireland she does have several cousins of the same age with whom she is best friends and she is thriving in what is clearly a stable and secure family unit and environment. Moreover, it is the position that the second couple were very open concerning involvement by the birth mother – from the outset. When they were in Mexico they were able to send some written questions to the birth mother and they asked her whether she would like to continue contact with Baby F or receive photographs of her. Although she declined she gave the couple various pieces of information about herself that she wanted the couple to pass on to Baby F. The offer to be open with the birth mother is a not insignificant feature of Baby F's adoptive parents approach to the adoption – as it reflects the desire on their part to put the welfare of Baby F to the fore from the outset. And it is only proper to add that that desire is one I see common to both couples in so far as the two children are concerned.

36. Taken together or taken separately the facts concerning both children and their adoptions in Mexico offer no cause for concern insofar as the objectives of the Hague Convention are concerned. Having said that, both cases do present the difficulty of deciding on the consequence of the absence of a valid Article 23 certificate from the competent authority when it would be wrong to allow the Convention be circumvented.

37. Insofar as the Central Authority in Mexico is concerned the position is explained as follows on its website: -

> *'In connection with Article 6, paragraph 2, and Article 22, paragraph 2, of the Convention, the systems for Integral Family Development act as the sole Central Authorities in each of the 31 federal units of Mexico, which are listed below. The National System for Integral Family Development has exclusive jurisdiction within the Federal District and subsidiary jurisdiction with the 31 federal units. The Legal Department of the Ministry of Foreign Affairs acts as the Central Authority for the receipt of documents from other countries.'*

38. But it has not been as simple or clear as that. The Permanent Bureau sent out a questionnaire on accredited bodies in the framework of the Hague Convention of 29th May 1993 on the Protection of Children and Cooperation in Respect of Inter-Country Adoption. This questionnaire was sent out at a time when the Permanent Bureau was undertaking preparations for the third special commission meeting to review the practical operation of the Hague Convention which meeting was to be held in The Hague in June 2010. The questionnaire was sent out in the context of the Permanent Bureau gathering information for a new guide to good practice on accreditation. As pointed out in the introduction to the questionnaire, in many countries, accredited bodies perform the functions of central authorities in relation to particular adoptions under the 1993 Hague Convention. The process of accreditation of bodies is one of the Convention's safeguards to protect children during the adoption process. The introduction to the questionnaire also stated that it was intended, except where expressly requested that it not do so, to place all replies to the questionnaire on the Hague Conference website. The answer which Mexico gave to question number 3 in the questionnaire is worth quoting in full: -

> "3. Have you informed the Permanent Bureau all of the details of bodies accredited by your state, as required by Article 13? Is the information which is currently on The Hague Conference Website up to date?
>
> Answer: We have not used accredited bodies.
>
> If your state has decided not to use accredited bodies, please explain the reasons and indicate what has influenced the decision. Please answer any questions that are relevant to your state's situation.
>
> Answer: Mexico has decided not to use accredited bodies, the reason being that in our country there are 32 central authorities and taking into account the amount of international adoptions that take place there is no need for accredited bodies as the central authorities have the capability to deal with this matter."

39. This reply seems to be at odds with the statement that the legal department of the Minister of Foreign Affairs acts as the Central Authority for the receipt of documents from other countries.

40. While it does now seem to be clear that the Central Authority in Mexico is the legal department of the Ministry of Foreign Affairs it does appear nonetheless judging by the answer to the questionnaire that there was some level of uncertainty on the point as late as 2009 and indeed for some time after that judging by the evidence before this court.

41. Commenting on the situation in *O'C v. Údarás Uchtála na hÉireann* [2014] IEHC 580, Abbott J. stated at para. 14: -

> *"This recital and the purported certification by the Mexican judge in the order is an anomalous aspect of this case and some background to it is given by an undated letter sent by the applicants to the individual members of the respondents board after difficulties had emerged in relation to having the adoption of the child registered in the Register of Foreign Adoptions from which it may be inferred that, whereas the applicants did not receive notice of the Article 23 certificate requirement of the Convention through the website, they had, through their Mexican lawyer, found out about an Article 23 certificate requirement but were assured that the Mexican judge could deal with same. This anomaly becomes more complex when it is realised (as it was drawn to the attention of the court by counsel for the applicants) that, in 1995, the Mexican Government reported to the working committee on The Hague Convention that certain Mexican judges were competent authorities for the purpose of issuing Article 23 certificates."*

42. When issues arose in relation to inter-country adoptions involving Mexican children after the commencement of the 2010 Act the Adoption Authority of Ireland was in significant contact with the Mexican Central Authority. Indeed, on 9th December 2011 a delegation from the Adoption Authority of Ireland met with officials from the Mexican Central Authority in Mexico City. A note of the events of the meeting is exhibited.

43. It appears that the actual identity of the Mexican Central Authority for Adoptions is the Secretary for Exterior Relations or the Secretaria de Relaciones Exteriores (SRE). The SRE is responsible for policy and issues key documentation certifying Hague compliance, including the Article 23 certificate that the adoption or grant of custody occurred in compliance with the Convention. The SRE implements the Hague Convention through the national system for the full development of the family, or the Sistema Nacional de Desarollo Integral de la Familia (DIF). The DIF is a public institution in Mexico in charge of implementing national policies on all matters pertaining to the family, and the implementation of domestic and inter-country adoptions resides in their purview, along with final execution of adoptions through the legal system.

44. At the meeting in Mexico City on 9th December 2011 it is noted that; -

> *"The DIF representative described how the adoption process had evolved worldwide, how the ratification of the Hague Convention imposed obligations on Mexico as a sending country to co-operate with other contracting nations to safeguard the rights of minors. He stressed that the Ministry of foreign Affairs was the only official body which could receive documentation from other countries. He*

further stressed that the documentation must go through the DIF in Mexico City and that this had not always been the case and that confusion must be eliminated and Hague adhered to."

45. In detailing the situation and the position of the Adoption Authority in respect of both Baby K and Baby F, its Director of Operations has sworn comprehensive affidavits which are informative and helpful.

46. The Director of Operations points out that, as has already been eluded to by the High Court in the O'C case, the Authority engaged in correspondence with the Irish Embassy in Mexico and the Mexican Embassy in Ireland from early 2011 onwards in relation to some 19 cases. On 12th June 2012 the Mexican Embassy issued a third party note to the Authority, confirming that the National Central Authority does not have the power to issue a certificate under Article 23 of The Hague Convention in respect of the 19 adoptions at issue, given the "irregularities" with the adoptions.

47. It is worth setting out the third party note in full: -

"the Embassy of Mexico presents its compliments to the Adoption Authority of Ireland and has the honour to refer to the 19 cases of Mexican children adopted by Irish couples and who have not been issued the certificate referred to in Article 23 of The Hague Convention for the Protection of Children and Co-Operation in respect of inter-country adoptions. The Mexican authorities have sent this Embassy the following:

(1) The procedures established by The Hague Convention for the Protection of Children and Co-Operation in respect of inter-country adoptions, valid for both countries is the instrument which determines that an adoption has been arranged in a regular or irregular manner, and not what either the Mexican or Irish authorities decide.

(2) The Mexican authorities and in particular the Central Authority in Mexico does not have the powers under the Convention, to regularise migration matters in the adoptive country of minors, to redress the existing inconsistencies in the adoption proceedings made in infringement of the provisions set in the Convention, but is impeded to issue the certificate referred to in Article 23 of the International Instrument.

The above is regardless of the results of investigations carried out by the Attorney General's office and the responsibilities which may result from such irregularities.

(3) If the Irish authorities wish to assist to regularise the situation it is their prerogative and it should be in accordance with their legislation. However, it would be deemed as strange if they were to seek to proceed with the regularisation of migration of cases that are clearly in violation of the rules

and procedures contracted bilaterally. It would also be a concern, as it could be construed as encouragement to violate Mexican procedures and then to have them validated by Irish authorities. The Hague Convention contains no provision to make up or improve the processes of adoption made outside its jurisdiction in fact it presupposes that those procedures are only valid in the Convention's. However, the adopters could, under their own volition, attempt to get judgments to remedy the mistakes which occurred in the previous procedure and argue the case in the best interests of the child. This might perhaps mean that the adoptions referred to the Mexican authorities would be nullified and that they would have to restart the process through the mechanism of The Hague. In this vein, the Mexican authorities should not be obliged to provide the elements that enable the adopters to nullify such decisions, but only to maintain official contact with the Irish authorities for purposes of The Hague Convention, as set out in Article no. 4.

(4) The above comments are made independently of the conclusions that the Attorney General's Office or any other authority could reach, on cases in analysis and administrative responsibilities that may distance themselves as a result thereof.

(5) The wellbeing of the child must prevail over the multiple considerations. Under the circumstances and given the social acclimatisation and the familiarity of the children, it is not advisable to remove the children and return them to Mexico but to keep them in Ireland. The children are the victims here of procedural errors which occurred, therefore if the granting of Irish citizenship is to occur this will be determined by the Irish authorities, experts in Irish legislation.

The Embassy of Mexico avails itself of this opportunity to renew to the Adoption Authority of Ireland the assurances of its highest considerations.

Dublin, 12th of June 2012."

48. For Baby K and Baby F the possibility of starting from scratch with a view to exhausting the Hague Convention procedure in Mexico and with a view to obtaining an Article 23 certificate from the Mexican Central Authority has not been an option, at least not for Baby F. When the issue concerning recognition arose and when it became apparent that the purported Article 23 certificate had not in fact issued from the Mexican Central Authority it also became apparent that the policy in Mexico in relation to inter-country adoptions permitted such adoptions in a limited number of scenarios, namely:

(a) minors from 5 years of age onwards;

(b) minors suffering from some form of incapacity (physical and/or mental);

(c) minors suffering from an illness, the treatment of which is expensive; and

(d) groups of siblings.

49. Insofar as Baby K is concerned and speaking theoretically this Mexican policy may permit her inter-country adoption as she has a biological sibling living in Ireland whose particulars are registered with the Authority as an inter-country adoption.

50. Whether or which, the practical reality is, as pointed out in the third party note from the Embassy of Mexico, that it is not advisable to remove the children and return them to Mexico. They should be kept in Ireland as they are, it is said, the victims of procedural errors which occurred.

51. It is also apparent to me from the affidavit sworn by the Authority's Director of Operations that the incoming change in the law was something visible to both couples before they travelled to Mexico. This cannot however detract from the fact that both couples had engaged significantly with the predecessor of the Adoption Authority under the 1991 Act over a considerable period before travelling to Mexico – and did then travel during the very early stages of transition from the old to the new with their Declarations and accompanying paperwork.

52. The difficulties which arose in relation to the group of inter-country adoptions from Mexico in the early stages post Hague implementation in Ireland occurred against a backdrop of serious concerns regarding alleged irregularities concerning inter-country adoptions effected in Mexico. In early 2011 the Authority became aware of an investigation by the Mexican National Agency for Family Development (DIF) into corruption in the adoption process in the City of Rosarito in the State of Baja, California. The corruption did not appear to be isolated to this area but also included adoptions to Irish couples elsewhere in Mexico. The concerns raised were real concerns. One consequence of the concerns was that the then CEO of the Authority wrote to the Mexican Ministry of Foreign Relations in June 2011 and the manager of the Inter-Country Adoption Unit wrote to the DIF by email on 26th July 2011, seeking clarification in relation to the application of Hague protocols in Mexico. The letter of June 2011 specifically sought clarification, *inter alia*, as to whether an Order from a Mexican court meets the requirements of Article 23 of The Hague Convention. Information on the alleged irregularities in the adoption process in Baja, California was also sought. A reply was received on 8th August 2011 to the letter June 2011 and a reply to the email was received on 26th July 2011. These replies provided further details on the Mexican adoption procedure. It clarified that only children over five years of age were eligible for inter-country adoptions in Mexico unless the minor in question suffered from a disability or high cost illness or was part of a group of siblings. The replies did not address issues in relation to the Court Orders purporting to certify compliance with Article 23 or with the alleged irregularities in the adoption process. There followed meetings and interactions between the Authority and the Mexican authorities.

53. By letter dated 27th July 2011 two social workers from the HSE notified the Authority that they were aware that prospective adopters were being matched with Mexican children, before the children were born, during the third trimester of pregnancy. Such practices

are contrary to the provisions of the Hague Convention. The irregular practices were also brought to the Authority's attention by others, thus heightening the concerns. It was because of these concerns that the representatives of the Authority travelled to and met with the representatives of the Mexican National Central Authority on the occasion which I have referred to above – the meeting taking place in Mexico City on 9th December 2011. At that meeting the representatives from the Mexican National Central Authority also indicated that they would review the group of adoptions in question and obtain a legal opinion on their compliance with the Hague Convention. The NCA expressed concerns in relation to the adoption of the children other than those falling into the most eligible groups referred to above. The Mexican representatives also made it clear that newborn babies were not generally available for inter-country adoption and they confirmed that only the NCA could issue Article 23 certificates and then only where the adoptions were in compliance with the requirements of the Hague Convention.

54. Despite the passage of time nothing further has occurred in relation to the Mexican adoptions of Baby K and Baby F. It seems clear that the Mexican court orders remain intact and there is no evidence before the court to suggest anything other than Baby K and Baby L being the subject of "procedural errors which occurred" thus preventing the recognition of their adoptions in Ireland by reason of the absence of an Article 23 certificate from the Mexican National Central Authority. The evidence does satisfy me that both couples did their best to satisfy The Hague Convention requirements in this regard and believed that they had done so. It is clear at this stage that only the National Central Authority in Mexico can certify Article 23 compliance but I am satisfied that that was far from clear to all stakeholders at the time we are speaking of.

55. I should say also that I am satisfied on the evidence that the Mexican adoptions of Baby K and Baby F would have been recognised in Ireland under the 1991 Act and that the only reason for the difficulty which now arises is the apparent non-compliance with the 2010 Act insofar as the Article 23 certificate requirement is concerned. Nor can it be ignored that both children travelled with their adoptive parents to Ireland with both children having the benefit of Mexican passports issued to them and the permission to enter and reside in Ireland as they have done since entry.

The Vested Rights Argument

56. Section 27 of the Interpretation Act 2005 provides:

> "(1) Where an enactment is repealed, the repeal does not—
>
> (a) revive anything not in force or not existing immediately before the repeal,
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

57. The precise meaning of this section of the Interpretation Act has been considered in several cases.

58. In *O'Sullivan v. Superintendent in Charge of Togher Garda Station* [2008] I.R. 212 the issue arose for consideration because of a change in the Road Traffic Legislation. On 5th March 2007 s. 7 of the Road Traffic Act 2006, which provided for a substituted provision for s. 29 of the Road Traffic Act 1961, was commenced. The previous s. 29 of the 1961 Act provided that a person who received a consequential disqualification order of not less than two years on conviction for a road traffic offence was entitled to apply for its removal after the expiration of nine months. The substituted s. 29 of the 1961 Act, as substituted by s. 7 of the 2006 of provides, *inter alia,* as follows: -

"(1) This section applies to a person in respect of whom a disqualification order has been made, whether before or after the commencement of s. 7 of the Road Traffic Act 2006, disqualifying the person from holding a licence during a period of more than 2 years, and which is the first such order made in respect of that person within a period of 10 years.

(2) A person to whom this section applies may, at any time following the completion of one-half of the period specified in the disqualification order, apply to the court which made the order, for the removal of the disqualification."

59. Both applicants in *O'Sullivan* were disqualified from driving for two years on conviction by the District Court prior to the substitution of s. 29 of the 196 by s. 7 of the 2006 Act. In November and December 2007 respectively, both applicants applied to the District Court for the restoration of their driving licences.

60. The District Court, by way of consultative cases stated, sought the opinion of the High Court as to whether the jurisdiction to remove disqualifications in s. 29 of the Act of 1961 was affected by the substitution of the provisions by s. 7 of the Act of 2006, so as to deprive the District Court of its discretion to remove a disqualification order for two years that was imposed prior to the commencement of the section.

61. The applicants submitted to the High Court, *inter alia*, that by virtue of s. 27, the repeal of the former s. 29 of the Act of 1961 did not and could not affect the previous operation of the enactment or anything duly done or suffered under the enactment and did not or

could not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act.

62. The High Court in answering the cases stated found: -

(1) that notwithstanding the repeal of the old s. 29 of the Act of 1961, the applicants' rights to apply for the restoration of their driving licences once a period of nine months had elapsed had not been removed and the applicants were entitled to apply to the District Court for restoration.

(2) That the legislature, in enacting s. 27(1) (c) and s. 27(2) of the Interpretation Act, 2005 clearly saw a distinction between a right acquired and a right accrued. The applicants acquired the right to apply for the restoration of their driving licences on their conviction and consequent disqualification and the right then accrued after the passage of nine months. Although the applicants right to apply for restoration accrued after the repeal of the old s. 29 of the Act of 1961, they acquired the right to apply prior to its repeal and therefore maintained their entitlement to apply to the District Court for the restoration of their driving licences.

63. It is worth quoting an extract from the judgment of Dunne J., at p. 222 in this regard: -

> *"Counsel for the respondent placed considerably emphasis on the provision of s. 27(1)(c) of the Interpretation Act 2005 and in particular on the use of the word "accrued" in that subsection. This is not surprising in the context of the second question in the case of the second named applicant. I do not disagree with the contention that the right to apply to the District Court under the old s. 29 does not accrue until after the period of nine months has elapsed. However, I think that this ignores the other words in s. 27(1)(c) which refers to 'any right, privilege, obligation or liability acquired, accrued or incurred under the enactment'. It seems to me that following their conviction, the applicants in these cases, having suffered the consequential disqualification, acquired the right to bring an application for the restoration of the driving licence. In the course of his written submissions, Counsel for the respondent made the comment "there is a clear distinction to be made between the mere possession of a right or privilege and the possession of a right or privilege that has actually accrued". However, it seems to me that, whilst there is such a distinction, the wording of s. 27(1) (c) of the Interpretation Act 2005 provides for that distinction by the use of the word 'acquired'. The word 'acquire' is defined, in the Concise Oxford dictionary as meaning 'come into possession of'. I am of the view that the applicants acquired the right or came into possession of the right to apply for the restoration of their driving licences on their conviction and consequential disqualification. The Legislature in enacting s. 27(1)(c) and also s. 27(2) clearly saw a distinction between a right acquired and a right accrued. I accept the argument of the applicants that the right to apply arose following conviction and that the right then accrued after the elapse of nine months.*

As I have indicated, Counsel for the respondent has submitted that the relevant section of the Interpretation Act 2005 in the context of these cases is s. 27(1)(c). If Counsel for the respondent was correct in his submissions to the effect that s. 27(1)(c) was the relevant provision then, that seems to me to set at nought the provisions of s. 27(1)(b) which provides that the repeal does not affect the previous operation of the enactment. If Counsel for the respondent was correct in his contentions then clearly the effect of s. 7 of the Road Traffic Act, 2006 in repealing the old s. 29 is that it does affect the previous operation of the enactment. If that were the intention of the legislature one would have expected that to be done in clear and express terms. The previous operation of the enactment permitted those convicted of an offence and who suffered a consequential disqualification to apply for the restoration of their licences. The application could not be made before the expiration of the period of nine months but it was an entitlement that existed following conviction. I am therefore satisfied that the provisions of s. 27(1)(b) and (c) have a bearing on these cases to the extent outlined above."

64. The High Court decision of Costello J. in *J. Wood & Company Limited v. Wicklow Co. Council* [1995] 1 I.L.R.M. 51 is another case where the issue of acquired rights arose in the context of the then relevant section of the Interpretation Act 1937. Section 21(1)(c) of the 1937 Act provided that when the Oireachtas repealed a portion of a previous statute then, unless the contrary intention appeared, such repeal would not affect any right acquired under the portion of the statute so repealed.

65. Part 6 of the Local Government (Planning and Development) Act 1963 was repealed by s. 3 of the Local Government (Planning and Development) Act 1990. New provisions for determining the right to and the amount of compensation payable when a decision to refuse permission to develop was delivered were introduced in the 1990 Act. The new Act came into operation on 10th June 1990 and any decision made after that date refusing permission to develop was to be subject to the new compensation provisions of 1990 Act. This was to be so whether the application to which the decision related had been made before or after the new Act had come into force, the relevant law being the law in force when the decision was made. No statutory right to compensation could arise until a decision was made. The applicants in the *Wood* case had on 10th June 1990 applied for development permission. However, no decision was made on that application by that date and they had therefore acquired on that date no right to compensation under 1963 Act. The right to compensation only arose when the decision to refuse permission was made at which time Part 6 of the 1963 Act was repealed and the 1990 Act was in force. The situation in that case is easily distinguished from the situation which arose in *O'Sullivan v. Superintendent in Charge of Togher Garda Station* and indeed from the circumstances of this case. This issue was also considered in the case of *Minister for Justice, Equality & Law Reform v. Tobin* [2012] 4 I.R. 148. In that case the respondent was convicted in his absence in Hungary of "*the misdemeanour of violation of the rules of public road by negligence causing death*". The Hungarian authorities issued a European Arrest Warrant for the arrest and surrender of the respondent who had returned to Ireland prior to his trial in Hungary. The applicant sought an order surrendering the

respondent to the Hungarian authorities. The High Court (per Peart J.) refused to grant the order of surrender on the grounds that the respondent had not "fled" Hungary and therefore did not come within the terms of s. 10 of the Act of 2003 as it was then enacted, and that decision was upheld on appeal to the Supreme Court.

66. Section 10 of the 2003 Act was subsequently amended by s. 6 of the 2009 Act, *inter alia,* in order to remove the requirement that a person the subject of a surrender application have "fled" the issuing State. A new European Arrest Warrant was subsequently issued in respect of the respondent and the applicant applied again for an order of surrender. The respondent objected to the application for his surrender on several grounds. One of the grounds was that s. 27(1)(b) of the Interpretation Act 2005 meant that s. 10 of the 2003 Act, as amended, could not be interpreted in a way that permitted the applicant to undo what had already been decided under the previous provision by way of re-litigation under the amended section. He further submitted that he had acquired the right or privilege to finality of the application for surrender and that the repeal of the "fled" requirement could not, under s. 27(1)(c) of the 2005 Act affect that right or privilege retrospectively.

67. The respondent was unsuccessful in the High Court and it (Peart J.) ordered his surrender. However, the Court did certify that its decision involved points of law of exceptional public importance, on which it was desirable in the public interest that an appeal should be taken.

68. A majority of the Supreme Court held in favour of the respondent on a number of grounds. Amongst the findings of the Supreme Court, in allowing the appeal, was the finding that while the dismissal of an application for extradition on technical grounds did not constitute a *res judicata* so as to prevent a second application, the second application might still be refused on the ground that it amounted to an abuse of process or an infringement of a right acquired under s. 27(1)(c) of the Interpretation Act 2005.

69. On this point, the following extract of the judgment of Hardiman J. in *Tobin* is worth noting at p. 305:-

> *"It was agreed that this issue turned on the interpretation of s. 27 of the Interpretation Act 2005. Insofar as relevant to this provision it states-*
>
> *(1) Where an enactment is repealed, the repeal does not - …*
>
> *(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the enactment, …*
>
> *(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment …"*
>
> *But s. 4 of the same Act provides: -*

"(1) A provision of this Act applies to an enactment except insofar as the contrary intention appears in this Act, in the enactment itself or, where relevant in the Act under which the enactment is made."

"In the present case, I agree that it can properly be said that the outcome of the Minister for Justice, Equality & Law Reform v. Tobin [2007] IEHC 15 and [2008] IESC 3, [2008] 4 I.R. 42 proceedings was to confer or create a right, being a right not to be extradited or surrender to Hungary so long as Irish law retained the "fled" provision that was a right, as opposed to a privilege or immunity. It is quite different from a right never to be forcibly rendered to Hungary, despite changes in the law: the contrary was not contended. I have read the ample discussion on this point contained in the judgment of O'Donnell J. and I agree with it.

Once the effect of the Minister for Justice, Equality & Law Reform v. Tobin [2007] IEHC 15 and [2008] IESC 3, [2008] 4.I.R. 42 is established as having been to create a right, however limited or transitory, the provisions of the Act of 2005 are of decisive importance. There is no doubt that the effect of the Act of 2009 is to permit, in a future case, even a person who has not 'fled' to be sent back to a jurisdiction in the position of Hungary in this case. But in relation to the appellant, who had, prior to the Act of 2009 acquired a right of the sort specified above, s. 27(1)(c) of the Act of 2005 provides a presumption that the right is not interfered with by new legislation.

In the course of argument on this appeal it became clear that s. 6(c) (ii) of the Act of 2009 was a specific response to the judgment of this Court in Minister for Justice, Equality & Law Reform v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4.I.R. 42. Counsel for the Central Authority was specifically asked whether the amendment was targeted at the appellant and he rejected that proposition. Accordingly, the provision is of general application in both wording and intent so that the section mentioned does not contain any clear expression of intention to remove the specific right acquired by the appellant. But that is what it would have to do in order to disapply the presumption contained in s. 27 of the Act of 2005 on the basis of the general provisions of s. 4 of that Act.

Accordingly, I consider that the Act of 2009 amending the Act of 2003 does not have the effect of removing the right vested in the appellant as a result of the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4.I.R. 42.

70. In the same decision O'Donnell J. had the following to say in relation to s. 27 of the Interpretation Act 2005: -

The third and related basis upon which it was argued that the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4.I.R. 42 had the effect of preventing his surrender under the amended provisions of the Act of 2003, was by reference to s.27 of the Interpretation Act 2005 which provides that:-

'(1) Where an enactment is repealed, the repeal does not –

…

(c) affect any right, privilege, obligation or liability acquired, accrued under the enactment'

This provision does not stand alone. It must be read alongside the provisions of s.4 of the Act of 2005 which make it clear that the presumptions and rules set out under that Act apply to any enactment "except insofar as the contrary intention appears in this Act, in the enactment itself, or relevant in the Act under which the enactment is made". Accordingly, s.27(1)(c) of the Act of 2005 creates a presumption against the removal of any right, privilege, obligation or liability, which presumption can be rebutted by demonstrating that the Oireachtas did indeed intend to remove the right, privilege or obligation in question.

71. In the Supreme Court decision in *Minister for Justice v. Bailey* [2012] 4 I.R. 1, O'Donnell J. at p. 121 although in part dissenting from the judgment, had the following to say in relation to s. 27 of the Interpretation Act 2005:-

"In classic common law theory a person can be said to have a right to do that which is not specifically prohibited by law. Accordingly since most Acts of the Oireachtas change the legal position, they will necessarily interfere with existing rights (in that sense) and that indeed is their purpose. The presumption contained in s. 27(1)(c) of the Interpretation Act 2005 is not a presumption against such effect: rather it is a presumption against interference with "right … acquired, accrued or incurred" or what, in the language of the cases can be said to be "vested rights". Thus Bennion on Statutory Interpretation (4th ed., Butterworths Lexis Nexis, 2002) explains at p. 259 the identical provisions of s. 16(1)(c) of the Interpretation Act 1978, as follows:- "The right etc. must have become in some way vested by the date of repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed." The same point is made in Craies On Legislation (9th ed., Sweet and Maxwell, 2008), at para. 14.4.12, p. 585:- 'The notion of a right accrued in s.16(1)(c) requires a little exposition. In particular, the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or have occurred to cause a particular right to accrue under a repealed enactment'. Accordingly, in order to succeed in this argument, the appellant must show two things: first, his entitlement after the 1st January, 2004, to have a court refuse to surrender him on the grounds set out in s. 42(c) of the Act of 2003 was a "vested right" or a right which could be said to be "acquired, accrued" at the time of the repeal of s. 42(c); and second, that the Oireachtas has not used clear words to rebut the presumption. The question in any given case of what constitutes a vested right for the purposes of this section is often a difficult one. As Lord Rodger points out at paras. 195 and 196 of his speech in Wilson v. First County Trust Ltd (No. 2) [2003] UKHL 40, [2004] 1 A.C. 816, the presumption

normally falls to be considered in relation to legislation which alters rights only for the future. Since, as he says at para. 195, p. 880, it is more likely that "parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive affect". At para. 196, p. 880 Lord Rodger observes that "[t]he courts have tried, without conspicuous success, to define what is meant by 'vested rights' for this purpose". It is apparent from his discussion of the concept, and that contained in the helpful decision of the Court of Appeal of England and Wales in Chief Adjudication Officer v. Maguire [1999] 1 W.L.R. 1778 that the decisions in the reported cases are not all easy to reconcile. Lord Rodger observed that this might lend weight to the criticism that the reasoning in such cases was essentially circular: courts are inclined to attach the label 'vested' to those rights which they conclude should be protected from the effect of the new legislation. In essence it appears that there is a dual inquiry: does it appear that at the time the right was granted that it was intended that it should be permanent; and the closely related inquiry as to whether it is unfair now to remove it, even for future events. In some cases these may be difficult concepts to apply with precision."

72. Ultimately, when looking at what is or is not a "vested right" it seems to me that a preliminary enquiry to be made is to identify whether something of substance is being claimed as a vested right. One is not speaking of vague or speculative or aspirational rights but rather something clearly identifiable and meaningful. It does not seem to me that the word "permanent" when used in relation to vested rights should be interpreted as meaning that all vested rights must amount to something that will last forever. It may be that some such rights fall into that category and that some such rights will be of indefinite duration. It may also be that some such rights are of finite duration but nonetheless rights of substance and meaning and value. After all the right may only be required for a specific and finite purpose. In the passage quoted earlier Hardiman J. refers to '*a right however limited or transitory*….'

73. A useful illustration of this point is to be found in the judgment of Buckley L.J. in the Supreme Court Judicature Court of Appeal (Chancery Division) on appeal from the High Court of Justice Chancery Division (Patents Court) delivered in the Royal Courts of Justice on Wednesday the 23rd April, 1980 in the case entitled: *In the Matter of the Patents Act, 1949 and 1977 and In the Matter of the Application of Convey Limited for the Restoration of Letters Patent No. 1.314,012*. The case concerned the Patents Act 1949 and the Patents Act 1977. The relevant provisions of the 1977 Act came into force on the 1st June, 1978. Both Acts provided for the restoration of a lapsed patent provided certain criteria were met. The criteria under the 1977 Act were more stringent than those under the 1949 Act. Under the 1949 Act the application for restoration could be made at any time within three years from the patent lapsing. The Patent in question lapsed in April 1978. Under the 1977 Act the application had to be made within one year after the patent lapsing. The patents in this case lapsed in April 1978. In addition, the criteria to be satisfied in order to entitle the applicant to have the patent restored were different in

the two Acts. Under the 1949 Act what the applicant had to show was that the failure to pay the renewal fee was unintentional and that there had been no undue delay in making the application for restoration. If the applicant satisfied the controller in those two respects, then he was entitled to have his patent restored as the language in the relevant section of the Act was mandatory. The patentee, upon realising that the patent had lapsed, made an application for its restoration which was framed as an application under the 1977 Act. The new provision had come into force on 1st June 1978.

74. Under s. 28 of the 1977 Act the different criteria required the controller of patents to be satisfied that the proprietor of the patent took reasonable care to see that any renewal fee was paid within the prescribed period and that the fees were not so paid because of circumstances beyond the control of the applicant. Thus, it was a matter of considerable importance to the applicant whether the application fell to be entertained under s. 27 of the 1949 Act or under s. 28 of the 1977 Act. The controller heard and determined the case on the footing that the Act of 1977 was the appropriate Act under which to entertain the application. On appeal, Whitford J. held that that view was mistaken and that the application fell to be dealt with under the 1949 Act. That decision of Whitford J. was appealed and the judgment of Buckley L.J. is the decision on that appeal.

75. The question on appeal centred principally upon the construction and effect of the transitional provisions contained in the 1977 Act.

The following extract from the judgment of Buckley L.J., at p. 7 shows this ; -

> *"Section 16(1) of the Interpretation Act of 1978 provides that without prejudice to Section 15- where an Act repeals an enactment the repeal does not, unless the contrary intention appears… "(c) affect any right, privilege obligation or liability acquired, accrued or incurred under that enactment… (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing act had not been passed".*

76. Then, having discussed the cases of *Director of Public Works v. Ho Po Sang & Ors*. [1961] A.C. 901 and *Free Lanka Insurance Company Limited v. Ranasinghe* [1964] A.C. 541, Lord Justice Buckley went on to say at p. 12; -

> *"……those two cases draw the distinction between what can be called an accrued right and what is no more than the hope of obtaining some discretionary remedy. In the present case it seems to me that the right of the applicants to require their patent to be restored, provided that they made their application within the three years limited by the 1949 Act, and established that the failure to make the payment of the renewal fee had been unintentional and that there had been no undue delay in their making their application, was a right which should be recognised as a right which had accrued to them in law before the commencement of the 1977 Act.*

Accordingly, it seems to me that this is a case to which Section 16 of the Interpretation Act of 1978 applies, unless it can be said that the contrary intention appears in the Act of 1977.

For the reasons which I have already given, it seems to me that no such contrary intention does appear in the Act; accordingly, I think that the learned Judge reached the right conclusion in holding that this was a case which was proper to be dealt with under the provisions of the 1949 Act, and not a case which should be dealt with under the provisions of the 1977 Act. For these reasons, I would dismiss this appeal."

77. The advice of the Privy Council in the *Free Lanka Insurance Company Limited v. Ranasinghe* [1964] A.C. 541 case, at p. 552 is also worth noting. The case arose from a road traffic accident in Ceylon where a lorry driver collided with the respondent's car. It was beyond doubt that the accident was a result of the negligence of the lorry driver and the Supreme Court of Ceylon accordingly awarded damages. '*At that time the law in Ceylon provided that the user of a motor vehicle must be insured as regards injuries resulting to third parties from accidents of the kind which occurred in this case – what are generally called third party risks'*. Under the legislation in Ceylon at the time, a third party was given the right to claim payment of damages. The point, of relevance to the case at issue, was the repeal of the relevant Ceylon legislation in force at the time of the collision but before the decrees that had been made in favour of the respondent in the relevant courts and the effect of this on liability in the case. This essentially concerned a transition between the 1938 Motor Car Ordinance and the Motor Traffic Act 1951. At p. 552, the Privy Council said: -

"The distinction between what is and what is not 'a right' must often be one of great fineness….The respondent had against the appellants something more than a mere hope or expectation…he had in truth a right, within the contemplation of s.6(3)(b) of the Interpretation Ordinance, under s.133 of the Ordinance of 1938 although that right might fairly be called inchoate or contingent".

78. On any view of the facts here it does seem right to acknowledge the force of the argument that the vested rights were inchoate until a date after the commencement of the 2010 Act. That does not however impact upon the existence of the vested rights and the entitlement of both couples to have those vested rights recognised in law and given effect, in the absence of anything in the legislation to show an intention to remove those vested rights.

79. Let us turn then to the timeline or chronology here.

PP / YY	
04/2006	Application for assessment of eligibility and suitability
02/08/2006	Application acknowledged by the Authority's predecessor
24/11/2009	Adoption assessment

24/02/2010	Declaration of eligibility and suitability (“DES”)
21/03/2010	First contact with Mexican lawyer
02/08/2010	Signed letter of acceptance
06 & 19/08/2010	Letters to PACT advising of intention to travel and requesting documents
20/08/2010	Letter from Authority headed “to whom it may concern”
29/09/2010	Email to Authority requesting documents for Mexican dossier
29/09/2010	Letter from Authority headed “to whom it may concern”
01/10/2010	Letter from Authority headed “to whom it may concern”
12/10/2010	Email to Authority requesting clarification on the law changing
15/10/2010	Letter to HSE requesting documents for Mexican dossier
25/10/2010	Reply to email of 12/10/2010 and phone call
31/10/2010	Letters to PACT advising of intention to travel and requesting documents
01/11/2010	*Adoption Act 2010 commenced*
02/11/2010	Agreement to post-placement assessments
03/11/2010	Letter to Authority advising of intention to travel to Mexico and seeking DES renewal
17/11/2010	Travel to Mexico
22/11/2010	Child placed with YY/PP
12/2010	Mexican statutory declaration sworn
06/12/2010	Granted status of “temporary residents”
28/12/2010	Email to Authority stating “in Mexico completing our adoption” and chasing renewal of DES
01/01/2011	Letter giving immigration clearance
04/01/2011	Letter from Mexican lawyer to Authority
11/01/2011	Email from Authority

08/02/2011	Second DES
09/02/2011	Letter from Authority headed “to whom it may concern”
15/02/2011	Email from Authority
17/02/2011	Letter from giving immigration clearance
21/02/2011	Application for adoption permit to Interior Ministry
14/03/2011	Psychological assessments
14/03/2011	Birth mother consents in court
10/05/2011	Mexican adoption
10/05/2011	Letter received from Desarrollo Integral de La Familia
13/05/2011	Paediatric assessment for passport
05/2011	Adoption decree received and child’s birth certificate issued
29/05/2011	Child’s passport issued
02/06/2011	Arrival in Ireland
05/06/2011	Application for entry on the Register of Intercountry Adoptions (“the Register”)
15/09/2011	Post-placement report
28/03/2012	Post-placement report (erroneously dated 2010)
16/09/2012	Post-placement report
26/02/2013	Authority refuses to enter adoption
28/03/2013	Post-placement report
26/02/2015	Letter from Authority refusing entry after O’C judgment

ZW / XM

20/02/2007	Application for assessment of eligibility and suitability
18/06/2007	Application acknowledged by the Authority’s predecessor
02/2009	Preliminary application to Mexican adoption agency
17/04/2009	Sent dossier to Mexico
01/05/2009	Adoption assessment

26/05/2009	DES
23/02/2010	Application for extension of DES and response requesting affidavit
02/03/2010	Statutory Declaration confirming application to adopt a child from Mexico
07/2010	First match with birth mother
9 & 16/08/2010	Agreement to post-placement assessments
01/11/2010	*Adoption Act 2010 commenced*
01/2011	Second match with birth mother
16/01/2011	Letter to Authority advising of intention to travel and request for immigration clearance
25/01/2011	Renewed DES collected stated to be pursuant to Section 63 of the Adoption Act, 2010
27/01/2011	Letter from Authority headed “to whom it may concern”
13/02/2011	Travel to Mexico
23/02/2011	Child placed with XM/ZW
24/03/2011	Birth mother consents in court
01/04/2011	Interview by Mexican authorities
17/05/2011	Mexican adoption
02/06/2011	Article 23 certificate issued
17/06/2011	Paediatric assessment
24/06/2011	Adoption decree received and child’s birth certificate issued
28/06/2011	Child’s passport issued
28/06/2011	Letter providing immigration clearance
06/07/2011	Arrival in Ireland
27/08/2011	Application for entry on Register
11/10/2011	Post-placement visit – report dated 25/10/2011

27/01/2012	Response from Authority about application for entry
15/05/2012	Post-placement visit – report dated 20/06/2012
28/02/2013	Authority refuses to enter adoption
15/04/2013	Post-placement visit – report dated 01/05/2013
21/10/2013	Post-placement visit – report dated 04/12/2013
23/04/2015	Letter from Authority refusing entry after O.C.

80. The declaration of eligibility and suitability along with the extensions are exhibited in respect of both couples. The declaration in respect of the first couple is dated the 24th February 2010 and the declaration in respect of the second couple is dated the 26th May 2009. Both are in a similar format. The declaration is provided on an official embossed style A4 page with the "Harp" at the top – and reads as follows: -

"DECLARATION

BY

AN BORD UCHTÁLA – THE ADOPTION BOARD

Application number …….

Adopters: ……

Address: Co.

An Bord Uchtála (the Adoption Board) having received an application from … and … (his wife) for a declaration as to their eligibility and suitability to effect an adoption outside the state and having had regard to a report, carried out by the pursuant to s. 8 of the Adoption Act 1991 and dated……, 2009, a copy of which is attached, hereby declares pursuant to Section 5 (1)(iii)(ii) of the Adoption Act 1991 that it is satisfied: -

(1) That they are eligible to adopt by virtue of Section 10 of the Adoption Act, 1991, and

(2) That they are suitable to adopt by virtue of Section 13 of the Adoption Act, 1952.

This declaration shall only apply in relation to an adoption effected during a period of 12 months from the date hereof.

Dated: day of 200

Given under the official seal of the Board.

_____

Kiernan Gildea

Registrar."

81. In the case of PP and YY the letter giving immigration clearance dated 1st January 2011 is worth quoting in full: -

> *"I refer to the case of JM and BL (his wife) of Co. who have been issued with a declaration by An Bord Uchtála (the Adoption Board) dated the 24th of February 2010 as to their suitability and eligibility and stating:*
>
> *(1) That they are eligible to adopt one child only by virtue of Section 10 of the Adoption Act, 1991, and*
>
> *(2) that they are suitable to adopt one child only by virtue of Section 13 of the Adoption Act, 1952.*
>
> *The above mentioned declaration shall only apply in relation to an adoption effected during a period 12 months from the date on which the declaration was issued.*
>
> *This is to confirm that the Irish immigration authorities will permit the entry into the state of one child legally adopted under Mexican law, during the period for which the declaration is valid. A separate entry visa for the child will not be required by the Irish authorities. Under an Adoption Order being made by the Adoption Board, in a case in which the adopter(s) are Irish citizen(s) the child, if not already an Irish citizen, shall be an Irish citizen and can remain in the state indefinitely thereafter.*
>
> *Permission to enter the state is subject to the child being in the company of an adoptive parent and that such parent is in possession of the adoption papers and passport in respect of the child, for presentation to the immigration authorities at the port of entry.*
>
> *This document is to be surrendered to an Immigration Officer on arrival at an Irish port of entry.*
>
> _____
>
> *Marie Madigan*
>
> *Foreign Adoption Unit, Immigration Services Section 1st January 2011."*

82. It is true that the similar immigration clearance letter which issued and was dated 17th February 2011 did refer to s. 33 and s. 34 of the Adoption Act 2010.

83. Insofar as the second couple is concerned the immigration clearance "To whom it may concern" letter reads as follows:

"I refer to the case of Z.W. and X.M. of , in the County , who have been issued with a declaration by Údarás Uchtála Na hÉireann – (the Adoption Authority of Ireland) to expire on the 31st day of October, 2012 as to their suitability and eligibility and stating:

That they are eligible to adopt one child only by virtue of s. 33 of the Adoption Act, 2010,

That they are suitable to adopt one child only by virtue of s. 34 of the Adoption Act, 2010.

The above mentioned declaration shall only apply in relation to an adoption effected during a period of 24 months from the date set out and the declaration issued on the 25th January, 2011.

This is to confirm that the Irish immigration authorities will permit the entry into the State of one child legally adopted under Mexican law, during the period for which the declaration is valid. A separate entry visa for the child will not be required by the Irish authorities. Under an adoption order being made by the adoption authority of Ireland, in a case in which the adopter(s) are Irish citizen(s), the child, if not already an Irish citizen, shall be an Irish citizen and can remain in the State indefinitely thereafter.

Permission to enter the State is subject to the child being in the company of adoptive parent and such parent is in possession of the adoption papers and passport in respect of the child, for presentation to the immigration authorities at the port of entry.

This document is to be surrendered to an immigration officer on arrival at an Irish port of entry.

_____

Sean Ryan

Foreign Adoption Unit

Immigration Services Section

28th January, 2010"

84. It will be noted that this letter is dated the 28th January 2010 and refers to the Adoption Act 2010 which did not come into force until the 1st November, 2010. The only explanation for this is a typographical error and that the 28th January 2010 should read the 28th January 2011 – which ties in with the actual chronology of the events as they transpired.

85. There is another letter from the Adoption Authority of Ireland which is dated the 27th January 2011 and this is exhibited at "ZW 16". This letter is entitled "To whom it may concern" and reads as follows:

> *"Údarás Uchtála Na hÉireann – the Adoption Authority of Ireland is a statutory independent body appointed by the government of Ireland. It is the central authority in Ireland for the administration of the Irish legal adoption system. The authority has the power to make adoption orders on the application of a person or persons who wish to adopt a child. Under s. 40 and 63 of the Adoption Act, 2010, the Irish Adoption Authority has the legal authority to grant declarations of eligibility and suitability to persons intending to adopt. The aforementioned declaration is the official document which indicates that the bearer(s) is/are suitable and eligible to adopt abroad.*
>
> *I confirm that the Health Service Executive is a body entitled to arrange for the placement of children for adoption and, under s. 37 of the Adoption Act, 2010, to assess persons as to their suitability to adopt.*
>
> *I can confirm that in accordance with the above mentioned Act, the Health Service Executive carried out an assessment as to the suitability of the bearer(s). Having had regard to the report of the assessment furnished in their case, the Adoption Authority made a declaration of eligibility and suitability pursuant to the Adoption Acts, 2010 and the said person(s) is/are eligible and suitable to adopt.*
>
> *In accordance with the Adoption Act, 2010 the Adoption Authority maintains a register of intercountry adoptions. An entry in the register grants recognition under Irish law to a foreign adoption. The bearer(s) is/are entitled to seek an entry in the register of intercountry adoptions upon their return to Ireland.*
>
> *Further, in accordance with s. 57 of the Adoption Act, 2010, a foreign adoption granted to persons ordinarily resident in Ireland is deemed to be effected by a valid adoption order if the following requirements are satisfied –*
>
> *1. As having been effected in accordance with The Hague Convention on Intercountry Adoption (1993) OR*
>
> *2. The adoption must be a "foreign adoption" as defined in s. 1 of the Adoption Act, 1991 as it read on 30 May, 1991 and therefore satisfy the conditions set out in that definition and*
>
> *3. Is not contrary to public policy.*
>
> *The Board shall exercise its discretion in respect of an entry in the register upon receipt of an application.*
>
> _____
>
> *Adrian Martin*

Adoption Authority of Ireland

27th January, 2011"

86. When I consider the legal authorities and the provisions of the Adoption Act 1991 along with the provisions of the Adoption Act 2010 I am driven to the conclusion that the declaration of eligibility and suitability vests clear rights in the bearers of that declaration. It is a formal official document issued pursuant to statute and it has clear, important and valuable consequences for the bearers. Indeed, to repeat just one part of the letter just quoted from the Adoption Authority of Ireland dated the 27th January 2011 concerning the declaration of eligibility and suitability:-

> *"The bearer(s) is/are entitled to seek an entry in the register of intercountry adoptions upon their return to Ireland".*

87. It is not necessary to repeat any other portion of the documents which I have recited in full but it is an inescapable conclusion and I find that the declaration of eligibility and suitability which issued to each couple vested in each couple rights which cannot be set at nought or taken away by the Adoption Act 2010 in the absence of very clear wording – which is noticeably absent from the 2010 Act. The vested rights are clear and there is nothing in the 2010 Act to rebut the presumption against an intention to remove these vested rights.

88. I am entirely satisfied that the declaration of eligibility and suitability vested rights in both couples once they came into possession of the declarations. The declarations of eligibility and suitability in question were in effect licences to allow the bearers at the time of issue to travel abroad to adopt a child abroad and return to Ireland with the child and apply to have the foreign adoption entered in the register of intercountry adoptions. The date of birth of the child adopted in Mexico cannot impact on these vested rights. The declarations are self-contained, clear and legal documents which must be afforded the recognition and effect which they were intended to have when issued in the absence of anything in the 2010 Act to say otherwise.

89. Unfortunately, the transition from the old to the new created the confusion and uncertainty which has led to this litigation and the protracted delay in having the two children's adoptions recognised in Ireland. That confusion and uncertainty by reason of the transition cannot deprive the two couples of the rights which were vested in them when they received the declarations of eligibility and suitability.

90. There cannot be any doubt but that both couples relied fully on the declarations of eligibility and suitability which issued to them. They took real steps to avail of the right or privilege or licence which the Declarations vested in them by proceeding with their plans to adopt abroad in Mexico.

91. In the O'C case Abbott J. referred to eight separate rights which he said had arisen as a result of the applicants taking steps to avail of the right and bring it to further states of

advancement through the process in which they were involved, by seeking to adopt under the 1991 Act. However, I am satisfied from considering his analysis of the facts and circumstances that what he has identified as "rights" are properly seen as illustrations of the existence of the right actually conferred by the Declaration of eligibility and suitability. It can hardly be denied that some of the events subsequent to the issue of the Declaration of eligibility and suitability in the *O'C* case created new or additional rights – but I find nothing in the *O'C*. judgment to suggest that vested rights did not come about once the Declaration of eligibility and suitability issued to the two couples in this case.

92. In my view the bearer or bearers of the declaration of eligibility and suitability had acquired, on its issue, important rights. It would in my view be unfair to remove those rights even though the child to whom the declaration of eligibility and suitability was subsequently related to was not born at the time the declaration issued or at the time the applicable law concerning inter-country adoption was changed. The removal of the vested rights could only have been achieved by clear and express wording in the 2010 Act. Such wording is absent from the Act. In written submissions on behalf of the Adoption Authority it is submitted that "*the Oireachtas cannot have intended that vested rights of the (limited) nature proffered here, would prevail over the requirements of the Convention*". I do not believe this submission to be well founded. Firstly, I am satisfied that the vested rights we are speaking of were significant legal rights which were acquired in accordance with statute and that it is inaccurate to describe them as limited. Secondly, as stated, if the Oireachtas had intended to remove those vested rights then it ought to have used clear and express language to do so. It did not. Thirdly, I do wonder how it can be stated that these vested rights might "prevail over the requirements of the Convention" in light of the provision in Article 41 of the Convention.

93. Section 63 of the 2010 Act sets out the transitional arrangement in relation to foreign adoptions in process immediately before the commencement of the Act – and states:-

"63.— (1) In this section, 'foreign adoption' means a foreign adoption within the meaning of section 1 of the Adoption Act 1991 .

(2) If, immediately before the establishment day, a foreign adoption described in the Adoption Act 1991 is not yet effected but is still in process as provided for under that Act—

(a) if the persons who applied under the Adoption Act 1991 had been issued with a declaration of eligibility and suitability before the establishment day, the adoption may proceed under this Act as if—

(i) it were commenced under this Act and the date of the issue of the declaration were that day,
(ii) the persons had applied under section 37 of this Act, and
(iii) section 40(1)(b) of this Act read "in another contracting state or a state that, in the opinion of the Authority, applied standards regarding

the adoption concerned that accord with those in the Hague Convention",

and

(b) in any other case,

the adoption may proceed under this Act as if it were commenced under this Act."

94. These transitional provisions are somewhat cumbersome and unclear. The written submissions on behalf of the Attorney General quite properly do acknowledge a lack of clarity in some respects and acknowledge also that it is a matter for this Court to determine the effect of the issuing of the declaration of eligibility and suitability under the 1991 Act insofar as the vested rights argument is concerned.

95. It may have been much clearer and easier for all concerned if Article 41 of the Convention itself had been transposed into Irish law. Article 41 is entitled "Application pursuant to Article 14 of the Convention in force." It provides:-

"The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving state and the state of origin."

96. It should be noted that Article 14 of the Convention provides for an application for adoption to the Central Authority and provides:-

"Persons habitually resident in a contracting state, who wish to adopt a child habitually resident in another contracting state, shall apply to the central authority in the state of their habitual residence."

97. The explanatory report on the Convention which was drawn up by G. Parra-Aranguren details the position in relation to Article 41 at paras. 579, 580 and 583 and they are worth quoting in full;-

"579 Article 41 was discussed on the basis of the proposal submitted by the permanent bureau in working document no. 100, to the effect that "the Convention shall apply as between contracting states only to adoptions made after its entry into force in these States". Although agreeing on the substance, Switzerland observed that the adoption may have been granted after the Convention enters into force, but prepared not according to the Convention's rules but rather according to the internal law of the State. Therefore, it was considered more appropriate to take into consideration the moment when the proceedings start, an idea that was accepted.

580. Working document no. 180, submitted by the drafting committee, specified the moment when the proceedings are to be considered to start, and suggested the following formulation: "the Convention shall apply, as between a receiving state and a state of origin, in every case where an application pursuant to Article 14 has

been received after the Convention has entered into force in both states". The Italian delegate observed the ambiguity of the proposal, but it became the final text after some linguistic adjustments.

583. Article 41 does not answer the question of the entering into force of the Convention in general, solved by Article 46, but its application to a particular case, assuming that the Convention is already in force in the state of origin and in the receiving state."

98. In the case of both children the subject matter of these proceedings, and their adoptive parents, it is abundantly clear that the adoption process commenced long before the 2010 Act came into force. The chronology in respect of both couples is set out above. The first couple made their application in April 2006 and the second couple made their application in February 2007.

99. Given the clear wording of the Convention and its objectives it is difficult to see why both couples have ended up where they are today. An analysis of the evidence before this Court in relation to Baby K and Baby F leads me to the conclusion that recognition of their adoptions in Ireland is in keeping with the spirit and objectives of The Hague Convention – and appears not to offend the wording of the Convention itself if due regard is paid to Article 41.

100. International treaties have the force of law in Ireland as a result of the passing of an act of the Oireachtas. The function of the court is to interpret the act itself. In that regard the normal rules of statutory interpretation should be applied. Having said that, the normal rules are qualified by the requirement that the enactment be interpreted in a way which is in accordance with the treaty in question. A court is permitted at common law, when interpreting statutes, which give effect to international treaties, to interpret the statute in question in light of the meaning of the relevant provisions of the treaty, as well as earlier drafts of the treaty, committee reports and other preparatory material. This is covered in Dodd & Cush, *Statutory Interpretation in Ireland* (Tottel Publishing, 2008) where the authors point to the case of *H.I. v. M.G.* [2000] 1 I.R. 110 concerning an issue which arose involving the Hague Convention on the Civil Aspects of International Child Abduction and its national enactment, the Child Abduction and Enforcement of Custody Order Act 1991. In that case Keane C.J. stated the general approach in the following terms, at p. 124:-

"….since the Convention has the force of law in this State solely by virtue of the 1991 Act and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the travaux preparatories which accompanied its adoption

may legitimately be used as an aid to its construction. (See the decision of this court in *Bourke v. Attorney General* [1972] I.R. 36)."

101. Thus, it is my view legitimate, if not necessary, to have regard to the wording of the Convention itself and to look at the explanatory report which I have referred to. Furthermore, s. 10 of the Adoption Act 2010 provides:-

'10.— (1) Judicial notice shall be taken of the explanatory report prepared by G. Parra-Aranguren in relation to the Hague Convention, a copy of which has been placed in the Oireachtas Library.

(2) When interpreting any provision of the Hague Convention, a court or the Authority, as the case may be, shall pay due regard to that explanatory report.'

102. The Hague Convention and the Adoption Act 2010 are dealt with in comprehensive judgments of the Supreme Court in the case of *CB & PB v. The Attorney General* [2018] IESC 30 in which judgment was delivered on the 12th July 2018.

103. Although touching on many of the issues visited in this case it is important to point out that the factual circumstances of that particular adoption case were very different to those prevailing here. In his judgment Mac Menamin J. was careful at para. 11 to *"emphasise that this judgment is confined to the specific facts of the instant case*". It was an inter-country adoption for Convention and statutory purposes and in circumstances where there was no engagement whatsoever with the Convention. What was attempted was to morph the facts into a domestic adoption simply by proof of habitual residence. The case in terms of the factual situation bears no resemblance to the facts here.

104. The High Court in *J.M. v. Adoption Authority of Ireland* [2017] IEHC 320 was asked to register a non-Convention compliant adoption pursuant to s.92 of the 2010 Act. Reynolds J. declined to do so. In that particular case the child in question was the niece of the proposed adoptive mother, she being the sister of the natural mother. Secondly, for many years there existed a close and loving relationship between the child and the aunt. Thirdly, it was a Hague Convention case. Fourthly, the adoption obtained was purely a domestic one from the country of origin. Fifth, there was non-compliance with the Convention. Sixth, there was no certification by the competent authority of the foreign state and, finally, there was no suggestion of deliberate non-compliance of mala fides on the part of the applicants. The situation arose through simple ignorance of the requirements of the Convention.

105. It is useful to set out the facts as Reynolds J. did at para. 6 of her judgment:-

"6. A.M. was born on the 4th April 1995 and is now twenty-two years of age. A.M. is the niece of the adoptive mother in this case in circumstances where she and the birth mother were sisters. It is clear that A.M. and her adoptive mother formed a very close and loving relationship during A.M.'s tender years. In later years, after the applicants had married, they proceeded to lawfully adopt A.M. in the

Philippines. Whilst it is clear that the application was properly processed through the Family Courts in the Philippines, the applicants appear to have been unaware of the necessity to liaise with the relevant Hague Convention Office with responsibility for intercountry adoption. In the circumstances, the respondent contends that the adoption is not one which is compliant with the procedures required for intercountry adoption in accordance with the Hague Convention.

7. The application form completed by the applicant for an entry of the adoption into the "Register" refers to the date of the adoption order as being the 9th November 2009. On that basis, the applicant contends that the adoption should be registered pursuant to Section 90(2) of the Adoption Act, as it had been completed prior to the 1st November 2010, (the establishment day for the purposes of the 2010 Act which incorporates the Hague Convention into Irish law). The relevance of that date is that an adoption which was effected prior to the said date is eligible to be registered on the Register under Section 57(2)(a) of the Act, even if it had not been effected in compliance with the Hague Convention.'

8. However, it is clear from the documents submitted by the applicants that the initial decision of the Philippine Court issued on the 28th March 2011 was followed by a Certificate of Finality dated the 1st July 2011"

106. In considering her decision, Reynolds J. contrasted the facts of the case before her with those existing in the *O'C* case (Abbott J.). In that case Abbott J. – as McKechnie J. puts it in the *C.B*. case (at para. 141) had expressed the need for flexibility where technical problems arise within the ambit of the Convention. Reynolds J. reconciled the *O'C* case and the case before her as follows: -

"34. Abbott J. directed the registration of the adoption under s.92 on the basis of vested rights under the law as it was before adoption of The Hague Convention and in circumstances where the applicants had complied in all respects with the requirements of a foreign adoption and had secured a declaration of eligibility and suitability before travelling to Mexico to adopt the child.

The approach adopted by Abbott J. recognised that some flexibility could be adopted by the court in situations where the requirements of The Hague Convention are broadly met.

However, clearly the facts of that case must be distinguished from the facts in the instant case in circumstances where the applicants had no prior engagement with the Authority and where no declaration of eligibility and suitability had been obtained."

107. Reynolds J. went on to conclude, at para. 36 that "*it is simply untenable to suggest that the broad requirements of The Hague Convention have been met or indeed that the court could properly direct the registration pursuant to s.92 of the Act*". In considering the latter decision in the *CB* case, McKechnie J., at para. 142, states: -

"Even though it is true that some contact was made with the Authority in the within case, unlike in JM, nonetheless the end point is identical: Total non-compliance with the Convention. Accordingly, I am satisfied that the instant situation approximates the facts of JM far more so than it does M O'C, where there was substantial compliance by any measure."

108. It is worth reiterating that in the *CB* case the Supreme Court was not dealing with a case which rested significantly on the transitional provisions of the 2010 Act as was the situation in the *O'C* case decided by Abbott J. This point is worth reiterating as it is the same transitional provisions of the 2010 Act which is the focus of attention in this case.

109. In terms of the timeline involved in the *CB* case the first contact between the applicants and the Adoption Authority took place on the 16th June 2011 when, in an email, CB asked the Authority for information regarding inter-country adoption. Ultimately, the "provincial adoption" was approved by the Provincial Adoption Committee in Country A on the 25th January 2012 and the adoption was registered on the 21st February 2012. On the 23rd February 2012 the children's change of family name was registered in Country A and passports were issued in respect of the children. On the 28th February 2012 the adopting couple made an application to the Irish Consulate in country A for visas for the children. Thus, all of the relevant events took place well after the commencement of the 2010 Act.

110. As an aside, the *CB* case subsequently returned to the High Court with an application pursuant to s.92 of the 2010 Act. In a judgment delivered on the 10th September 2019, Faherty J. made an Order pursuant to s. 92(1)(a) of the 2010 Act directing the Authority to enter the adoptions of JB and KB on the Register. Following a rigorous scrutiny of the facts and a careful examination of the legal position and legislation, Faherty J. was satisfied that she was dealing with, in the words of the majority view in the Supreme Court, *"a truly exceptional case".*

111. This review of the background and of the legal position is in my view necessary in order to put the case stated and my response in context. It is also worthwhile I believe setting out the text of the case stated which is as follows: -

"Background

(1) By two letters dated 20th June 2017, solicitors for the parents wrote to the Chairman of Údarás Uchtála na hÉireann (hereinafter the 'Authority') on behalf of PP and YY (in respect of the application to adopt K) and on behalf of ZW and XM (in respect of the application to adopt F). This followed meetings on 13th June 2017 between the Authority and both sets of applicants, as well as prior correspondence.

(2) The Authority had previously determined that the principles and the judgment of Mr. Justice Abbott in *MO'C and BO'C v. Údaras Uchtála na hÉireann* [2015] 2IR 94 (the '*O'C* judgment') did not extend so far as to permit it to register the adoptions of, *inter alios*, the two foregoing minors on the Register of Inter-Country Adoptions ("the Register") in particular because the minors were born after the date of

commencement of the Adoption Act, 2010 (the Act) on 1 November 2010, in distinction from the situation which applied in the *O'C* judgment.

(3) The said letters of 20th June 2017 requested the Authority to state a case to this honourable court under s.49 of the Adoption Act, 2010 ('the Act'). The letters submitted that the issues arising were as follows: -

> *"1. Whether the aforementioned adoption should be recognised and/or registered in Ireland on the basis that rights had vested in the Respondents prior to the commencement of the Adoption Act, 2010?*
>
> *2. Whether in all the circumstances of the aforementioned adoption the High Court is satisfied that an entry with respect to same should be made in the register of inter-country adoptions pursuant to s.92 of the Adoption Act whether ancillary to and/or arising from the recognition thereof pursuant to Paragraph 1 hereof or otherwise."*

(4) The Authority has considered that additional questions ought to be stated other than those sought, and accordingly the Case Stated herein is brought pursuant to Section 49(1) of the Act as well as Section 49(2) thereof.

Relevant dates in respect of key events

(5) YY and PP were issued with a declaration of eligibility and suitability ('DES') in respect of K (a minor) on 24 February 2010. K was born [in] November 2010, and K's mother consented to adoption on 14 March 2011. A Mexican Adoption order issued on 29 April 2011.

(6) XM and ZW were issued with a DES on 26 May 2009 in respect of F (a minor) which was renewed on 25 January 2011. F was born [in] January 2011, and F's mother consented to adoption on 24 March 2011. A Mexican Adoption Order issued on 27 May 2011.

Vested Rights and the O'C judgment

(7) The concept of vested rights, referred to in the letters of 20 June 2017 requesting a case stated, would appear to emanate from the *O'C* judgment. In that judgment, Abbott J noted at paragraph 1 of the judgment that '*The child was born on 22 October 2010, and was placed in the applicant's care on the 26th of October 2010, following which a Mexican Court made an Adoption Order on 24 March 2011*.'

(8) He noted at paragraph 7 that the applicants in that case had received a DES from An Bord Uchtála, the pre-cursor to the Authority, applicable '*during a period of 12 months from 20 October, 2009*' which period was subsequently extended. He continued at paragraph 8: -

> *'An Bord Uchtála then issued a letter signed on their behalf dated 29 June, 2010, headed 'To whom it may Concern', which may be regarded as a letter of introduction of the applicants to the authorities in Mexico from which they*

might seek adoption arrangements. The applicants made an agreement in July, 2010 in relation to post placement assessments of the child in Ireland when they returned to Ireland…'

(9) He continued at paragraph 34: -

'In dealing with the provisions of Section 63 of the Act of 2010 dealing with transition, it is accepted, as suggested by counsel for the Attorney General, that there should be a two legged test to examine whether under Section 27 of the Interpretation Act 2005 pre-existing rights to adoption of the applicants survived the Act of 2010. The first such leg is to determine whether, on the criteria of the case as set out in the judgment of O'Donnell J. in Minister for Justice v. Bailey [2012] IESC16, 2012 4 IR 1, such a right arose, and the applicants took real steps to avail of it, and to bring it to further states of advancement through the process in which they were involved, by seeking to adopt under the Act of 1991. I conclude that on this leg the following rights have arisen: -

1. *the Declaration of eligibility not only of the applicants but also in relation to the process of seeking a child not older than six months;*
2. *the furnishing of a letter reflecting such Declaration of eligibility from the Authority which gave the applicants a right to travel abroad, in this case to Mexico, can seek out a child….the possession of a letter backed by the official and solemn authority of a State Adoption agency is, in itself, a right and important step towards the advancement and absolute securing of that right….;*
3. *the consent of the birth mother to place the child with the applicants is a very real and dramatic right…this consent, although perhaps not enforceable by action, nevertheless gave rise to a number of real expectations and calls for actions by way of preparation to receive the child on both sides of the consent;*
4. *Placing of the child in custody and guardianship,…was a right which the applicants had which was enforceable against all the world, except for the fact that the consent could still be withdrawn, and left the right to feasible or conditional to that extent….;*
5. *the right of the child when in the custody and guardianship of the applicants pending the full adoption hearing to develop physically and emotionally by getting food, shelter and parental nurturing so that the beginnings of the child parent bond could emerge, and that the basis for establishing a sound sense of identity of the child could be established even if these aspects could only be realistically or significantly developed from the applicants' side, in the first instance;*
6. *the applicants with custody of the child with a properly contained consent armed with a Declaration of eligibility and letter of introduction from the Irish Adoption Authorities, had a right and duty to apply to*

the Mexican Court, which on the basis of its satisfaction as to the probity of actions taken to date on the provision of reports indicating the positive qualities and possibilities of the proposed adoption, would grant the adoption;

7. the right of the applicants and of the child (who, by now, after the Mexican Order, was in the custody and guardianship of the applicants by reason of a consent which had become absolute by the reason of the Mexican Adoption Order) to apply to the Adoption Board under the Act of 1991 to have the *Mexican adoption recognised and the adoption registered so as to be deemed an Irish adoption….;*

8. It should be noted that the enumeration of such rights are taken together, which presents an almost irreversible situation in fact,…'

(10) At paragraph 35, Abbott J made further observations with respect to the DES, including that: - "*The court is obliged to construe the legislation in accordance with the principles of the Constitution and to allow for an interpretation of the provisions allowing the continuing use of Declarations of eligibility which avoids outcomes such as invidious discrimination against persons in the applicants' position*."

Approach of the Authority following the *O'C* judgment

(11). Following the *O'C* judgment, a portion of the applications for entry on the register were granted by the authority. All of these applications related to adoptions of children from Mexico.

(12). A number of applications were not granted by the authority, in particular on the basis that the children were not born until after 1 November 2010 when the Act was commenced. These included both sets of applicants who, through their solicitors, have sought cases to be stated.

Alternative routes suggested by the Authority and interactions with the Child and Family Agency

(13) The solicitors for the authority stated in correspondence dated 3 February 2016 to solicitors for the parents that the Authority was willing to consider applications under Part VII of the Act and, accordingly, suggested that the relevant applicants contact the Child and Family Agency (the 'CFA') to start the relevant process. This suggestion was repeated in further correspondence on behalf of the authority to include letters dated 4 May 2016, 20 May 2016, 14 June 2016, 11 July 2016 and 8 March 2017.

(14) It appears that the applicants to adopt F (a minor) have engaged with the CFA. However, obstacles have been encountered in advancing matters. By letters dated 20th April, 2017 from the CFA to the authority in respect of these applicants, the CFA stated *inter alia*:

> *"… the agency will not be in a position to commence its assessment until such time as the child's eligibility to be adopted has been confirmed in compliance with Article 4 of the Hague Convention."*

(* It became apparent in the course of the case, as indicated earlier, that the parents of K also endeavoured to avail of the Part VII procedure but came up against similar obstacles.)

(15) In subsequent correspondence with the CFA, the Authority has disputed the correctness, as a matter of law, of this approach by the CFA by letters dated 29 May and 23 June 2017.

(16) Legal representatives on behalf of both sets of applicants have taken the position that the applicants could have rights vested for the purpose of the Adoption Act, 1991 (the '1991 Act') even if the children so to be adopted were born after the repeal of the 1991 Act through the commencement of the Act on 1st November, 2010. For the purposes of s. 49(2) of the Act, the authority has determined that such a legal position is not frivolous. In addition, the authority has determined that related questions of law arise in respect of which it is appropriate to state a case under s. 49(1).

Questions Stated

(17) The Authority therefore STATES A CASE to this Honourable Court pursuant to both s. 49(1) and s. 49(2) of the Act, as follows:-

(1) for the purposes of s. 27(1) (c) of the Interpretation Act 2005 are "… *pre-existing rights to adoption* [which] *survived the Act of 2010*" (as per paragraph 34 of the O'C judgment), capable of arising where the minor to be adopted was born after the commencement of the Adoption Act 2010 on 1 November 2010?

(2) In the event that the answer to question one is "No", is the Authority entitled to proceed under Part VII of the Adoption Act 2010 in respect of the applicants who are notice parties to this case stated, subject to hearing the persons in section 53(1) (a) of the Act and the other requirements in Part VII being fulfilled?

(3) Is the Child and Family Agency entitled to insist on confirmation that a child is eligible for adoption before carrying out an assessment under section 37 of the Act?"

112. Before answering the questions, it is appropriate for me to say that I am doing so in the context and against a backdrop of the analysis of the facts and the law which I have set out earlier in this judgment. It would be inappropriate to answer the questions or deal with them in a vacuum, not least because the welfare of the two children involved requires finality and certainty to be achieved insofar as their status is concerned, and as speedily as is possible. Article 35 of the Hague Convention states "*The Competent Authorities of the Contracting States shall act expeditiously in the process of adoption*." It is regrettable that half of their childhood has already passed without any resolution to the predicament caused by they being victims of what the State of origin referred to in the third party note as "procedural errors which occurred". It is apparent to me that the significance and importance of the declarations of eligibility and suitability which were granted to both couples have not been afforded the recognition which they ought to have

been afforded. Each of those declarations of eligibility and suitability were hard earned by those to whom they issued and vested in them as bearer's important rights which survived the Act of 2010.

113. I answer the questions as follows:

(i) Yes.

(ii) Does not arise in light of the answer to the proceeding question.

(iii) No.

114. I will hear the parties in relation to the issue of costs and any other matters arising from this judgment.