Record No. 2022/170

UNAPPROVED

THE COURT OF APPEAL
CIVIL

Whelan J
Costello J
Power J

Neutral Citation No [2022] IECA 196

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

AND

IN THE MATTER OF B (A MINOR)

BETWEEN:

THE CHLD AND FAMILY AGENCY AND A

APPELLANTS

AND

THE ADOPTION AUTHORITY OF IRELAND,

AND C AND Z

RESPONDENTS

Judgment of Ms Justice Power delivered on 10th day of August 2022

Introduction

1. This is an urgent and complex case at the centre of which is a young girl who is known and loved by two mothers – her birth mother, C, and her foster mother, A. The girl, B, will be eighteen on 3 September 2022. The concerns which preclude me from allowing the appeal in this case arise in respect of two issues: (i) how the statutory safeguards in adoption

applications are to be interpreted and applied where the minor in question is on the 'cusp of adulthood'; and (ii) having regard to the relationship which exists between this girl and her birth mother, whether it is, truly, in her best interests that the legal recognition of that relationship be extinguished.

2. Before an order authorising the Adoption Authority ('the Authority') is made, the High Court must be satisfied that certain statutory requirements have been met. At issue is whether, on a strict interpretation, each one of those requirements is capable of being met in respect of this minor. If they *are*, then would the making of an adoption order be in the best interests of this child? The trial judge was not satisfied that each requirement was met. Moreover, he did not consider that the minor's best interests would be served by making an order authorising her adoption in the last remaining days of her childhood.

3. Time is of the essence in this case. For that reason, I do not propose to recite all the relevant constitutional and statutory provisions that are required to be considered and applied. Nor do I propose to rehearse the various quotations from several decided cases that reiterate the paramountcy of the child's best interests in an application of this nature. That principle is well settled law and I accept that it is the paramount consideration in this case. Given the constraints of time, I propose only to highlight those issues in respect of which I have reservations. The issues are mixed matters of law and of fact. Before doing so, however, I want to make three preliminary remarks.

4. First, this is one of several cases in which serious concern has been expressed by the High Court over the significant failures on the part of the State's Child and Family Agency ('the Agency') to work towards family reunification of children who are placed in care.[1] The concern is evident where 'eleventh hour' applications are made seeking authorisation

[1] See, for example, *Child and Family Agency and K and C –v- Adoption Authority of Ireland and A and J (Re S A Minor)* [2021] IEHC 677; see also *Child and Family Agency and GK and CK –v- Adoption Authority of Ireland and ML* [2020] IEHC 419.

for adoption orders. Fairness is intrinsic to justice and the High Court has expressed its concern, on several occasions, about the unfairness that such recurring failures and late applications are causing. In view of the public interest in the proper administration of justice, it is troubling that the High Court considers that it must make such orders in the best interests of the child but in the face of what it considers to be situations of ***fundamental unfairness***.[2]

5. Second, I do not consider that the regrettable failures on the part of the Agency in this case could ever be the basis for refusing to authorise an adoption order if such were in the best interests of the minor concerned. Adoption is not about punishing or rewarding any person or entity (see *Child and Family Agency and HR and FR v. Adoption Authority and PW and AW (Re CW A Minor)* [2018] IEHC 515). Still less is it a lottery and it would be grossly unfair to a child to allow or refuse an adoption order to be made on the basis of whether a statutory authority happened to have discharged its responsibilities well or poorly, in a given case.

6. Third, I am not persuaded that the trial judge's refusal to authorise an adoption order in this very particular case, if upheld, would mean that '*at a systemic level, children aged 17 and over could never be adopted*'. Every child's story is different. Any adoption order made or refused, must be made or refused on the basis of the law as it applies to the specific and unique facts of a particular child's life. As with everyone's identity, this minor's identity is that which helps her to know what it is about her that is unique from other people. In this sense, the history that she has had with both her birth mother and her foster mother is an important part of the mosaic that makes up *her* life, *her* identity.

[2] See *Child and Family Agency and K and C –v- Adoption Authority of Ireland and A and J (Re S A Minor)* [2021] IEHC 677.

Birth family background

7. The facts of the case and the contents of the affidavits are set out, extensively, in the judgment of the High Court. It is not in dispute that the minor was brought up in the care of a foster family supported, as it was, by the Child and Family Agency. Her gestation and birth coincided with a time of extreme crisis in her mother's life and the child was placed, voluntarily, in care. Her mother was a target of extreme domestic violence. She was isolated in a rural setting, subjected to deprivation and sexually and physically assaulted. Her husband was also abusive towards the children. To cope with the crisis, C began to drink. She was unaware of her pregnancy with B for the first trimester and when the baby was born in September 2004 she had medical complications. By this time, C had reported her husband to the Gardaí. He was gone from the family home (though continued to harass C) when B was born. [3]

8. As a single parent and facing the threat of care proceedings, C agreed to place the child, B, voluntarily, in care in December 2004. She also agreed to enter rehabilitation. To facilitate this, her two other children were placed in care. Following a 28-day rehabilitation programme, C has abstained from alcohol ever since. She underwent parenting programmes, therapy and after care. After eighteen months, the two other children were returned to her because they were at risk in care. Removed from the crisis situation that prevailed at the time of B's birth, C, over time, was able to rebuild her life. C educated and raised her other children well. She says that she wanted all of her children back but was told by the social worker that she would never get B back and, that B would '*die in [her] care'*. She says she was told to concentrate on the other children and that she did not have the transport necessary to bring B to her medical appointments. She says she felt '*pressurised and riddled with guilt*' and she consented to the care order being made.

[3] Z has played no part in the minor's life nor did he participate in the proceedings. This judgment is concerned, principally, with the constitutional relationship between the minor and her natural mother.

9. Access to her child, B, was easier for C when they lived in closer proximity to each other in the countryside. For several reasons, she moved away from the rural setting but continued for the next 3 years to have regular access to her child because she had somewhere to stay when she made the long journey from the city to the countryside to see her. She had attended every Child in Care Review before she left the rural setting. She went to great lengths to maintain contact with B, travelling up and down by train from the city to the countryside, at times needing to ask the Community Welfare Officer for the fare. The Agency's notes record that, at that time, both the mother and child '*really enjoy the contact when they meet'*. For a period, when she had nowhere to stay in the country, she depended on the foster mother, A, to bring B to the city for access visits. Things then became more difficult and, at a low point, and feeling '*hopeless*' and '*very excluded*' from the child's life, she wrote to the foster mother suggesting that she adopt the child. She regretted this soon afterwards and wanted to keep fighting for a relationship with her child, which she did. In any event, adoption at that time was not pursued by the foster mother who was separating from her husband—B's foster father, in 2011. B now has no relationship with her foster father.

10. Given the distance, attending Child in Care Reviews that were scheduled for 10 am was difficult for B's birth mother, C, as she was wholly reliant on public transport. For three years, no social worker was assigned to liaise with her and she saw her child only once each year. She wrote seeking greater contact with her child but there was no reply. Eventually, she was contacted by a social worker in 2017 and her access increased to twice a year. Although video calls were earlier rejected as an option, they were then introduced during the pandemic. Now, she and her daughter have regular contact, including, via 'FaceTime' calls. Her foster mother, A, confirms on affidavit that B '*is always very happy*' to meet with her birth mother and '*is happy following the visits*' to the city having spent time out alone with

her birth mother. B enjoys her calls to and visits with birth mother, C, who has graduated from university and now lives in a secure home in the city with her older children. B's natural siblings know her and love her.

11. C, the birth mother would, someday, like to have B—who will be eighteen shortly—live with her but recognises that there is no question of that happening imminently and certainly not for the remaining period of her childhood. She knows that building upon the relationship they already have, will take time. C has experience of working with people with intellectual disabilities, and her oldest daughter, who has similar experience, is committed to helping her.

12. B has a number of medical issues, and a learning difficulty and her foster mother, A, describes her as having a pleasant and sunny disposition. The issue of wardship in this case was raised by C and objected to by the appellants on the basis that it was neither appropriate or necessary. For my part, I did not interpret the submissions of the birth mother as positively advocating wardship. As I understood it, it was put forward in the context of it being rather less radical than an adoption order:- '*If <u>any</u> order should be made, then it should be wardship'*. This, to my mind, was consistent with the birth mother's sincerely held conviction that that the court should make not make an order authorising her child's adoption.

The Quality of the Evidence

13. A complicating factor in this case is the quality of the evidence that was before the High Court. Of note, was the absence of any evidence from an *appropriate* expert as to the level of the minor's stated disability. Such evidence, in my view, should have been available to the High Court and the onus was on the Agency to produce it. It is all the more critical where there is something of an ambivalence on the part of the Agency as to the practical

consequences of the minor's disability on a day to day basis. On the one hand, its says (in disagreeing with wardship) that there is no question of B lacking capacity. On the other, it urges the court to approve an adoption order because of the level of support B will need when dealing with issues pertaining to her own medical treatment and decisions upon entering adulthood. This was not an application for wardship and it is not appropriate, in my view, to attempt to determine the necessity or correctness of such a step in the absence of any clinical evidence.

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

15. Compounding this is the fact that such evidence as was before the High Court on behalf of the Agency was given by a deponent who had no direct involvement in or personal knowledge of B during her years in care. No criticism whatsoever was made of this witness by the judge as she had been allocated as a social worker in the case as recently as June 2021. However, it was submitted on behalf of C, that the deponent's evidence was hearsay. By contrast, the birth mother's sworn evidence concerned matters that were directly within her own knowledge and based upon her own experience. To the extent that the resolution of any conflict between the parties was necessary for the proper disposition of the case, I am satisfied that it was incumbent upon the Agency '*to use appropriate procedural measures to ensure that the potentially conflicting evidence [was] challenged*' (*RAS Medical Ltd v Royal*

College of Surgeons of Ireland [2019] 1 IR 63, at 92). The Agency's deponent's evidence was challenged and a notice to cross-examine her was served. In contrast, the birth mother's evidence stands as untested sworn testimony in circumstances where there was no application to cross-examine.

The Requirements of the Law

16. Before making an order under s. 54(2) of the Adoption Act, 2010 (as amended) ('the Act') authorising the Authority to make an adoption order, the High Court must satisfy itself that certain legislative requirements as set out in s. 54(2A) (a) to (f) of the Act have been met. I will refer to these requirements from the time to time as the relevant or necessary 'proofs' or 'safeguarding provisions. An issue that concerns me in this case is whether a strict interpretation and application of some of the required proofs is possible given the factual realities that frame the instant application.

17. Compliance with the terms of a statute is essential. The court is not permitted to exceed the statutory limitations of the decision-making process. The rigour with which the proofs are approached cannot be diminished merely because, when considered in the context of a particular case, they present challenges of interpretation and application. A brief review of the parliamentary debates on the safeguarding provisions in question suggests that they were not debated or contemplated in the context of a child being days away from adulthood, nor, as far as I can see, were the challenges which such a scenario presents for their interpretation and application ever addressed.

18. Section 54(2A) requires that before making an order authorising an adoption, the Court shall be satisfied that each of the relevant proofs has been met.[4] These proofs are safeguards to ensure that the enormity of the proposed interference with the constitutional rights of the

[4] The emphasis here, and throughout the judgment, is mine unless otherwise stated.

natural family and the individual child, as a member thereof, can be justified, objectively. Once those safeguarding provisions are met, then the court has a discretion to authorise and adoption order with the paramount, though not sole, consideration being the child's best interests. From the case law, two principles emerge as to how the court should interpret and apply the proofs. The first is that each individual requirement must be fulfilled; a generalised or broad-brush approach to the proofs as a whole is not permitted. The second is that the threshold in each in each individual proof is a high one—the statutory requirements are '*stringent*'.

19. In *FR*, the High Court (MacGrath J.) recalled (at para. 98) the important observations of Finlay CJ in *Re the Adoption (No. 2) Bill 1987* [1989] I.R. 656 wherein the then Chief Justice emphasised that each of the requirements (then of s. 3 of the Bill) had to be fulfilled before the court could make an authorising order. Finding that '*similar considerations apply'* to the requirements of s. 54(2) of the Act of 2010, MacGrath J. cited the findings of Finlay, CJ (at pp. 663 to 664) wherein he had stated that:

> *'They are not merely matters to be taken into consideration by the court in exercising a general discretion but are framed in the much more stringent form of being absolutely essential proofs requiring separately to be established. Failure in any one of these proofs absolutely prohibits the making of an authorising order, no matter how strong might be the evidence available of its desirability from the point of view of the interests of the child.'*

20. In speaking of the first three limbs or proofs of s. 54(2A) Jordan J. in the *Child and Family Agency and MH and IAH v. Adoption Authority* [2021] IEHC 53 reiterated that '*as a matter of law they are distinct legal requirements or stringent proofs, all of which must be satisfied* (see *Northern Area Health Board, W.H. and P.H. v. An Bord Uchtála* [2002] 4 I.R. 252, In *Re the Adoption (No. 2) Bill 1987* [1989] I.R. 656)'. In particular, in my view, the fact that a full care order has been made in respect of a minor concerned is by no means

decisive of the matter and each of the s. 54(2A) requirements must be satisfied (see MacGrath J. in *HR and FR*)

21. Only then, does the High Court come to consider whether adoption is a '*proportionate*' means to supply the place of the parents' (see *In Re the Adoption (No. 2) Bill 1987*, [1989] IR 656 albeit with reference to the earlier language of '*appropriate*' means). The court is required to look at the specific proofs and the requirements of the legislation in the context of the decided authorities in this area (see *Child and Family Agency and K and C –v- Adoption Authority of Ireland and A and J (Re S A Minor)* [2021] IEHC 677).

22. How the High Court is to apply the provisions of s. 54(2A) in a strict and meaningful manner when a child is about to turn eighteen presents a particular challenge. It is all the more so where the natural parent is no longer in the crisis situation that gave rise to the child's placement in State care. In this regard, Jordan J. in *K and C* (at para. 19) queried how the '*reasonable prospect'* proof at subparagraph (b) of s. 54(2A) is to be approached. On his analysis and given that the minor in that case was also about to turn eighteen, he considered that '*it makes no sense to even debate'* that provision of the law when applying it so late in the day. If, by reason of an eleventh-hour application, it *makes no sense* for the High Court to even consider testing whether a stringent protective requirement has been met—how can a finding that such a requirement has been met be a finding that is meaningfully reached? The judgment in *K and C*, leaves one with the impression that the court felt confronted with a *fait accompli* and was '*dismayed*' that a consideration of this statutory requirement was taking place with just two months to go before the minor's eighteenth birthday. If, through the passage of time, the court is effectively deprived of its duty to weigh and consider, in any meaningful way, an essential statutory requirement then that, in my view, presents the court with a fundamental problem as it undermines or sets at

nought the very protection which the proof is there to provide. I shall return to the case of *K and C* later, towards the end of this judgment, but I hear it as *cri de coeur* from the High Court that something needs to be done to prevent an ongoing and serious injustice that is being visited upon natural parents in late applications for adoption.

23. As satisfying each requirement is the threshold that must be crossed before an authorising order can be made, a brief consideration of some of the safeguarding provisions of s. 54(2A) and how they can operate, meaningfully, in late applications for adoption, such as this one, is required.

24. The appellants consider that the High Court was clear in determining that the factors set out in subsections (a), (c) and (e) of s.54 [2A] had been met. In the context of s. 54, the judge erred only in respect of his approach to and interpretation of the proofs required in subsections (b), (d) and (f) of s. 54(2A).

25. I am doubtful about the process by which the High Court determined that the requirement of proof (a) was met. That said, I accept that the judge's finding was not contested on appeal. For that reason, my remarks in respect of proof (a) will be limited to some general observations as to how the provision can operate in late applications for adoption.

26. However, when it comes to the proofs in respect of which the judge was not satisfied, the situation is more complex. Proof (b), in particular, presents a difficulty in terms of how it is to be interpreted. There is an argument that, on a plain reading of the text as applied to the particular facts of this case, the trial judge was correct to find as he did. If he *was* correct in finding that the required proof at (b) was not satisfied, then that is a matter of some significance in this appeal.

The statutory 'proofs' as applied to this case

27. Proof (a): – *Satisfaction as to the past failure of duty and the likelihood of 'harm*'

The first statutory requirement is set out in subsection (a) s. 54(2A). It provides that:

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

(a) *for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53(1) relates have failed in their duty towards the child* ***to such an extent that the safety or welfare of the child is likely to be*** *prejudicially affected*."

28. On a plain reading of the text above, the High Court must be satisfied in respect of two limbs: the actual *failure* of parental duty and *the extent* of that failure to the required level namely, that it is such as to give rise to a likelihood (and not a mere risk) of harm.[5] As I see it, there has to be a *nexus* between the two limbs, that is, between the past parental failure (the 'failure' assessment) and the likelihood of harm (the 'likelihood' assessment) to the child. Where a child is about to turn eighteen, how is the second limb of the test to be assessed? How can it be met when there is little left of childhood? What does the second limb require? On what period of time is the court to focus when looking at the *likelihood* of harm in the child's life arising from the past failure?

29. The making of care orders during a child's life serves, *inter alia*, to obviate the immediate risk of harm to his or her safety or welfare. The making of an adoption order when there is little left of childhood is altogether different. If a child is ten years old when an adoption is contemplated, an assessment of whether a past threshold failure is to such

[5] I refer to the '*likelihood of harm'* as a shorthand way of referring to the required statutory '*extent'* of parental failure, which is '*to such extent that the safety and welfare of the child is likely to be prejudicially affected'*.

extent that it *is likely to* affect prejudicially the future safety and welfare of the child is possible. If a child is almost eighteen years old—what is the appropriate period of the child's life (and the legislation speaks only of the child) that falls to be examined when considering the *likelihood* of harm to her safety and welfare? The remaining weeks of her childhood? The rest of her adult life, indefinitely, into her future?

30. Counsel for the Agency acknowledged '*a degree of a lack of clarity*' but submitted that '*the test was forward-looking*', . . . '*the language of the section—whether the safety and welfare of the child is likely to be prejudicially affected, . . . I read that as forward looking'*.[6] Counsel for the birth mother, considered that the 54(2A) (a) test was a '*backward looking'* or '*retrospective*' test. When asked specifically about the '*likelihood'* limb of the test, she said that she actually took that to be '*a backward-looking test*' but she submitted that the provision was '*very strangely worded*'.[7] Counsel for the Authority considered that the s. 54(2A) proofs were '*short to medium term*' and '*have to be directed towards the period until 18*'.[8]

31. I agree with the position of the Authority in that the court has to direct its attention towards the period until the child is eighteen. That is a narrow window to be studied in this case and similar cases of late applications for adoption. The period in respect of which the *likelihood* of the child's safety and welfare being prejudicially affected falls to be considered is limited to the remaining days of B's childhood.

32. The trial judge does not appear to have addressed his mind, specifically, to this limb of proof (a). He seems to have glided somewhat smoothly from a consideration of the past failure (the 36-month failure '*presents*') to the best interests of the child without querying or

[6] Transcript of appeal hearing, page 15, line 35 and page 16 lines 2 – 4.
[7] Transcript of appeal hearing, page 15, lines 20 – 21. She regarded proof (a) as retrospective and proof (b) as prospective.
[8] Transcript of appeal hearing, page 36, lines 7-28. He contrasted this with the long-term view of the child's best interests which s. 19 requires.

examining, the *likelihood* (again, not risk) of harm in the weeks that remain of the minor's childhood. Considerations of '*likelihoods*' are also required to be undertaken in assessing proof (b) and that is a matter to which I shall turn, presently.

33. It should not be presumed that every past failure necessarily impacts in the same way upon every child solely because of the passage of time. What is required is a careful examination of the *extent* to which the birth mother's past failure *is likely to* prejudicially affect the safety and the welfare of this child before the court. When assessing the *extent* of the parental failure in duty, any dilution of the content of the phrase '*is likely to*' risks undermining the protection afforded by the provision.

34. That '*extent*' of (future) prejudicial harm may be and, in my view, probably is, influenced significantly by the past relationship which a child has had with his or her birth mother Where extraordinary efforts have been made by a natural parent to limit the damage, so to speak, caused by past failures by maintaining an ongoing relationship with a child (in some cases, against all odds) then, *that*, as I see it, is an important factor that goes into the mix when examining the *extent* of the failure indicated.

35. The trial judge did accept that there had been parental failure and he was satisfied that the requisite period of 3 years was met. I do not find in the High Court judgment a specific consideration of the '*extent*' limb of the test, that is, the likelihood of this minor's safety and welfare, over the remaining weeks of her minority, being prejudicially affected by reason of the past failure on the part of her birth mother. I accept that the 'finding' under proof (a) was not contested, albeit with counsel for the birth mother conceding that she did not think that on appeal anything could be said. I take the view that given the magnitude of the matter in issue, the High Court ought to have examined the second limb of proof (a).

Proof (b): *The prospective likelihood of the birth mother being able to care for the child*

36. The second statutory requirement in respect of which the High Court must be satisfied before making an authorising order is set out in s. 54(2A) (b) of the Act and provides that:

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

37. How this proof is to be interpreted and applied, correctly, in circumstances where a child is weeks away from attaining her majority is a matter that concerns me in this case. The trial judge was satisfied that there was no question of any change in the minor's day-to-day care in the near future. Her foster mother's love for her was not dependent on her legal status as a fostered or an adopted child. The High Court judge determined that he could *not* conclude that there was no reasonable prospect of C, '*a demonstrably competent mother'*, being unable to care for the minor in a manner that will not prejudicially affect her safety or welfare.

38. The Agency submits that the High Court judged failed to consider the prejudice that B would suffer '**IF'** she were removed from her foster home. The Authority, likewise, says that the trial judge erred in focusing on the general competence of C as a mother and that he failed to consider the prejudicial effect on the child '[***IF***] *she were to be cared for by her birth mother during this time and removed from the only home she has ever known*'. The submissions of both the Agency and the Authority essentially invite the court to imagine or to speculate on what *might* happen if the child were suddenly to be removed from her foster home and placed in the home of C. They ask the court to engage in a '*What if'* supposition or conjecture. Such a speculative exercise is not mandated by the statutory provision in question. As I see it, just as s. 54 is not about what could or would or might have happened

if past events had taken a different course and better efforts made at family reunification, neither is it about engaging in an entirely unrealistic and hypothetical scenario that involves speculating about what could or might occur if a (non-contemplated) 'removal' of the minor were to be made, in the remaining weeks of her minority. Each case must be examined on its facts and I cannot accept that Oireachtas intended the courts to depart from the plain and rather straightforward issue that requires to be determined under the second statutory requirement by engaging in unwarranted speculation.

39. As a matter of statutory interpretation, I am not persuaded that it is necessary to add a rider to the provision or to read it with the assumption that it means *'**IF** the minor were now to be transferred into her birth mother's custody'* The question of a transfer of custody may well arise as a relevant consideration if advanced in the context of a younger child's adoption but, where a minor is about to turn eighteen and no one has proposed a removal of the girl from her home, I do not consider that the court is entitled or obliged to assume that such a transfer of custody must automatically be envisaged and read into s. 54(2A)(b). From a plain reading of the text, the test is not that whether there is any reasonable prospect of the child being returned to her mother, or of the birth mother *actually* caring for the child immediately. The language used requires the court to be satisfied there is no reasonable *prospect* of C ***being able to*** care for the minor in a manner that would not prejudicially affect her safety or welfare. Adopting a purposive approach to the statute, it seems to me that the provision is not focused on issues of immediate transfer of custody but is part of an assessment required to ensure that constitutional relations are not sundered lightly.

40. Counsel for the Authority submits that statutory proof (b) is not concerned with the birth mother's ability to parent or her general competence as a mother. It is, rather, they say, about her ability to *parent this particular child*[9] in way that would not prejudicially affect

[9] Transcript of Appeal Hearing, page 34, lines 2 – 6.

her safety and welfare. I cannot disagree. But neither can I close my eyes to the fact that this particular child is about to turn eighteen, and this particular child, on the evidence, has neither the desire nor the intention nor the need to leave her foster home any time soon. If and when she ever decides to leave home, it seems to me that she will be well past the age of eighteen. From the evidence before the court, there is not now nor, will there ever be any question of compulsion in this regard. Additionally, any fears of the child being 'taken away' cannot withstand B's attainment of her majority. It will be a matter for this particular minor when she leaves childhood to decide where and with whom she lives during the years of her early adulthood. The trial judge did, indeed, address the general competence of birth mother but he did not do so without having regard to the actual facts pertaining to this particular girl's life, now being just weeks away from eighteen.

41. Notwithstanding the over-arching constitutional imperative to consider the best interests of the child (a matter to which I shall return, presently), the s.54(2A) safeguards oblige the court also to take account of the lived reality of the birth mother in circumstances where an order authorising the severance of her constitutional link with her child is being sought. Section 54 is, as counsel for the Authority put it: '*an effort to give effect to the constitutional rights of the parents. I mean that's why you have, that's why the tests have to be met in section 54, that's what section 54 is doing, it's saying when you're dealing with these constitutional rights we're going to set out thresholds that have to be met. I mean, that's a statutory attempt by the Oireachtas to give effect to those constitutional rights.'*[10]

42. Ensuring that the constitutional relationship is not extinguished lightly or unnecessarily is what the s. provisions are all about. Section 54 is about the High Court being satisfied that certain matters have been 'stress tested'—the parental failure, the likelihood of it having a prejudicial effect on the safety and welfare of the child in the

[10] Transcript of Appeal Hearing, page 47, lines 21 – 25.

remaining period of her childhood, the ability or otherwise of the natural parent to care for the child without impacting, adversely, upon her. The timing of an application *necessarily* modifies the approach which the court must take when examining the necessary proofs.

43. The language of proof (b) does not speak of the transfer or change of custody of any child at the point of the court's assessment. To the extent that the trial judge's approach may be criticised for being too theoretical or abstract, the approach advanced by the appellants and the Authority requires the court to speculate on what might happen **IF** an imaginary transfer of custody or a removal of the minor were to occur at this point. Such speculation, in my view, is neither necessary nor appropriate where, on the facts of the case before the court, there is no reality to the 'removal' of B from her foster home either now or after her eighteenth birthday. There is no question of her welfare, whilst a minor, being prejudicially affected. There is no question whatsoever of B being required or compelled to undergo any change in her established routine whether at home, at school or with friends or with anything else that forms part of her lived reality.

44. The birth mother's expressed desire that, at some point, her daughter B might come to live with her was not, as I read it, a proposal for a trial transfer of custody in B's remaining weeks of childhood. There was no evidence or question or application before the court that such a transfer of custody would take place. That is not fatal, in my view, to her opposition to the making of an adoption order on the facts of this case and in the timeframe remaining. The order, if made, will have a lifelong effect. The trial judge was obliged to deal with the reality that confronted the court and I am not convinced that an imaginary prospect of a transfer of custody weeks before the minor turns eighteen is the appropriate manner in which to approach the second statutory safeguard.

The other statutory requirements

45. The trial judge found that the statutory requirements of subsections (d) and (f) of s. 54(2A) were not satisfied. I do not propose to analyse these provisions in great detail. As observed by Jordan J. recently in the matter of *C and K*, it seems appropriate that (d) and (f) should be considered together. The trial judge was not satisfied that the requirement in (d) was met. He had '*no doubt* on the evidence before him that, if the existing foster arrangements were to collapse (and they will not) Ms C would be perfectly capable of functioning as a competent and loving mother to Ms B and 'that it would be over-reach by the State to supply her place'.

46. On this point, the Agency and the Authority point to the fact that the foster mother has supplied the place of her parents since 2004. That is true. It is also true that the girl has never resided with her birth mother. However, once again, I find that the timing of the application and the period remaining in childhood to be important considerations in the context of this statutory proof. Adoption is not to be considered as a reward for having done a good job, which A most certainly has done. Nor is a punishment for past failures, which C most readily acknowledges. It is an intervention by the State in very exceptional circumstances that are prescribed by statute. In *Re JJ* [2021] IESC 1 ('*JJ*'), the Supreme Court provided a comprehensive review of the law in the context of State intervention, in a child's best interests, where parents fail in the duty. The factual context of *JJ* was obviously different. The Supreme Court held (at para. 135) that '*The touchstone for State intervention is prejudicial effect on the safety or welfare of a child*.' State 'intervention' in this case, to date, has been to promote the child's welfare as a child needing care and protection. The type of State intervention now contemplated is a far reaching and significant measure not only in terms of the rights of the natural mother but also her child's natural and imprescriptible rights. I do not advance the general proposition that the older the child the

lesser is the need for the State to supply the place of the parent. Each case turns on its facts and what may be proportionate in one case may well be 'over-reach' in another. However, given that the minor in *this* case is secure in her foster family, has a positive relationship with her birth mother and is about to turn eighteen, I have some doubt whether the level of intervention now contemplated by the State is warranted and whether a refusal by the court to make an authorising order would prejudicially affect her safety or her welfare as a minor for the remainder of her childhood.

47. As to the proportionality of an adoption order—proof (f)—I have already noted (at para. 12 above) that I did not interpret the submissions of the birth mother as positively advocating wardship. Rather, it seems to me to have been suggested not as an alternative to adoption but as a *possible* route that might be explored should the capacity of the minor in this case be an issue in her soon to be adult life. In this regard, both the Authority and the Agency refer on a number of occasions to the minor's 'special needs' when advocating the proportionality of the measure. At the same time, any suggestion that wardship might be an option was roundly rejected. The application before the High Court (and this Court) was and is not a wardship application and, given the state of the evidence that exists, it would be wrong, in my view, to attempt to address or resolve that issue. When B turns eighteen, she will have the same rights as any other adult. If she is vulnerable (as many young adults are) though not in lacking legal capacity, she can seek the counsel of those who love her. The reality is, however, that when it comes to making decisions as a young adult, including decisions as to medical or surgical interventions, neither her birth mother nor her foster mother will be entitled make those decisions on her behalf. If it transpires that she does, in fact lack legal capacity, then whatever measures are deemed appropriate and/or necessary to assist her may be pursued,

Concluding remarks on statutory proofs

48. Section 54 is about '*the sundering of a link that is of constitutional importance*'[11] and the provisions at s. 54 (2A (a) to (g) are safeguards designed to ensure that it cannot and is not sundered lightly. 'Eleventh hour' adoption applications create a particular difficulty for the interpretation and application of those provisions. If, because of the passage of time, a strict interpretation and application thereof is simply not possible, and the court is called upon to view them through a speculative prism of an imagined world, then that, in my view, is not a satisfactory approach to compliance with legislative requirements in question. They must be interpreted and applied in a meaningful way. If because of delay and based on the facts of a given case, a meaningful assessment of the requirements cannot be made, then the court cannot conclude, safely, that the required statutory provisions have been satisfied.

49. When considering s. 54(2A), the trial judge gave particular attention to the fact that the minor in this case was about to turn eighteen. Such was the reality of the minor in question and s. 54 applications are not about some 'hypothetical or counterfactual reality.[12]

50. Given the significance of the State intervention sought in applications of the nature and the consequences in terms of a severance of the constitutional ties that exist between a child and her natural mother, it is imperative, in my view, that the proofs are not reduced or diminished or presumed to be met in cases where the threshold duration of *past* parental failure has been established. The proofs, to my mind, require a good deal more than past parental failure of duty. To approach the stringent requirements in a manner other than strictly, runs the risk that they become statutory boxes presumed to have been ticked because a late application for an adoption order is presented before the court.

51. It is important to recall that failure to meet any of the safeguarding proofs <u>absolutely prohibits</u> the making of an authorising order (per Finlay, CJ in *Re the Adoption (No. 2) Bill*

[11] Transcript of appeal hearing, page 36, lines 4 – 5.
[12] Counsel for the Authority, Transcript of appeal hearing, page 38, lines 1 – 6.

1987) and this prohibition stands '*no matter how strong the evidence might be available of its desirability from the point of view of the interests of the child*'. Having recognised the overarching constitutional imperative by reason of Article 42A of the Constitution, MacGrath J. in *FR* went on to reiterate (at para. 101 of his judgment) that all the proofs in section 54(2A) must be met. The child's best interest as the paramount consideration '*does not mean, however, that there is any easing in the requirements for satisfactory proof of each and all of the matters set out in s. 54(2)'*.

52. Long before Article 42A was inserted into the Constitution, the Supreme Court affirmed that a child has *a natural right* to have his or her welfare safeguarded and that the State has obligations in relation to a child whose parents fail in their parental duty (see *G-v-An Bord Uchtála* [1980] IR 32). The background to the introduction of Article 42A to the Constitution by the 31st Amendment was set out by O'Donnell J. in *Re JB v KB* [2018] IESC 30, [2019] 1 IR 270 ('*RB v KB'*). The Supreme Court in *JJ* recognised (at para. 134) the significant change of focus brought about by the removal of the reference to parental failure for *'physical or moral reasons*' and the new requirement that such failure must be '*to such an extent as to prejudice the safety or welfare of the child'*. Whereas earlier jurisprudence focused on the *cause* of parental failure, the focus now, has shifted to its *effect* with 'the touchstone' for State intervention being, as already noted, prejudicial effect on the safety or welfare of the child.[13]

The 'Best Interests' Test

53. A key strand in the submissions of counsel for the Authority was the contention that the trial judge erred in his assessment of the value of adoption, both generally and, specifically, in this case. He also argued that the judge erred in how he treated the best

[13] *JJ* at para. 135.

interests of the child, there being '*no independent assessment*' thereof. Criticism of the trial judge was also made by the Agency because, it was argued, he did not conduct a proper or sufficient analysis of the factors set out in s.19(2) of the Act.

54. When a court is determining what is in the best interests of the child it is obliged to have regard to all factors or circumstances which it considers relevant to the child, including, the following factors that are set out in Section 19(2) of the Act:

- the child's age and maturity
- the physical, psychological and emotional needs of the child
- the likely effect of adoption on the child
- the child's views on his or her proposed adoption
- the child's social, intellectual and educational needs
- the child's upbringing and care
- the child's relationship with his or her parent, guardian or relative, as the case may be, and
- any other particular circumstances pertaining to the child concerned.

55. Adoption, it was agued, is essentially a forward-looking process. It is about 'what happens next'. That may well be so but it is clear from s. 19(2) that when the court is considering a child's best interests, it should have regard not only to present day realities (the child's age and maturity) but also to the future (the likely effect of adoption on the child) whilst not closing its eyes to the past (the child's upbringing and care). The High Court is also conferred with a discretion to consider any particular circumstances pertaining to the child concerned.

56. Although the trial judge may be criticised for not listing, individually, each of the factors set out in s. 19(2) of the Act, it seems to me that he did have regard in a global way to all of those issues as they pertained to this particular minor. He did, however, place

particular emphasis on those matters or circumstances which he considered relevant to the application before him. He was entitled, in my view, to do so. In this regard, I accept the submissions on behalf of the birth mother, and the reliance placed upon what the court in *QR v ST* [2016] IECA 421to the effect that considering each factor *ad seriatim* may be a better approach, it is neither universal nor mandatory.

57. The child's age and maturity were factors to which the court had regard. The fact that she was about to turn eighteen but appeared to have little understanding of the meaning of adoption carried weight in the trial judge's assessment. To the extent that he was entirely satisfied that there no question of any disruption to the minor's day to day life, he implicitly factored in her physical, psychological, social, educational, intellectual and emotional needs. Those needs are provided in her foster home and there was no risk whatsoever, in the judge's mind, that those needs would now go unaddressed. Her foster mother would continue to love and support the minor irrespective of her legal status and, the judge was satisfied there was not the slightest suggestion that she would not be looked after when she reaches the age of eighteen.

58. As to the likely effect of adoption on the child, the trial judge took the view that, in the very particular circumstances of this case, he did not see what adoption at this time would achieve. In terms of her security, she would still be loved by her foster family. He observed that she could change her name if she wished so to do and that inheritance from her foster mother by means of a will was always an option. In his view, '*All that adoption will undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child',* a child with whom the natural mother has fought to retain the closest contact over the years.

59. The trial judge was criticised by counsel for the Authority for his 'undervaluing' of the positive effects of adoption. Of course, I accept that adoption is not only about severing

an existing legal relationship. It can and does confer many benefits upon a child. But that, in itself, is not sufficient to conclude that an adoption order should be made. I am not persuaded that the judge discounted the value of adoption. Rather, in my view, in having regard to the minor's best interests, he attributed greater value to the benefit which the maintenance of a legal relationship with her natural mother would confer on *this* particular child. He was entitled to have regard to that relationship with her mother as one of the factors in s. 19(2) of the Act.

60. In my view, that relationship is the essential basis upon which case may be distinguished from many of the other late adoption application cases that have come before the High Court and in which significant criticism has made of the Agency, but where an authorising order was made. In considering this application, the judge was entitled, , in the *child's* best interests, to have regard to the fact that her mother had fought and succeeded in maintaining a relationship with her notwithstanding enormous difficulties.

61. No one disputes that B has lived within her foster family unit without interruption since she was an infant. However, I reject the submission that was made, more than once, at the hearing that her foster family '*is the only family she has ever known*'.[14] This denies a fundamental aspect of this particular child's life. During her early and crucially formative years, she had regular access to her birth mother. Initially, those access visits occurred in her foster home but, subsequently, she spent regular times in the home of her birth family. She was there when her older siblings came home from school. She is known and loved by her natural family as well as being known and loved by her foster family.

62. By contrast with the child in *ML*, where the High Court, with serious reservations, approved an adoption order, there was nothing in the evidence here to suggest that this young girl harbours any sense of rejection by her birth mother. Admittedly, when her mother

[14] Transcript of Appeal Hearing, page 9, line 5.

moved to the city access became more difficult, but it did not cease altogether. Through the tenacity of her birth mother and the support of her foster mother, it improved in recent years. Access to her birth mother has remained to this day and the evidence is that the young girl enjoys her visits to her birth family and her FaceTime calls with her birth mother.

63. The situation of this child is not in any way comparable to that of the 17+ year old in *HR* who had had no access to and who objected to visits with his birth parents for several years prior to the making of the application for adoption. Nor is it similar to the 17+ year old in *ML* who, by age of 6, had no real bond with her birth mother and who, by the age of 8, had told her social worker that she did not wish to see her. Nor does it compare to the situation that obtained in *K and C* where the last contact between the 17+ year old minor and his birth mother had been ten years prior to the making of the application to the High Court. This case, to my mind, is readily distinguishable because of the quality of the relationship that exists between the child and her natural mother.

64. Having regard to the positive nature of that relationship and to its remarkable survival, supported as it was by B's foster mother, I am not convinced that there is '*clear and convincing*' evidence that the best interests of *this* child require the making of an adoption order. This case is finely balanced, and I am not persuaded that this child's best interests require that her legal ties to her birth mother be severed notwithstanding the potential benefits which adoption may confer. In my view, B's knowledge, in later years, that her birth mother fought for her and refused to forget about or abandon her, in the moral sense, is likely to be an important aspect of this girl's life and identity. B shares her birth mother's family name and has borne all her life.

65. Whereas the court is not entitled to refuse an authorising order on the basis of the Agency's past failures, it is entitled to look at the past when considering the overall picture that presents. Indeed, the child's (past) upbringing and care is a specific factor to which

regard should be had under s. 19(2). In doing so, it is entitled recognise the fundamental unfairness which has been created—an unfairness that affects the child as well as the birth mother. In this regard I agree with the view of Jordan J. in *K and C*. He noted that the position in relation to the *support* of the birth mother is not included in s.54(2A), (a)-(f) of the 2010 Act. However, observed that under s. 54(3) of the Act, the court was obliged to have regard to the rights, whether constitutional or otherwise, of the persons concerned, including, the natural and imprescriptible rights of the child and to any other matter which it considered relevant to the application. In view of those provisions, he was satisfied that, in having regard to anything that he considered relevant, he *should* have regard to what transpired over the years in terms of the support or lack of support for the birth mother.[15] It, too, forms part of the mosaic.

66. As to the potential financial benefits which an adoption order would confer, I do not consider that undue or inordinate weight should be placed on this. Of course, in the context of succession law, the minor may benefit from particular entitlements in respect of her foster mother's estate should certain eventualities transpire. Should an authorising order be refused, she will not have legal parity with her adult foster siblings. However, if an adoption order is *not* made, she will retain all the potential financial benefits that accrue in connection with her birth family, including, a right to a share in her mother's estate[16] in the event of an intestacy and the right to bring an application under s.117(1) of the Succession Act should that be appropriate or necessary. Moreover, if her foster mother wishes to gift or bestow property on Ms B as a foster child, there are several statutory provisions that may be used to the advantage and benefit of the donee. Thus, for example, subject to certain evidential requirements, a foster child will be deemed to be the child of a disponer for the purpose of

[15] At para. 6 of the judgment.
[16] There was affidavit evidence that whereas heretofore her birth mother resided in rented accommodation, she now has the security of her own home.

calculating the tax on any inheritance pursuant to Schedule 1, Part 1, paragraph 9 of the Capital Acquisitions Taxes Consolidation Act 2003.

67. Adoption may confer many benefits upon a child, but the trial judge was not *obliged* to find that, in this particular case, an adoption order ought to be made notwithstanding the fact that, the prevailing case law on late applications, sees such orders being made. He had a discretion to exercise in the decision-making process and, in that process, her best interests were paramount. I am not convinced that he erred in his conclusion in this regard.

The views of the child

68. Nor am I persuaded that the High Court judgment should be impugned, entirely, for the manner in which the judge approached the views of the child in this case, although I do accept that weight should not have been afforded to the birth mother's view in this regard. Pursuant to section 54(3)(b) of the Act, in a case where the child concerned is capable of forming her own view, the High Court, in so far as is practicable, is required to give 'due weight' to the views of that child, having regard to his or her age and maturity. It is common practice in the courts for a child's view to be ascertained through an Assessor's Report or through the appointment of a *guardian ad litem.* The High Court had no such assistance in this regard. At para. 22 of his judgment, the judge recognised the obligations conferred on him pursuant to s.54(3) of the Act of 2010 which required him to take account of the child's constitutional rights and any other matter he considered relevant. He also noted that he must give due weight to the views of the child having regard to her age and maturity – mindful of the fact that a child has a natural right to have her welfare safeguarded.

69. The trial judge took the child's views into account. He was entitled, having met the girl, to determine the 'due weight' that he should attribute to her view. Affording due weight to the views of the child does not involve complying with the child's wishes in every case.

The engagement, understanding and maturity of this minor stands in stark contrast to the minors in other cases where significant weight was attached by the court to their views. The child *M.L.* for example, had a very clear discussion with the trial judge about the prospect of adoption and she presented with a maturity that was consistent with her age. The judge could ascertain that *M.L.* harboured a sense of rejection by reason of the fact that her birth mother was missing from her life and that she was *"totally unable to comprehend how or when a court would prevent her adoption"*. The court gave due weight to those views. The minor in this case was different.

70. A transcript of the interview in this case makes clear that there was no real engagement on the issue by this minor who is almost eighteen. Even accounting for shyness or the pressures of the day that was in it, the judge was entitled in the light of her monosyllabic replies, to consider her ability to formulate, sufficiently, her view on the matter of adoption. When asked specifically by the judge if she had any questions or wanted to ask anything about the process, it was the social worker who interjected with '*You want to live with Ms C. I think B knows what she wants, the ... adoption.*' Although the opinion of a social worker who had visited the child was reported by the Agency's deponent, there was no information available as to how to topic of adoption was introduced to his minor.

71. Whereas no one expects a legal analysis from an almost eighteen-year-old minor as to what an adoption entails, the judge was entitled to conclude that B, in the light of the evidence available, had little understanding of the magnitude of adoption. For a girl of her age to consider that adoption means that she can live with her foster mother forever was striking, in my view, and disclosed that she has little insight into the true meaning of adoption and the judge was entitled to factor that in to the weight that he attributed to her views.

72. In *AU v. TNU* [2011] 3 IR 683 the Supreme Court considered the weight to be attached to the views of children when considering whether to return them to New York pursuant to

the 1980 Child Abduction Convention. The children in the case were seven and eight and a half years old. The High Court had refused to return them and the relevant part of the judgment of Birmingham J. (as he then was) was cited in the judgment of Denham J. at para. 15:

> *"I think the report can only be interpreted on the basis that she is reporting to the court that the boys, while young, eight and a half years and seen years, have reached an age and degree of maturity which makes it appropriate to take account of their views. Their views are clear. That, of course, is far from the end of the matter for as MacMenamin J. commented in ZD v. KD (Child Abduction)* [2008] IEHC 176, [2008] 4 IR 751 '*The views of the child are not synonymous with an obligation to bow to the child's wishes'. It is clear that a court's obligation is to take account of the child's views and it is not the obligation of the court to implement those views. I myself have returned a teenager to care in the Netherlands despite her very firm, and very forcefully expressed objections, being convinced that despite the strength of her views the policy of the Convention and the teenager's best interests required her return."*

73. An older child's views are not determinative of the matter and the extent to which they should be taken into account will depend on all the circumstances of the case.

74. The Authority recognised that B's understanding of adoption was *'somewhat limited'*. The trial judge formed a similar view. He had the benefit of meeting her in person and he acknowledged in his judgment what she had told him. He did not consider that her monosyllabic replies should be interpreted as an emphatic 'Yes'. This was not the impression conveyed. The judge's sense that her understanding of adoption was limited for a child of her years informed his view. I am not persuaded that he failed to give due weight to B's view. Having regard to her age and maturity and bearing in mind her overall best interests he was not bound by those views. As Denham J. in *A.U.* stated (at p.697):

"Having regard to the views of the children, it was for the trial judge to determine the weight to be applied to those views. This he did. The High Court judge identified factors that were relevant and applied them."

Other matters

75. In reviewing the trial judge's consideration of the best interests of B, I am conscious of what the Chief Justice stated in *Re JB v KB* [2018] IESC 30, [2019] 1 IR 270 ('*RB v KB'*) wherein he recognised (at para. 6) that the best interest test involves both '*broad societal judgments and individualised determinations in a particular case'*. Of particular significance, as I see it, was his consideration of how the court should approach matters in the context of a statutory framework:

"In the context of a statute, it does not authorise the court to exceed the statutory limitations of the decision-making process: rather, it means that, within the area in which a court has to make a decision, where there is a discretion, the decision should be made on the basis that the paramount consideration should be the best interests of the child, rather than the interests of parents, relatives or the State itself. Article 42A. 4.1° now underpins that. However, the area for decision making in which those considerations apply is defined by statute.

If it were otherwise, then the effect of Article 42A.4.1°, far from being modest, would be dramatic, since it would mean that in the area of adoption [. . .] the legislation could be reduced to a simple provision that orders may be made or refused whenever it would be in the best interests of the child to do so, in the view of the Court. This

would be undesirable at a practical level, and also at the level of principle, since it would remove the Oireachtas almost entirely from the area."

76. In this case, the trial judge, approached the statutory limitations that were imposed upon the court in the decision-making process, strictly and, within the area in which he had to make a decision, he exercised his discretion in what *he* considered to be the best interests of the child. I do not accept that he made the decision to refuse the application because of the past failures on the part of the Agency. The final paragraph of his judgment expressly states his position: '*Ultimately, notwithstanding the Child and Family Agency's manifold and serious failings, it is the best interests of Miss B, as matters stand at this juncture in time, that are the paramount consideration in the resolution of this application*'. He reiterated that he did not consider that acceding to the application would be in B's best interests and it was '*for that paramount reason'* that he refused it.

77. As I read the judgment, his refusal was based on the entire picture that presented. In contending that the judge fell into error, counsel for the Agency submitted that a child needs stability and security to take them into adult life. This child, *'needs to know that there is certainty about whom she is legally related to, in this case the person she has resided with since she was four months old'.* An adoption order, it was said, would undoubtedly enhance her sense of identity as the child of the parent who raised her. [17]

78. It seems to me, that in terms of her identity, B. is a child of two families.[18] It is crucial to her identity as she enters adulthood that she knows *the human roots* of who she is (see McKechnie J. *In JB* at para. 23). She is a much-loved child of her foster mother and a much-loved child of her birth mother who fought for a meaningful relationship with her and who,

[17] Transcript, page 27, lines 10 - 13

[18] Having regard to the Agency's interactions with C and with her other children, generally, I am persuaded by arguments that C never sought B's return.

conscientiously, refuses to consent to the extinguishing of her daughter's legal identity. Such refusal, in my view, cannot be regarded as parental failure.

79. To the extent that it argued that an adoption order will confer on the minor a legal identity, I am satisfied that she already has one. If she had no history or knowledge or experience or relationship with her birth mother, then of course different considerations would apply (see *a contrario FR* and *ML*). Moreover, there is no evidence that her identity or her security is threatened, no question of a disruption to her life, no suggestion of a move to an alien environment if approval for adoption is refused. Her birth mother's wish that someday they may live together, is just that. It is no more than any wish.

80. When it comes to the future, B, who now lives in the country, may well seek to pursue further education or training. Should she wish to study in the city, having a '*home from home*' with her birth mother may be of significant benefit. Should she pursue further study, her birth mother will stand as a model and an inspiration as to what is possible, notwithstanding the crises and disabilities that sometimes confront us in life. This is a girl who enjoys spending time with her birth mother, whether remotely or in person. The circumstances of this case are quite distinct, and any determination as to proportionality and best interests must bear that in mind.

Conclusion

81. In his judgment in *JB and KB,* McKechnie J. provided (at para. 23) a precis, in brief but poignant terms, of this country's history of adoption. He recalled how thousands of children were moved, covertly, to the United States. Many were never to return or have contact with their parents or siblings or even to know '*the human roots'* of who they were. He observed that, by today's standards and social norms, such a regime would constitute a scandal of some serious proportion. He stated:

"It is easy to disconnect from the past, but I speak of a time not so distant to those who lived through it, and most certainly not for those who were affected by it. Thankfully, albeit not before time, and not without much suffering and great pain, we presently live in a much more humane and civilised society."

82. Whilst the best interests of the child have been given express constitutional recognition, I am not convinced, in the light of several recent judgments of the High Court, that we have moved entirely beyond a time of '*much suffering and great pain'*. The High Court is striving to draw attention to what Jordan J. describes as *'a system failure'* within the country's adoption framework, a failure which leaves many natural parents genuinely stressed and upset. Criticism is directed not at the Authority but the Agency and, in particular, at the unnecessary delays which are '*a very significant aspect in these applications*' when they are made late to the court. The engage fundamental questions of justice.

83. The child in *K and C* expressed very clear and consistent views and initiated the adoption process by presenting his foster parents with a Christmas card with an adoption form inside. Jordan J. considered that his views were a weighty consideration. The overarching principle was the child's best interests that were the paramount but not the only consideration. He stated (at para. 47):

*"But, <u>and there is a but</u> in this judgment if the Court goes back to the rights of (the birth mother) in looking at other matters, any other matters which the Court considers relevant to the application, **<u>I have to say that I am very much in two minds</u>** about whether or not to grant the approval which is sought in this application . . ."*

84. The judge's position, which hovered on ***the point of refusing*** the approval sought, was based on what he considered to be the very valid arguments put forward by the birth mother from the outset in relation to the lateness of the application and the fact that the process was rushed. She was, in his view, being placed between a rock and a hard place because of the manner in which the application had come about against the backdrop of her inaction with the Agency and its obligations in relation to children in care. He considered that the court cannot ignore the importance of efforts being made to reunite children in care with their biological parents. Jordan J. continued (at para 48):

> *"It does occur to me that if this Court does not do something in relation to what is occurring, what this Court sees occurring with these applications being made at a very late stage and placing genuine decent people such as A in the invidious position which they are placed between a rock and a hard place, it does seem to me that unless the Court takes action to show in a positive way* ***its disapproval of such a state of affairs occurring and being repeated*** *in papers arriving into this Court, then it is going to continue and nobody will pay any heed and other people will be in the position of A again and again because the Child and Family Agency will consider that no application is refused particularly when the child wants it and when the paramount consideration is the best interests of the child."*

85. The judge explained the court's dismay at what transpired in *ML* and how the court had made the order because it considered that a refusal so to do would negatively impact on the best interests of the child. In *K and C*, Jordan J. stated:

> *"Here I am again looking at another last-minute application which I consider could and should have been avoided if necessary and timely action was taken at an earlier*

stage to advise people in relation to adoption, to counsel people in relation to adoption and to see to it that the process started some years ago. ***A system failure is what has us here now*** *and has A here and genuinely stressed and upset. This happening at this hour in the life of S (the child) and in her own life, and I have to say that this timeline of delay in applications of this nature, is a very significant aspect in these applications when they are made late, and falls squarely, in my view, within something* ***that must be considered by the court with a view to deciding whether or not it is just to grant the approval.***

86. In *C and K*, the High Court expressed its concern that granting the approval might be seen as tolerating something which ought not to have been tolerated or sending out all the wrong signals that would be detrimental in terms of the rights of parents and children, if one looks at the bigger picture. Being ***on the point of refusing the approval*** which has been sought in that case, the only thing that stopped the High Court judge from refusing the grant of approval was the damage he considered it *could* do to the child going forward and the fact that he knew that the birth mother in her heart did not want him damaged in any way, which had been her position throughout her entire life. It was with a considerable degree of reluctance and with, yet another, emphasised expression of his concerns, that the trial judge granted the order sought.

87. In coming to my view in this case, there were many times when I, too, have wavered on the brink. It is not an easy case to decide. I have concerns as to how the important safeguarding provisions are to be interpreted and applied in a case of this nature. I also consider that a clear distinction can be drawn between this case and the judgments in *ML*, in *FR* and in *K and C*. Ultimately, I find that I would refuse the appeal. I would do so, not because of the several failings committed in respect of the child and her birth mother, but

because I am not persuaded, having regard to the enduring and positive nature of the relationship that has prevailed between them, a relationship that time and attention can strengthen, that it would, truly, be in this child's best interests—to sever the constitutional link that currently exists and to change her legal identity.